O. EVIDENCE

O.1. Admitting/Excluding Evidence

O.1.a. General criteria

TITLE: Allen v. State
INDEX NO.: O.1.a.
CITE: (4th Dist., 8-9-04), Ind. App., 813 N.E.2d 349
SUBJECT: Erroneous exclusion of relevant evidence - right to present defense
HOLDING: In murder prosecution, Tr. Ct.'s exclusion of a defense witness's testimony indicating that someone other than D had committed the offenses was reversible error. D has a right to present evidence tending to show that someone other than accused committed the charged crime & exclusion of such evidence cannot be deemed harmless error. Joyner v. State, 678 N.E.2d 386 (Ind. 1997). Here, Tr. Ct. erroneously excluded a defense witness's statement he had given outside presence of jury indicating that Crenshaw & some other individuals were actual perpetrators of murders. Witness refused to testify for defense at trial & Tr. Ct. halted his testimony before D's direct examination had concluded, but his out-of-Ct. statements were admissible under Indiana Evidence Rule 804(b)(2), because he had been under oath & was subject to cross-examination by prosecutors who were trying the case. Record supported conclusion that this witness's testimony was exculpatory, unique, & critical to defense as there was no other source for D to rely upon to present this part of his defense that another individual had committed crimes. Ct. also found error in Tr. Ct.'s exclusion of certain reconstructive evidence & tests that had been offered by defense expert who challenged an eyewitness's identification of D while witness drove through an intersection on morning of murders. These reconstructive tests, & expert's testimony regarding results of those tests, was type of evidence that prevented D from presenting a meaningful opportunity to present a complete defense. Kubsch v. State, 784 N.E.2d 905 (Ind. 2003). Held, convictions reversed & remanded for new trial.

RELATED CASES: Camm, 908 N.E.2d 215 (Ind. 2009) (statements of third party who was undisputedly at crime scene and involved in triple murders that he had three bodies on his conscience, and that one more wouldn't matter" and that if physical evidence of his presence was found at the murder scene, it would be "pretty obvious" he committed the crime were not admissions to the crime admissible under statements against penal interest).

TITLE: Best v. State
INDEX NO.: O.1.a.
CITE: (3d Dist. 9/29/82), Ind. App., 439 N.E.2d 1361
SUBJECT: Admitting evidence - testimony of prior crimes
HOLDING: Evidence tending to prove a material fact is admissible, even though its tendency in that direction may be exceedingly slight. Thomas 238 N.E.2d 20. Here, D raised materiality objection to testimony of witness who testified she was 14-year-old runaway when she stayed with D. Ct. finds her testimony was material because (1) D's actions toward her were substantially similar to present allegations (child molesting) & (2) it was foundation for introduction of 9 exhibits (pictures of her nude/semi-nude) which were admitted to show D's depraved sexual instinct. Held, no error.

TITLE: Crane v. Kentucky
INDEX NO.: O.1.a.
CITE: 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)
SUBJECT: Admissibility at trial of circumstances surrounding taking of confession
HOLDING: Certain interrogation techniques are so offensive to civilized system of justice that they must be condemned under 14th Amend. Due Process Clause. To assure that fruits of such techniques are never used to secure a conviction, Due Process also requires that jury not hear confession until Tr. judge has determined that it was freely & voluntarily given. Sims v. GA (1967), 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593. Circumstances surrounding taking of confession can be highly relevant to 2 separate inquiries: one legal & one factual. Manner in which confession was extracted is relevant to purely legal question of its voluntariness. But physical & psychological environment that yielded confession can also be of substantial relevance to ultimate factual issue of D's guilt or innocence. Here, D's confession was determined to be voluntary. Tr. Ct. granted state's motion in limine & prevented D from introducing any testimony bearing on circumstances under which the confession was obtained. U.S. S.Ct. holds that Constitution guarantees D a meaningful opportunity to present a complete defense, whether rooted directly in Due Process Clause of 14th Amend. or in Compulsory Process & Confrontation Clauses of 6th Amend. Thus, blanket exclusion of testimony about circumstances of D's confession deprived him of a fair trial. Held, remanded to state court for determination as to whether error was harmless. All justices joined opinion.

TITLE: Davis v. State
INDEX NO.: O.1.a.
CITE: (12/2/83), Ind., 456 N.E.2d 405
SUBJECT: Admitting/excluding evidence - cumulative
HOLDING: Tr. Ct. did not err in admitting autopsy report. Here, D contends report, which was read to jury, & attached diagrams, which were passed to jurors, were merely cumulative of the operating surgeon's testimony. Cumulative evidence is "that which goes to prove what has already been established by other evidence." Blacks Law Dictionary 343 (5th ed. 1979). Such evidence is not inadmissible per se. Hyde 451 N.E.2d 648; Chittenden 436 N.E.2d 86. Evidence relevant to illustrate testimony of witnesses is admissible although it is cumulative. Feller 348 N.E.2d 8. Admission of cumulative evidence is discretionary. Hedges 443 N.E.2d 62; Webster 426 N.E.2d 1295. Surgeon could not specify point of entry of bullet. Autopsy report included pathologist's explanation of bullet's traverse. Diagrams illustrated point of entry, thus aiding jury's understanding of evidence re self-defense. Held, no abuse of discretion.

TITLE: Dumas v. State
INDEX NO.: O.1.a.
CITE: (2-26-04), Ind., 803 N.E.2d 1113
SUBJECT: Rules of Evidence - applicable in penalty phase of capital/LWOP trials
HOLDING: Indiana Evidence Rule 101(c) exempts certain proceedings, including sentencing, from rules of evidence. Where the guilt-determination phase of a capital trial is presented to a jury, penalty phase is also presented to a jury. Like guilt-determination phase, the penalty phase of a capital trial requires introduction of evidence with burden on State to prove its case beyond a reasonable doubt. Despite death penalty statute's characterization of penalty phase as a "sentencing hearing," see Ind. Code 35-50-2-9(d), this phase is nonetheless in the nature of a trial to which the Indiana Rules of Evidence apply. Thus, Tr. Ct. erred in allowing State to introduce hearsay testimony during penalty phase of LWOP trial. However, D invited error by arguing that penalty phase of trial was essentially a sentencing hearing in which hearsay is admissible. Held, judgment affirmed.

Note: *Citing* Green v. Georga, 442 U.S. 95 (1979) the Court noted that the rules of evidence are subject to constitutional limitations. In Green, the U.S. Supreme Court held that the rules of evidence cannot trump a capital D's right to present reliable evidence that is highly relevant to a critical issue at the penalty phase. Id., 442. U.S. at 98.

RELATED CASES: Davis, App., 892 N.E.2d 156 (in assisting a criminal prosecution, Tr. Ct. did not err in admitting probation officer's hearsay statement that D showed little remose; rules of evidence & Crawford do not apply at sentencing hearing).

TITLE: Garland v. State
INDEX NO.: O.1.a.
CITE: (2/16/83), Ind., 444 N.E.2d 1180
SUBJECT: Admitting evidence - plea agreement of state witness
HOLDING: Plea bargain agreement detailing recommended sentence for state's witness is properly admissible. Prosecutor has duty to disclose any agreements between witness & state. Campbell 409 N.E.2d 568; Newman 334 N.E.2d 684. Here, D contended admission of plea agreement was error because it referred to a recommended sentence of 2 years, thus allowing jury to infer D would also receive 2-year sentence. Ct. recognizes that jury need not be informed of prescribed penalties (Debose 389 N.E.2d 272), but finds jury was not instructed concerning penalties for charges against D (theft, habitual). Tr. Ct. simply allowed jury to hear & see the reward prosecution witness was receiving in exchange for testimony; there was no indication D would receive the same sentence. Held, no error.

TITLE: Gerrick v. State
INDEX NO.: O.1.a.
CITE: (7/27/83), Ind., 451 N.E.2d 327
SUBJECT: Admitting evidence - testimony regarding written report
HOLDING: Tr. Ct. did not err in permitting police technician/firearms expert to testify concerning results of his analysis of gun/bullets after lab report had been admitted; best evidence rule is not violated so long as witness is being asked to testify regarding personal observations & not to attest to content of writing he/she has prepared. Here, D contends state was attempting to prove terms of writing (lab report), thus only written report was admissible to prove its content & oral testimony was inadmissible under best evidence rule. Ct. finds D misconstrues rule, which requires use of writing where party seeks to prove terms of writing itself. Eldridge, 361 N.E.2d 155; Hilligoss, 255 N.E.2d 101. Testimony of witness as to facts personally observed is not inadmissible simply because these observations have been embodied in a written report. Jackson, 411 N.E.2d 609; Hilligoss. Held, no error.

TITLE: Goodloe v. State
INDEX NO.: O.1.a.
CITE: (12/3/82), Ind., 442 N.E.2d 346
SUBJECT: Admitting evidence - relevancy
HOLDING: Evidence is relevant if it tends to prove a material fact. Jones, 425 N.E.2d 128; Lock, 403 N.E.2d 1360. Tr. Ct. has wide discretion in ruling on relevancy of evidence. White, 425 N.E.2d 95; Turpin, 400 N.E.2d 1119. Any evidence tending to connect accused with commission of crime is admissible (Wilson, 374 N.E.2d 45; Pullins, 256 N.E.2d 553) & positive proof or authentication of such evidence is not required for its admissibility (Wilson). Here, D objected to introduction of weapon, arguing it had not been shown to be related to corpus delicti. Robbery victim, witness, police officer & co-D testified concerning the weapon (pool cue wrapped in red tape). Held, no error in admission.

RELATED CASES: Shipley, App., 620 N.E.2d 710 (In trial for murder & neglect of dependent, Tr. Ct. did not abuse discretion in allowing questioning concerning D's sexual preference because any possible sexual relationship was relevant to effect on children's behavior. Ct. also found testimony about husband's medical license went to his motive in failing to seek medical treatment for daughter & was not prejudicial to D because it did not refer to her.)

TITLE: Guajardo v. State
INDEX NO.: O.1.a.
CITE: (9/4/86), Ind., 496 N.E.2d 1300
SUBJECT: Presentation of warrant & affidavit to jury - harmless error
HOLDING: Although it was error to present probable cause affidavit & search warrant to jury, Ct. finds reversal is not required (no prejudice to D). Here, at trial, D contended vehicle search was illegal & filed motion to suppress all evidence obtained from it. Out of jury's presence, prosecution offered search warrant, including probable cause affidavit, to prove search was legal/evidence admissible. Tr. Ct. denied motion to suppress. Jurors individually reviewed warrant later in trial. Probable cause affidavit & search warrant pertain only to admissibility of evidence obtained under warrant. That determination is matter for Ct., not jury. Clark, App., 379 N.E.2d 987. Ct. finds statement of witness to police (re having seen D's vehicle in neighborhood on morning of rape) was hearsay because she did not testify at trial. However, victim unequivocally identified D as assailant & testified his car was vehicle in which she was raped. In light of strong ID testimony, hearsay statements were merely cumulative & constituted harmless error. Held, conviction affirmed.

RELATED CASES: Jacobs, App., 802 N.E.2d 995 (D failed to demonstrate that there was an aspect of search warrant that contributed to her verdict); Winbush, App., 776 N.E.2d 1219 (it was improper for search warrant to be introduced into evidence for consideration by jury); Brown, 746 N.E.2d 63 (any error arising from jury's exposure to irrelevant information in charging information & probable cause affidavit was harmless); Hollen, App., 740 N.E.2d 149, aff'd 761 N.E.2d 398 (Tr. Ct. erred in admitting PC affidavit that discussed subsequent battery for which D was not charged).

TITLE: Hyser v. State
INDEX NO.: O.1.a.
CITE: (10/17/2013), 996 N.E.2d 443 (Ind. Ct. App 2013)
SUBJECT: Erroneous exclusion of relevant evidence - denial of right to present a defense
HOLDING: In child molesting prosecution, Tr. Ct. improperly denied D a meaningful opportunity to present a complete defense. Throughout the trial, D attempted to present a defense that the allegations and testimony against him were fabricated as a retaliatory act in response to a report he made to DCS that he believed complaining witness (C.W.) was being abused by C.W.'s mother's boyfriend (Marner). D wished to elicit testimony from two witnesses who observed Marner strike C.W., and from a detective that the report to DCS was made by D and that it prompted C.W.'s allegations that D had molested him. In addition, D wished to present evidence that Marner was a registered sex offender to show Marner knew how the system worked and that J.M. could be taken away from him if a new charge was filed against him.

Court concluded that this evidence was relevant under Ind. Evidence Rule 401 as it had, at a minimum, the tendency to show that the molestation allegations against D were untrue and were made, or caused to be made by C.W. through the influence of Marner, in retaliation or in response to D making a child abuse report regarding Marner. Evidence regarding report to DCS was not inadmissible hearsay because D did not wish to present it to prove truth of matter asserted, but instead to demonstrate he had made the report against Marner a few days prior to time he was first accused of the molestations, and report provided a motive for Marner to fabricate the molestation allegations and influence C.W. to testify against D. Dyson v. State, 692 N.E.2d 1374 (Ind. Ct. App 1998). Probative value of the evidence was not outweighed by danger of unfair prejudice, and exclusion of the evidence is inconsistent with substantial justice and therefore not harmless. The evidence D wished to elicit and present was exculpatory, unique, and critical to his defense. D had a right, as a fundamental element of due process of law, to present his own witnesses to establish a defense and to present his version of the facts. See Kubsch v. State, 784 N.E.2d 905 (Ind. 2003); Allen v. State, 813 N.E.2d 349 (Ind. Ct. App 2004). Held, convictions reversed and remanded for new trial.

TITLE: Joyner v. State
INDEX NO.: O.1.a.
CITE: (3-31-97), Ind., 678 N.E.2d 386
SUBJECT: Erroneous exclusion of relevant evidence
HOLDING: Tr. Ct. committed reversible error when it prevented D from presenting evidence supporting his theory that another person committed murder. In his offer to prove, D sought to present evidence that: Bowens, who worked at same place as victim & D, was having affair with victim; Bowens had sex with victim on night before murder; Bowens had lied to his wife about where he was that evening & later told his wife that he had argument with victim on last day she was seen alive; & Bowens came in late to work on morning after murder & lied about his tardiness on his time card. Some evidence admitted at trial, including expert testimony regarding hair analysis, was consistent with D's theory that crime was committed by Bowens.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind.Evidence Rule 401. Evidence which tends to show that someone else committed crime logically makes it less probable that D committed crime, & thus meets definition of relevance in Rule 401. In this case, it was error to prevent D from offering proposed evidence. Some of proffered testimony could have established motive (argument) & opportunity (unexplained absence/coverup). Erroneous exclusion of evidence was inconsistent with substantial justice & could not be deemed harmless error. Ind.Trial Rule 61. Held, reversed & remanded for new trial.

RELATED CASES: Bryant, App., 802 N.E.2d 486 (evidence offered in attempt to establish that D's father was person who killed victim was properly excluded); Smith, 754 N.E.2d 502 (D only sought to present (mostly hearsay) evidence of various threats made by victim himself; there was absolutely no effort to present any evidence of any behavior by any other person suggesting existence of another suspect; thus, evidence D sought to present falls well short of test for admissibility enunciated by Joyner); Roop, 730 N.E.2d 1267 (no error in excluding evidence that D's father-in-law may have molested D's wife when she was child).

TITLE: McBrady v. State
INDEX NO.: O.1.a.
CITE: (3/20/84), Ind., 460 N.E.2d 1222
SUBJECT: Admitting/excluding evidence - videotape wrap-up
HOLDING: Tr. Ct. did not err in admitting police officer's testimony about videotape wrap-up of sting operation transaction as this tape is part of normal police records in this case. Here, negotiation of sale of stolen car was conducted outside range of videotape. Officer summarized transaction on videotape after D left. Officer testified that these wrap-ups were normal procedure to ensure details were not forgotten. Held, no error.

TITLE: Sewell v. State
INDEX NO.: O.1.a.
CITE: (3d Dist. 12/16/82), Ind. App., 442 N.E.2d 1142
SUBJECT: Admitting evidence - connection to crime
HOLDING: Johnson 400 N.E.2d 132 holds: Evidence is generally admissible if it has a tendency to prove/disprove a material fact. Minton 378 N.E.2d 639. Positive proof/identification of evidence not required prior to admission. Elliot 279 N.E.2d 207. Inconclusive connection with crime affects weight, not admissibility, of evidence. Carman 396 N.E.2d 344. Here, D objected to admission of revolver found under car seat, arguing no nexus shown between weapon & robbery. Ct. finds although D never displayed weapon in course of robbery, cashier reasonably believed D was armed. D apprehended shortly after robbery in possession of some cash, including marked $2 bill, & revolver. Fact D in possession of handgun when apprehended shortly after crime, though not conclusive, increases reasonableness of inference D was armed. Johnson. Held, no error in admission of gun.

TITLE: Simpson v. State
INDEX NO.: O.1.a.
CITE: (4th Dist., 10-27-09), Ind. App., 915 N.E.2d 511 (Ind. Ct. App 2009)
SUBJECT: Denial of request to recall State's witness - no error
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion in denying D's request to recall a State's witness, Brian Gates, to impeach his earlier testimony that he was not seeking a sentence modification in exchange for inculpatory evidence contained in a letter he wrote to Tr. Ct. and forwarded to prosecutor. Gates, D's fellow inmate, testified that D said he shot victim because victim was pistol whipping his friend, so he "unloaded the gun" on victim, and that when he finished, victim "looked like Swiss cheese." Gates also testified that D said he shot victim before he had a chance to point his gun at D, but that he was going to say victim was trying to shoot him to support his defense of justifiable homicide. Gates also testified that he was testifying against D "because it's the right thing to do," not because he was trying to obtain a sentence modification and only wanted to be moved to a different facility out of safety concerns related to D's case.

However, Gates had, in fact, written the Tr. Ct. to request a sentence modification or early release based on safety concerns. When D learned about this letter, he sought leave to recall Gates as a witness to impeach him. Tr. Ct. denied the request but after the State rested its case, it did advise the jury that Gates "did have on record with this Court, unrelated to his testimony here, a pending letter requesting that he be housed elsewhere or released early" based on "[s]afety concerns unrelated to this case." The Tr. Ct. denied Simpson's request to admit the letter as an exhibit.

Court could not conclude that Tr. Ct. prejudiced D's substantial rights by not letting him recall Gates to the stand, even if it would have been the "better practice" to do so. Tr. Ct.'s refusal to actually admit the letter as an exhibit was "probably error," but did not affect D's substantial rights because Tr. Ct. accurately described Gates' letter to the jury. Court also held that State presented sufficient evidence to negate D's claim that he was legally justified to shoot the victim to defend a third person. Held, voluntary manslaughter and criminal recklessness convictions affirmed.

TITLE: Springer v. State
INDEX NO.: O.1.a.
CITE: (5/15/84), Ind., 463 N.E.2d 243
SUBJECT: Admitting/excluding evidence - foundation
HOLDING: Tr. Ct. erred in admitting knife into evidence as Exhibit 8 where state never connected that specific knife to D or to commission of crimes. Error was harmless because D failed to demonstrate prejudice. Here, victim testified knife was "exactly like" knife D used to stab him. State conceded at trial that Exhibit 8 was not knife used by D. Foundation requirements for admission of physical evidence are: (1) witness must testify object is like object used to commit crime; (2) connection of object to D & to commission of the crime. Hooper, 443 N.E.2d 822. Tr. Ct. could have allowed knife to be used to illustrate/explain victim's testimony. Held, conviction affirmed.

RELATED CASES: Lycan, App., 671 N.E.2d 447 (given close temporal relationship between D's possession of semi-automatic pistol & shooting, considered with D's incriminating statement immediately following shooting & testimony that he never retreated from confrontation with victim, evidence concerning possession of pistol had at least some probative value to rebut D's claim of self-defense); Hubbell, 754 N.E.2d 884; Tynes, 650 N.E.2d 685 (Tr. Ct. committed harmless error in admitting weapons & ammunition into evidence, where items were not used in charged crime & were not helpful to "complete the picture" of crime).

TITLE: State v. Samuel
INDEX NO.: 0.1.a.
CITE: 643 N.W.2d 423 (Wis. 2002)
SUBJECT: Involuntary Witness Statements - Suppression
HOLDING: Wisconsin S.Ct. holds that when D seeks to suppress statement of witness on ground that it was obtained under pressure from authorities, conduct must be so egregious that it makes statement involuntary as matter of law. Court listed 6 factors to aid in determining egregiousness of police misconduct: (1)whether witness was coached; (2) whether questioning was blatantly tailored to extract particular answer; (3) whether authorities made threat that would have been unlawful if carried out; (4) whether witness was given express and unlawful quid pro quo; (5) whether state had separate legitimate purpose for its conduct, and (6) whether the witness was represented by counsel at time of statement. First 4 factors weigh in favor of suppression, while last two weigh against it.

O. EVIDENCE

O.1. Admitting/Excluding Evidence

O.1.b. Motion in limine (violations, see also D.15.b.1 and D.15.b.3)

TITLE: Clausen v. State
INDEX NO.: O.1.b.
CITE: (10/26/93), 622 N.E.2d 925 Ind.
SUBJECT: Motion in limine - preserving error
HOLDING: In order to preserve error in overruling of pre-trial motion in limine, appellant must have objected to admission of evidence at time it was offered. Conner, 580 N.E.2d 214. Failure to object at trial to admission of evidence results in waiver. Id. Motion in limine is used as protective order against prejudicial questions and statements being asked during trial. Baker, 425 N.E.2d 98, 101. Ruling does not determine ultimate admissibility of evidence; that determination is made by Tr. Ct. in context of trial itself. Id. Pre-trial denial of motion in limine is preliminary ruling itself insufficient to preserve error for incorrect ruling on motion. By requiring objection during trial at time when testimony is offered into evidence, Tr. Ct. is able to consider evidence in context in which it is being offered & is able to make final determination on admissibility.

Here, Tr. Ct. denied D's motion in limine to exclude prior acts of sexual misconduct. At trial, D's adopted daughter testified to D's prior sexual misconduct. D did not object before witness testified about prior sexual misconduct. At sentencing hearing, Tr. Ct. granted D's motion to reopen record for purpose of inserting objection to precede adopted daughter's testimony. D's objection to witness' testimony which occurred subsequent to trial by means of motion to reopen was insufficient to preserve error. Held, convictions affirmed; Dickson, J., dissenting.

RELATED CASES: Lovett, 943 N.E. 2d 409 (Ind. Ct. App 2011) (State failed to prove on interlocutory appeal from order in limine that it could lay proper foundation for evidence it wanted to admit; admissibility of evidence at trial will depend on the evidence presented by the State prior to offering the evidence, the foundation laid for each piece of evidence, and by missteps by the parties that may open the door for the presentation of some hearsay or that may render it inadmissible); White, 687 N.E.2d 178 (failure to make contemporaneous objection at trial to admission of testimony of former wife as privileged marital communication resulted in waiver of issue even though D had filed motion in limine & Tr. Ct. heard extensive argument on issue); Albright, App., 501 N.E.2d 488 (motion in limine is designed to exclude prejudicial matters, not matters that are merely irrelevant or immaterial).

TITLE: Gaines v. State
INDEX NO.: O.1.b.
CITE: (4th Dist. 12/12/83), Ind. App., 456 N.E.2d 1058
SUBJECT: Motion in limine - violation of; effect
HOLDING: No error results from Tr. Ct.'s admission of evidence in violation of its order in limine if evidence is otherwise admissible in context of particular trial. Here, Tr. Ct. granted D's motion in limine to exclude evidence of other drug purchases. Undercover officer on direct examination by state mentioned previous cocaine buys. D objected & moved for mistrial because testimony violated order in limine. Ct. notes issue is one of first impression. IN first acknowledged motions in limine in 1973 in Burrus v. Silhavey, App., 293 N.E.2d 794. Relying on Lagenour 376 N.E.2d 475, Ct. finds no error in Tr. Ct.'s admission of evidence in violation of D's motion in limine, because evidence was otherwise admissible in this trial (common scheme/plan). Ct. notes where witness' testimony may encroach order in limine, better practice is to proceed through sensitive part of testimony outside presence of jury. Held, no error.

TITLE: Hill v. State
INDEX NO.: O.1.b.
CITE: (2/25/2016), 51 N.E.3d 446 (Ind. Ct. App 2016)
SUBJECT: No error granting State's motion in limine
HOLDING: The State did not improperly interfere with D's defense, which included calling his wife to testify that despite her initial statement to the police, D did not, in fact, batter or confine her.

The State declined to call wife to testify, but D included her on his witness list. The State filed a motion in limine, asking the trial court to bar wife from testifying because she would either commit perjury or invoke the Fifth Amendment for most questions, which would render her testimony irrelevant. The State also said the party calling wife might suborn perjury. The trial court let wife testify outside the jury's presence for a while to "see where [wife's testimony] is going." When asked about the alleged incident, wife invoked the Fifth Amendment. D said he wanted to make a record that his rights to cross-examination and a fair trial had been compromised, but said he would defer to the trial court's decision on the State's motion in limine. The trial court granted the motion, preventing wife from testifying. D was convicted of criminal confinement, domestic battery, and interference with the reporting of a crime.

The State did not intimidate wife into invoking the Fifth Amendment by cautioning her about the danger of self-incrimination, and the trial court did not abuse its discretion in granting the State's motion in limine. By saying he would abide by the trial court's ruling on the motion in limine, D invited any error that may have occurred. See Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005). Also, any possible error from not allowing wife to testify was harmless because there was other substantial evidence of D's guilt. See Johnson v. State, 747 N.E.2d 623, 629 (Ind. Ct. App. 2001). Held, judgment affirmed.

TITLE: Riley v. State
INDEX NO.: O.1.b.
CITE: (2/27/86), Ind., 489 N.E.2d 58
SUBJECT: Motion in limine (MIL) - violation
HOLDING: Despite MIL prohibiting prosecutor from mentioning prior drug use or sale by D (charged with delivery of cocaine), prosecutor repeatedly questioned snitch about prior drug-related contacts with D. Defense objections were repeatedly sustained, but motion for mistrial was denied. Prosecutor argued that multiple buys at same price established common scheme, but Tr. Ct. found insufficient foundation. Ct. finds prosecution "persisted in its attack by harpoon." Prosecutor's "obvious goal" was to reveal D's drug use as well as similar drug transactions, which is impermissible. Gaston, App., 451 N.E.2d 360 (card at O.4.d). Ct. distinguishes case from English 485 N.E.2d 93 (vacating Ct. App. opinion which held prosecutor intentionally elicited evidence of prior offense by D). Ct. finds prosecutor deliberately violated D's rights & violation prejudiced D. Held, conviction reversed; remanded for new trial.

RELATED CASES: King 468 N.E.2d 226 (distinct possibility that MIL knowingly breached requires high level of assurance that admonition erased all residuum of prejudice; held, conviction affirmed); Rose 437 N.E.2d 959 (Crim L 1170(6); prosecutor's questioning was not deliberate interjection of inadmissible evidence (unrelated drug charge vs. D); DISSENT by DeBruler contends pattern of questioning was probably deliberate violation of MIL); White 272 N.E.2d 312 (deliberate interjection of inadmissible evidence of other crimes was misconduct by prosecution; held, conviction reversed).

TITLE: U.S. v. Gonzalez-Maldonado
INDEX NO.: O.1.b.
CITE: 115 F.3d 9 (1st. Cir. 1997)
SUBJECT: Reversing Motion in Limine and Causing Jury To Be Misled
HOLDING: Tr. Ct. committed reversible error when it first ruled that expert witness could testify about alleged accomplice's mental illness and tendency to exaggerate, then reversing ruling and barring witness' testimony after defense told jury in opening statement to expect it. Ds were charged with money laundering and drug distribution. Much of government's evidence consisted of tape-recorded conversations between Ds and third individual, who had been found incompetent to stand trial. Defense sought to offer testimony of mental health expert regarding third D's schizophrenia, which caused him to be grandiose and to exaggerate things. Tr. Ct. initially ruled that expert could testify, and defense counsel gave opening statement to jury which referred to expert's expected testimony. During defense's case, Tr. Ct. reversed its ruling, reasoning that expert testimony went to competence of witness, which was for court to decide. Court of Appeals finds that expert should in fact have been allowed to testify, pursuant to Fed. R. Ev. 702. In any case, Tr. Ct. committed reversible error by reversing its ruling after jury had been told to expect expert's testimony. Preventing expert from testifying at that point created implication that defense could not find expert to give desired testimony.

O. EVIDENCE

O.1. Admitting/Excluding Evidence

O.1.c. Objections/motions to strike/admonitions

TITLE: Blinn v. State
INDEX NO.: O.1.c.
CITE: (2d Dist. 1/13/86), Ind. App., 487 N.E.2d 462
SUBJECT: Objections/motion to strike (MTS) - use of; preservation of issues
HOLDING: By asserting grounds in MTS (made long after evidence was admitted) that were available when evidence was first offered (and D first objected), D failed to preserve such issues for appeal. Objections must be made at first available opportunity. Bonds 436 N.E.2d 295. Objections to exhibits are required after offered but before admitted into evidence. MTS is proper remedy when objection cannot be interposed before evidence is admitted (no time); when question was proper but response objectionable; or when objectionable nature of evidence is unapparent until after admission. Collins 429 N.E.2d 629. Here, grounds asserted in D's MTS were apparent when evidence was first offered. Tr. Ct. has discretion to sustain untimely objections/MTS, but appellate tribunals do not. [Citations omitted.] Held, any error was waived.

RELATED CASES: N.W.W., App., 878 N.E.2d 506 (juvenile waived objection to show-up identification evidence by failing to make timely & specific objection at denial hearing & instead relying on post-hearing motion to suppress); Ashford 464 N.E.2d 1298 (Crim L 1169.5(1); sustained objection cannot be basis of argument on appeal); Solomon 439 N.E.2d 570 (Crim L 696(5), 1169.11; D objected to exhibit after it was admitted & then requested MTS/admonition; held, D was too late); Brown, App., 504 N.E.2d 1040 (Crim L 1043(1); objection must assert proper reason why evidence should be inadmissible in order to preserve any error for appellate review); Hobson, App., 495 N.E.2d 741 (D's objection "for reasons . . . set out earlier" failed to preserve error; objection must be specific; reference to grounds stated in earlier motion or in chambers is inadequate to preserve error, *citing* Abner 479 N.E.2d 1254 & Johnson 472 N.E.2d 892).

TITLE: Bullock v. State
INDEX NO.: O.1.c.
CITE: (1st Dist., 03-25-09), 903 N.E.2d 156 (Ind. Ct. App. 2009)
SUBJECT: Objection - contemporaneous requirement does not mean instantaneous
HOLDING: D preserved an evidentiary issue for appeal by contemporaneously objecting prior to the introduction of the evidence at trial. To preserve an issue for appeal, a party must make a contemporaneous objection at trial. Instantaneous reaction is not necessarily required. Counsel only need be nimble to the extent that his objection be in time to allow the alleged error to be corrected. Here, when prosecutor moved to admit a tape recording into evidence, defense counsel stated, "no objection, Judge." While the judge and the prosecutor were discussing the logistics of playing the recording for the jury, defense counsel corrected herself and objected on hearsay grounds. Tr. Ct. overruled the objection. Because Tr. Ct. had the opportunity to rule on the objection prior to the introduction of the evidence, the issue was preserved for appeal. Held, judgment affirmed.

RELATED CASES: Evans, 30 N.E.3d 769 (Ind. Ct. App 2015) (D waived issue of admission of cash beyond buy money found on him at his arrest; D objected in motion in limine and when a photo of the cash was offered into evidence, but not before, when detective testified about the cash); Smith, 983 N.E.2d 226 (Ind. Ct. App 2013) (even though counsel initially told court he did not object to admission of D's statement, he did not waive argument that statement should have been suppressed, because moments later, D did object and stated grounds for objection).

TITLE: Camm v. State
INDEX NO.: O.1.c.
CITE: (6-26-09), 908 N.E.2d 215 (Ind. 2009)
SUBJECT: Prior acts - no evidence connecting D to act
HOLDING: Although not a clear case of preservation, the D did preserve issue of inadmissible motive evidence for appeal. The overriding purpose of the requirement for a specific and timely objection is to alert the Tr. Ct. so that it may avoid error or promptly minimize harm from an error that might otherwise require reversal, result in a miscarriage of justice, or waste times and resources. Moreover, it is axiomatic that the State cannot bootstrap evidence into admissibility by putting it in, forcing a denial, and then claiming it was put in issue by the D. Bassett v. State, 795 N.E.2d 1050, 1052 (Ind. 2003). Here, D was charged with murders of wife, daughter, and son. D did not object to the medical examiner's testimony regarding the daughter's injuries and her opinion that the injuries could be caused by molestation or a straddle fall. But, the D did object to the pediatricians' opinions that the injuries were most likely due to molest and the State's closing argument that molest was the motive for murder. The D also filed a motion in limine and motion to correct errors arguing the pediatricians and the argument should be excluded. Because the D consistently objected to the speculation of these experts and the hypothesis that he was the molester before, during, and after trial, the Tr. Ct. was well aware of the issues. Moreover, while the D made arguments from this evidence, the thrust of the D's argument was that an alleged co-conspirator, Boney, acted alone and sexually attacked D's wife, not the daughter. Thus, the Tr. Ct. committed reversible error by allowing the admissibility of the evidence. Held, judgment reversed.

TITLE: Chambers v. State
INDEX NO.: O.1.c.
CITE: (4th Dist.; 05-3-06), Ind. App., 848 N.E.2d 298
SUBJECT: Word "objection" not required to preserve issue for appeal
HOLDING: Although defense counsel did not use the word "objection" when the State requested a continuance of the trial date beyond the 70-day speedy trial limit, the defense counsel's statement reminding the judge that the D had filed a speedy trial request was in nature of an objection and was sufficient to preserve issue for appeal. Held, convictions reversed.

TITLE: Davenport v. State
INDEX NO.: O.1.c.
CITE: (7/6/84), Ind., 464 N.E.2d 1302
SUBJECT: Admitting/excluding evidence - evidentiary harpoon
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial, predicated upon prosecutor's improper questions during rebuttal testimony of police officer. Here, officer was questioned about picture of D's girlfriend taken at time search warrant was executed. D's objection was overruled. Officer answered. Prosecutor asked if officer had examined girl's arms. D objected & after bench conference, jury was admonished to disregard questions & answer. D contends Q & A created inference of girlfriend's drug addiction, amounting to evidentiary harpoon, which required mistrial, *citing* White 272 N.E.2d 312. Strong presumption exists that jury followed admonition to disregard hastily given evidence in response to leading questions or questions calling for hearsay answers. Davis 418 N.E.2d 203; Hightower 296 N.E.2d 654. Held, no abuse of discretion in denial of mistrial.

TITLE: Harris v. State
INDEX NO.: O.1.c.
CITE: (7/30/85), Ind., 480 N.E.2d 932
SUBJECT: Impeachment - prior convictions; motion in limine (MIL)
HOLDING: Tr. Ct. did not err in denying D's MIL asking that state be prohibited from introducing evidence of his criminal convictions to impeach him in event he testified. Here, D did not testify & claims he was denied right to present evidence/due process. Denial of MIL is not final action causing prejudice to D. Error, if any, occurs when challenged evidence is improperly admitted & objection is made at trial. Bennett 423 N.E.2d 588. It was D's decision whether to testify; there is no right to special consideration if D chooses to testify. Robinson 446 N.E.2d 1287; Geisleman 410 N.E.2d 1293. Held, no error.

RELATED CASES: Luce v. US (1984), 469 U.S. 38, 105 S.Ct. 460, 83 L. Ed.2d 443 (Crim L 1036.2; Cts. may not review Tr. Cts.' in limine ruling that prior conviction fell within category of permissible impeachment evidence Fed. R. Evid. 609(a) where D does not testify); Lewis 486 N.E.2d 526 (Witn 300; no error in denial of MIL that state could not impeach D at guilt phase with prior conviction alleged in habitual, *citing* Williams 419 N.E.2d 134).

TITLE: Humphrey v. State
INDEX NO.: O.1.c.
CITE: (5-29-97), Ind., 680 N.E.2d 836
SUBJECT: Limited admissibility of evidence - failure to request jury admonishment
HOLDING: Indiana Evidence Rule 105 does not impose affirmative duty on Tr. Ct.'s to admonish or instruct jury regarding limited admissibility of evidence. Rule places burden for securing limiting admonition on parties. Here, Tr. Ct. did not err in failing to affirmatively admonish jury that witness's prior inconsistent statement implicating D in crime, properly admitted for impeachment purposes, was not to be considered as substantive evidence. By failing to request admonition, D waived any error based on absence of admonition. Where potentially damaging evidence is properly admitted for one purpose, as here, trial strategy may dictate not requesting admonition. Limiting admonition or instruction may do more harm than good because it could focus jury on undesirable aspect of evidence.

Ct. also found no error in Tr. Ct.'s exclusion of pretrial affidavit, which was merely cumulative of witness's trial testimony. Held, no error.

RELATED CASES: Smith, App., 872 N.E.2d 169 ("we think it particularly prudent to address the merits of a D's claim in cases where trial counsel has rejected an offer to admonish the jury & specifically commented on the unsavory position of choosing between emphasizing inappropriate testimony to the jury & waiving appellate review of the Tr. Ct.'s denial of a motion for mistrial.") Martin, 736 N.E.2d 1213 (D failed to request admonition & thus waived any claim of error).

TITLE: Merritt v. State
INDEX NO.: O.1.c.
CITE: (4/12/2018), 99 N.E.3d 706 (Ind. Ct. App 2018)
SUBJECT: Failure to sua sponte admonish jury was not fundamental error
HOLDING: The Tr. Ct. did not commit fundamental error by failing to sua sponte admonish the jury to not speculate about why two witnesses who had testified at D's first trial did not testify at his second trial.

D asked Jordan White to share his cocaine. White refused. Merritt shot and killed White. At D's first trial, Elizie Wombles and Rusell Church testified against D. The trial resulted in a hung jury. Before the second trial, D approached fellow inmate Ryan Ivy and offered Ivy $1,000 to kill Wombles. The State could not locate Wombles and Church for the second trial, so the Tr. Ct. permitted the State to read their testimonies from the first trial. D did not object. Ivy testified that D approached him about killing Wombles.

On appeal, D argued it was obvious from Wombles' and Church's prior statements that they were made during a prior trial and that, considering Ivy's testimony in the second trial, without an admonishment the jury was free to speculate that D had caused Wombles' and Church's absences, which denied him a fair and impartial jury.

Because D does not claim that Wombles' and Church's testimony was untrue, the alleged error does not rise to the level of fundamental error. See Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010). Further, admonishments are double-edged swords. They can help focus the jury on the proper considerations for admitted evidence. However, they can draw unnecessary attention to unfavorable aspects of the evidence. See, e.g., McCollum v. State, 582 N.E.2d 804, 811 (Ind. 1991). Thus, the Tr. Ct. may well have determined that D's attorney thought an admonishment was not worth the risk of drawing unnecessary attention to their absences. Held, judgment affirmed.

TITLE: Nowling v. State
INDEX NO.: O.1.c.
CITE: (01-31-12), 961 N.E.2d 34 (Ind. Ct. App 2011)
SUBJECT: Continuing objection - subsequently waived
HOLDING: On rehearing, Court clarified that D's subsequent claim of "no objection" when lab results were admitted into evidence waived his earlier continuing objection based on the illegality of the seizure of the substance being tested. A party may waive its objection to certain evidence based upon a continuing objection when it subsequently indicates that it has no objection to a particular piece of evidence. Hayworth v. State, 904 N.E.2d 684, 693-94 (Ind. Ct. App 2009).

Here, in its original opinion, Court found that an error in admitting illegally seized evidence was harmless because a probation officer later testified, without objection, about D's admission to possessing the illegally seized evidence. Prior to the testimony of the probation officer and a police officer in the State's case-in-chief, D renewed his motion to suppress and his continuing objection, stating that he wanted to make sure that his objection was "continuing through this witness, to which the court replied "sure" and "this one and all others." But, on rebuttal, the State recalled the probation officer and a forensic scientist. When, through the forensic scientist, the State admitted results of a lab test based on the seized evidence, D stated "No objection." Thus, if D's continuing objection applied to the forensic scientist's testimony regarding the lab test, D waived his ability to challenge on appeal the lab results by stating he had no objection when they were subsequently introduced. Court granted D's petition for rehearing for the limited purpose of clarifying its analysis and affirming the original opinion. Held, judgment affirmed.

RELATED CASES: Hostetler, 184 N.E.3d 1240 (Ind. Ct. App. 2022) (despite continuing objection, challenge to inventory search waived by D saying "no objection" when evidence was admitted).

TITLE: Segar v. State
INDEX NO.: O.1.c.
CITE: (12-01-10), Ind. Ct. App, 937 N.E.2d 917
SUBJECT: Objection - timeliness; not required to object to foundational testimony
HOLDING: Trial counsel properly preserved suppression issue for appeal by objecting at the time seized marijuana was admitted when previous testimony regarding the marijuana was foundational and equivocal to the identity of the marijuana. A claimed error in admitting unlawfully seized evidence at trial is not preserved for appeal unless an objection was lodged at the time the evidence was offered. Brown v. State, 929 N.E.2d 204, 205 (Ind. 2010). Where a D does not object to the testimony concerning the discovery, search and collection of drugs and a chemist's testimony that the material seized was drugs, objection to the subsequent admission of the drugs is untimely and insufficient to preserve the issue for appeal.

Here, D objected on constitutional grounds at the time the seized marijuana was entered into evidence. Although two officers testified, without objection, about their seizure of the marijuana prior to the introduction of the marijuana, neither officer stated unequivocally that the plant material collected from D was in fact marijuana, as was required to prove D's conviction beyond a reasonable doubt absent additional evidence. Rather, the officer's testimony regarding the "alleged marijuana" was foundational in nature for the purpose of linking D to the physical evidence. D was not required to object to that foundational testimony. As the actual marijuana was not cumulative of the testimony already presented, its admission affected D's substantial rights and cannot be deemed harmless. Held, judgment reversed.

O. EVIDENCE

O.1. Admitting/Excluding Evidence

O.1.d. Preserving error/offer of proof (CR 6)

TITLE: Arhelger v. State
INDEX NO.: O.1.d.
CITE: (1st Dist., 6-22-99), Ind. App., 714 N.E.2d 659
SUBJECT: Offer of proof - required on cross-examination
HOLDING: Purpose of offer to prove is to preserve for appeal Tr. Ct.'s allegedly erroneous exclusion of evidence. Bradford v. State, 675 N.E.2d 296 (Ind. 1996). It is appropriate & necessary for counsel to make offer of proof on cross-examination if she believes Tr. Ct. has improperly limited line of questioning or has erroneously sustained objection by opposing counsel. Offer may be made immediately upon judge's sustaining of opposing counsel's objection, or before judge rules on objection. While such offer need not be formal, it must make substance of excluded evidence or testimony clear to Ct.; it must identify grounds for admission of testimony; & it must identify relevance of testimony. Roach v. State, 695 N.E.2d 934 (Ind. 1998). Offer should not be tendered with less than good-faith basis regarding what witness would say. Here, D did not make valid offer of proof & thus failed to create necessary record for appellate review. Held, judgment affirmed.

RELATED CASES: Harmon, 4 N.E.3d 209 (Ind. Ct. App 2014) (where Tr. Ct. provided counsel the opportunity at a sidebar to explain the substance, relevance and grounds for the excluded evidence, D was not denied his right to make an offer of proof); King, App., 799 N.E.2d 42 (D made no offer of proof before or after Tr. Ct. sustained State's objection to his line of questioning, & substance of evidence he sought to elicit from victim was not apparent from context of his questions); Nelson, App., 792 N.E.2d 588 (it is reversible error for Tr. Ct. to deny a party opportunity to explain substance, relevance & admissibility of excluded evidence with an offer of proof).

TITLE: Baker v. State
INDEX NO.: O.1.d.
CITE: (7-17-01), Ind.,750 N.E.2d 781
SUBJECT: Offer of proof sufficient to preserve issue for appeal
HOLDING: To preserve claim of error in ruling excluding evidence, proponent of evidence must make substance of evidence known to Tr. Ct. by proper offer of proof, unless substance of evidence was apparent from context in which questions were asked. Ind.Evid.R. 103(a)(2). Indiana practice on preservation of error about exclusion of evidence requires proponent, out of hearing of jury, to propose certain questions & give Tr. Ct. chance to rule, & make offer of proof. When this procedure is not followed, any claim of error is not available for appellate review, even when Tr. Ct. earlier granted motion in limine. Mitchem v. State, 503 N.E.2d 889 (Ind. 1987); Bieghler v. State, 481 N.E.2d 78 (Ind. 1985). Here, in rape prosecution, defense counsel failed to make oral offer to prove at trial, but filed offer of evidence under Evidence Rule 412(a)(1) asserting that D & victim had some twenty acts of consensual sexual intercourse in months preceding date of alleged offense. Document asked Tr. Ct. to make specific ruling either affirming or revoking its grant of State's motion in limine. Sidebar discussion of issue occurred immediately before D was to testify & Tr. Ct. clearly stated its intention that any sexual history between D & victim should not be aired in front of jury. In subsequent hearing, Tr. Ct. indicated he recalled receiving D's offer of evidence, & that he made no effort to rule on it in open Ct., because D had already taken reasonable steps to preserve issue. Ct. held that primary reasons for requiring offer to prove were satisfied. Held, transfer granted, rape conviction reversed & remanded for new trial.

TITLE: Bedolla v. State

INDEX NO.: O.1.d.

CITE: (5-28-19), Ind. Ct. App., 123 N.E.3d 661

SUBJECT: PCR court abused discretion in denying legitimate request to make an offer of proof and foreclosing discovery

HOLDING: Post-conviction court abused its discretion in closing evidence without allowing counsel the opportunity to make a legitimate offer of proof and thus foreclosing enforcement of a valid subpoena to secure a deposition. This offer of proof was related to the petitioner's request to proceed with his attempts to depose an essential witness who may possess evidence of petitioner's actual innocence. Both parties and post-conviction court had originally agreed to the deposition, but at a status conference after an unsuccessful deposition, post-conviction court refused to hear argument from Defendant's counsel to secure the witness's testimony and wrongfully denied her the opportunity to make an offer of proof, even threatening her with contempt. When a judge refuses to hear a party's offer to prove, she not only abdicates the duty to listen, but she calls into question the principle of fundamental fairness, which requires that parties, particularly those bearing the burden of proof, receive every reasonable opportunity to make their case. Hirsch v. State, 697 N.E.2d 37, 43 (Ind. 1997). Held, transfer granted, post-conviction court's order denying Defendant's motion to correct error reversed and remanded to allow deposition of witness. Slaughter, J., concurring in part and dissenting in part, believes the relief awarded to Defendant exceeds the relief he sought or what the trial court's violation warrants.

TITLE: Bradford v. State
INDEX NO.: O.1.d.
CITE: (12/10/96), Ind., 675 N.E.2d 296
SUBJECT: Offer of proof - Limited use of
HOLDING: In arson & murder case, Tr. Ct. did not err in denying D's motion for new trial on newly discovered evidence. Proper offer to prove is "offer" from counsel regarding what witness would say if he was permitted to testify & has been described as "making a record as to the substance & nature of the precluded testimony." Without such record appellate court has no information from which to make ruling. Wallace, 553 N.E.2d 456. Purpose of offer to prove is to preserve for appeal Tr. Ct.'s allegedly erroneous exclusion of evidence. Id. Here, D did not raise on appeal propriety of Tr. Ct.'s exclusion of witness' testimony, but instead sought to have Ind. S. Ct. use his offer to proof as part of record in order to consider substance of witness' testimony as it related to new trial based on newly discovered evidence. Offer of proof is part of record only insofar as D chooses to challenge Tr. Ct.'s exclusion of evidence. D did not challenge exclusion on appeal & appellate courts will not consider offer for any other purpose. Held, judgment affirmed.

RELATED CASES: U.S. v. Vest, 116 F.3d 1179 (7th Cir. 1997) ("This circuit does not require litigants to make formal offers of proof ... but 'the record must show the equivalent: grounds for admissibility, the proponent must inform the court and opposing counsel what he expects to prove by the excluded evidence, and he must demonstrate the significance of the excluded testimony.'")

TITLE: Duso v. State
INDEX NO.: O.1.d.
CITE: (1st Dist., 05-15-07), Ind. App., 866 N.E.2d 321
SUBJECT: Offer of proof regarding witness asserting privilege against self-incrimination
HOLDING: Tr. Ct. did not abuse its discretion by denying D the ability to make an offer of proof via a question & answer format when D's witness asserted her privilege against self-incrimination. A party has a right to make an offer of proof. There are three methods for making an offer to prove: (1) question & offer format, allowing counsel to explain what testimony would be if witness allowed to answer the question; (2) a question-and-answer format; & (3) offer to prove without questions if neither the Ct. nor opposing counsel requires the use of questions. Further, when confronted with a witness's assertion of his Fifth Amendment rights, Tr. Ct. must hold a hearing outside the presence of the jury. In order to permit the Ct. to rule on the assertion of privilege with specificity, claims of privilege must be made & sustained on a question-by-question basis. Here, when the witness asserted her Fifth Amendment right outside of the presence of the jury, D asked to make an offer of proof by asking the witness some questions because D believed that the witness would deny everything rather than incriminate herself. Tr. Ct. did not allow D to question the witness. D's stated belief of the witness' testimony was an offer of proof, although not in the answer-and-question format. While Tr. Ct. could have required the witness to assert her privilege on a question-by-question basis, D did not object on this basis. D's Sixth Amendment right to compulsory process does not trump the witness' Fifth Amendment right against self-incrimination. Held, judgment affirmed.

TITLE: Hart v. State
INDEX NO.: O.1.d.
CITE: (8/20/96), Ind. App., 671 N.E.2d 420
SUBJECT: Offer to prove
HOLDING: In intimidation, escape & theft case, Tr. Ct. did not err in excluding evidence of any action or termination of deputy town marshal. Offer of proof is method by which proponent of evidence preserves any error in its exclusion. Tyson, 619 N.E.2d 276. When proponent fails to make offer of proof, he has not adequately preserved exclusion of witness= testimony as an issue for appellate review. Id. Held, absence of offer of proof in present case resulted in waiver of issue.

RELATED CASES: Griffith, App., 898 N.E.2d 412 (D failed to make an offer of proof pursuant to Evid.R. 103 after Tr. Ct. excluded his testimony regarding alleged hearsay statements; to the extent substance of evidence was apparent from context within which questions were asked (See Evid.R. 103(a)(2)), exclusion did not affect D's substantial rights); Noble, 725 N.E.2d 842 (Rules of Evidence require that substance of evidence be made known to Tr. Ct. & that offer to prove identify grounds for admission & relevance of testimony); Davis, App., 772 N.E.2d 535 (Because defense counsel did not make offer to prove at trial, Ct. was unable to address argument that Tr. Ct. improperly limited defense counsel's cross examination of co-Ds); Clark, 562 N.E.2d 11 (where substance of witness= testimony was already on record as result of his answer to first question, D was not required to make offer of proof after objections on subsequent questions were sustained in order to preserve issue for appeal; after Tr. Ct. had sustained objection to first question & stricken witness' answer, counsel had attempted to get at same answer in variety of other ways); Fischer, App., 493 N.E.2d 1265 (State waived error by failing to make offer to prove after judge refused to allow witness to testify re: D's prior conviction for child molesting).

TITLE: Hernandez v. State
INDEX NO.: O.1.d.
CITE: (9/24/82), Ind., 439 N.E.2d 625
SUBJECT: Offer of proof - when proper; form of
HOLDING: Offers to prove are proper only on direct examination. Carter, App., 422 N.E.2d 742; see also Walker 262 N.E.2d 641. Here, Ct. limited D's cross-exam of pharmacist; D made offer to prove conversation between D & pharmacist - that drug was "for an old man out in the car." D argues conversation was within *res gestae* exception (statement simultaneously uttered at time of occurrence). Such statements are not admissible if shrewd, calculated & self-serving. Arnold, App., 383 N.E.2d 461. Ct. finds exculpatory statements self-serving, & an attempt to make evidence for himself given that the state could not have cross-examined D. Cain 300 N.E.2d 89. Held, no abuse of discretion in exclusion of pharmacist's testimony.

RELATED CASES: Aslinger, 2 N.E.3d 84 (Ind. Ct. App 2014) (D failed to make his offer of proof regarding his prior substance offense convictions in a timely manner, where he waited until after jury commenced deliberations); Arhelger, App., 614 N.E.2d 659 (it is appropriate & necessary for counsel to make offer of proof on cross-examination if she believes Tr. Ct. has improperly limited line of questioning or has erroneously sustained objection by opposing counsel); Albright, App., 501 N.E.2d 488 (D's offer to prove failed because witness was not present; here, witness in obscenity case failed to appear & defense counsel presented oral summary of what witness would have said re contemporary community standards; Ct. holds summary was hearsay - witness must be present, citing Miller, Evidence Section 103.110 & TR 43(C)); Burns, App., 500 N.E.2d 1243 (Tr. Ct. properly denied as untimely D's offer to prove made after denial of his motion for judgment on the evidence).

TITLE: Landis v. State
INDEX NO.: O.1.d.
CITE: (5th Dist.; 4-4-00), Ind. App., 726 N.E.2d 801, aff'd 749 N.E.2d 1130
SUBJECT: Other crimes/acts - D opened door
HOLDING: Tr. Ct. did not err in permitting State to present evidence that D violated previously issued no contact order in order to dispute D's contentions that his contact with victim was desired by victim. When D goes beyond merely denying charged crimes & affirmatively presents specific claim contrary to charge, State may then respond by offering evidence of prior crimes, wrongs or acts to extent relevant to prove some issue of genuine dispute other than character of D in order to show conformity therewith. Sundling, App., 679 N.E.2d 988. Here, on direct, D went beyond merely denying charges & presented claim that any contact between him & victim was not unwanted, but was in fact desired by her, stemming from long-standing consensual relationship. Thus, on cross, State was justified in rebutting D's affirmative position by discussing D's prior convictions for unwanted contact with victim & his violation of no contact order. Held, petition for post-conviction relief properly denied.

RELATED CASES: Sasser, 945 N.E. 2d 201(Ind. Ct. App 2011) (D's clarification on cross that he did, in fact, register each time he was required to register in State's Exhibit 6 did not open the door to evidence regarding other instances in which D did not register as required; fundamental error).

TITLE: Shaffer v. State
INDEX NO.: O.1.d.
CITE: (1/20/83), Ind., 443 N.E.2d 838
SUBJECT: Offer of proof - prior sexual conduct
HOLDING: D's request that 2 surprise witnesses be allowed to testify that prosecutrix had been seen hooking at infamous intersection in Gary was properly refused because substance of that testimony falls within proscription of rape shield statute. Here, D contends on appeal that rape shield statute (Ind. Code 35-1-32.5-1) violates equal protection, an argument found meritless in Cherry, 414 N.E.2d 301. D also contends tendered testimony was erroneously excluded in that it was admissible under Section 2 of statute (inflammatory/prejudicial nature does not outweigh probative value). Ct. finds D made no formal offer to prove (thus no basis for reversal; excluded testimony must appear in record). "An offer to prove must be certain & must definitely state the facts sought to be proved, & must show the materiality, competency & relevancy of the evidence offered." Tope, 362 N.E.2d 137. Even assuming D's representation of witness's testimony constituted adequate offer to prove, Ct. finds testimony is prohibited by rape shield statute. Held, no error.

TITLE: State v. Wilson
INDEX NO.: O.1.d.
CITE: (11-02-05), Ind., 836 N.E.2d 407
SUBJECT: Sufficient offer of proof
HOLDING: The purpose of an offer of proof is to convey the point of the witness's testimony & provide the trial judge the opportunity to reconsider the evidentiary ruling. Baker v. State, 750 N.E.2d 781 (Ind. 1995). Equally important, it preserves the issue for review by the appellate Ct. To accomplish these two purposes, an offer of proof must be sufficiently specific to allow Tr. Ct. to determine whether evidence is admissible & to allow an appellate Ct. to review correctness of Tr. Ct.'s ruling & whether any error was prejudicial. Language in Hilton v. State, 648 N.E.2d 361 (Ind. 1995), that would require time & place & other details overstates the requirement for an adequate offer of proof, & is disapproved. Offer of proof should show the facts sought to be proved, the relevance of that evidence, & the answer to any objection to exclusion of the evidence. Details that are immaterial to the ultimate facts are not necessary. Ct. also disapproved the language from Hilton suggesting that an offer of proof must vouch for anticipated testimony. The attorney making an offer of proof must have a good faith & reasonable belief that witness will testify as the attorney states, but attorney is not a warrantor of the witness's reliability & should not vouch for the witness. Here, State's offer of proof was sufficient as to D's relevancy & marital privilege objections. Held, transfer granted, Ct. App.' opinion at 816 N.E.2d 61 vacated, judgment precluding D's wife from testifying reversed.

RELATED CASES: Britt, 937 N.E.2d 914 (Ind. Ct. App. 2010) (court of appeals reviewed claim despite D's failure to make offer to prove; discussions before Tr. Ct. made it clear that evidence at issue was a witness's prior conviction); Littler, 871 N.E.2d 276 (Tr.Cts. should very rarely completely deny a party's request to make an offer of proof, & then only upon clear abuse by requesting party).

O. EVIDENCE

O.1. Admitting/Excluding Evidence

O.1.e. Stipulations

TITLE: Butler v. State
INDEX NO.: O.1.e.
CITE: (3/16/95), Ind., 647 N.E.2d 631
SUBJECT: Offers to stipulate - State's refusal to accept
HOLDING: In voluntary manslaughter and murder prosecution, Tr. Ct. did not err in admitting photographs of bodies of victims despite D's offer to stipulate that he killed victims using knife. At trial, there is no rule limiting facts in issue when one party unilaterally concedes or offers to stipulate that fact be taken as proved. Stipulations by both parties may limit facts in issue, & consequently, admissibility of evidence relevant to establish those stipulated facts, when approved by Tr. Ct. Absent such stipulations, evidence of facts in issue by reason of charge & plea of not guilty remains admissible. Perigo, 541 N.E.2d 936. Held, D's unilateral concessions in opening statement & in his objections to exhibits did not support claim of error regarding admissibility of photographs.

RELATED CASES: Davis, App., 892 N.E.2d 156 (no error in admitting evidence of murders in which D was alleged to have assisted, notwithstanding fact she stipulated that murders occurred); Hollowell, 753 N.E.2d 612 (use of prior conviction's case chronology in habitual offender stage proper despite stipulation); Martinez, 549 N.E.2d 1026 (fact that D was willing to stipulate as to victim's cause of death did not foreclose State from foregoing stipulation & presenting evidence of photographs of victim); cf. Sams, App., 688 N.E.2d 1323 (because of risk of unfair prejudice, Tr. Ct. abused its discretion by admitting into evidence D's entire motor vehicle driving record, instead of allowing D to stipulate that his license was suspended for life in OWI and driving after license suspended for life prosecution, but error was harmless).

TITLE: Clark v. State
INDEX NO.: O.1.e.
CITE: (10/30/90), Ind., 562 N.E.2d 11
SUBJECT: Stipulations - binding nature of
HOLDING: Evidence was sufficient to support D's convictions for arson and felony murder. On appeal, D attempted to attack sufficiency of evidence of intent. In rejecting D's argument, Court noted that D stipulated at trial that fire was intentionally set. Once stipulation is entered into between parties it is generally accepted rule that facts so stipulated are conclusive upon both parties and tribunal. It has been held, however, that stipulation of facts will not be construed to admit facts which were obviously intended to be controverted." Lewis, 482 N.E.2d 487. Because there is no indication that D attempted to contest issue of intent at trial, stipulation that fire was intentionally set was more than sufficient to sustain both convictions. Held, convictions affirmed.

TITLE: Corbin v. State
INDEX NO.: O.1.e.
CITE: (5th Dist.; 7-12-99), Ind. App., 713 N.E.2d 906
SUBJECT: Stipulations - transforming trial into nolo contendere plea
HOLDING: Agreement between D & State whereby D would be tried before bench upon stipulated evidence did not transform proceeding into impermissible nolo contendere plea hearing. Stipulation that particular witness would, if called, testify in particular way neither constitutes admission that such testimony is true nor forecloses impeachment by D. Stipulated evidence is entitled only to be accorded same weight by trier of fact as if given by witnesses themselves in open Ct. Stipulation to certain facts in no way transforms trial into guilty plea hearing. Gann, App., 570 N.E.2d 976. Here, evidence was overwhelming against D that he committed burglary & rape. During voir dire, D & State reached agreement that D would be tried before bench upon stipulated evidence in exchange for State's dismissal of rape charge if D was found guilty of burglary. During bench trial, defense counsel stipulated that, had witnesses taken stand, they would have testified consistently with evidence presented & summarized by prosecutor, & defense counsel objected to admission of some of State's evidence. Tr. Ct. sustained some of D's objections. Because D benefitted from agreement in that rape charge was dismissed & heinousness of crime was not put in front of jury, bench trial with stipulated evidence was not transformed into guilty plea hearing. Held, conviction affirmed; Staton, J., concurring on basis that he disapproves of this procedure because it presents two dangers: (1) it allows D to get around Ind.'s law that D cannot plead guilty & maintain innocence at same time; & (2) stipulating to all evidence & agreeing not to make defense will result in consistently unfair outcomes.

RELATED CASES: Stringer, App., 899 N.E.2d 748 (where there was no further deliberation by Tr. Ct. or argument by the parties in a bench trial after D's attorney stipulated to D's prior conviction, the stipulation was the functional equivalent to a guilty plea to the auto theft enhancement; any challenge to the voluntariness of the plea must be addressed on PCR); Hopkins, 889 N.E.2d 314 (where Tr. Ct. referred to D's admission to being a habitual offender as a stipulation during a bench trial, the admission was not a guilty plea; thus, the Court did not consider whether Boykin applied to habitual allegations); Garrett, 737 N.E.2d 388 (fact that D stipulated to prior convictions in HO adjudication did not transform trial into guilty plea because D did not stipulate that convictions were unrelated and jury still deliberated); Vanzandt, App., 730 N.E.2d 721 (where D admitted to prior convictions & being HO, & Ct. dismissed jury without verdict, D essentially pled guilty to HO enhancement & can only challenge enhancement through PCR).

TITLE: Dokes v. State
INDEX NO.: O.1.e.
CITE: (07-30-12), 971 N.E.2d 178 (Ind. Ct. App 2012)
SUBJECT: Parties may not appeal procedural stipulation unless object at trial
HOLDING: At D's combined hearing on a new charge and an alleged violation of probation based on that charge, D waived his claim that State failed to present sufficient evidence that he was, in fact, on probation because he stipulated to a joint trial of criminal charge and probation violation and did not object to the stipulation at trial.

Here, the parties agreed to jointly try the charge that D committed possession of a handgun by a serious violent felony and the State's claim that D violated his probation by committing the handgun offense. Parties may not appeal a procedural stipulation that was not objected to at trial. State ex rel. Randall v. Long, 237 Ind. 389, 392, 146 N.E.2d 243, 245 (1957); Viccaro v. City of Ft. Wayne, 449 N.E.2d 1161, 1163 (Ind. Ct. App. 1983). At no time during the combined hearing did D or his attorney object to the stipulation or allege that he was not on probation. Further, two witnesses testified that D was on probation. Held, judgment affirmed.

TITLE: Morgan v. State
INDEX NO.: O.1.e.
CITE: (10-13-10), 934 N.E.2d 1246 (Ind. Ct. App 2010)
SUBJECT: Stipulation - may be placed before jury via preliminary instructions
HOLDING: The State presented sufficient evidence to support D's conviction for Serious Violent Felon in Possession of a Handgun (SVF), even though the stipulation of his status as a SVF was never entered into evidence. In order to prove the D was a SVF, the State had to prove that D had a conviction listed in Ind. Code 35-47-4-5 at the time he knowingly possessed a firearm. Here, a preliminary instruction stated: "The parties have agreed and stipulated that the D has a conviction listed in Ind. Code 35-47-4-5. No further proof will be introduced in this case. You are instructed that you are to consider such fact as true and proven beyond a reasonable doubt." Neither party objected to the instruction, and no stipulation was read or entered into evidence. However, Court held that a stipulation may be presented to the jury in the form of a preliminary instruction. Because the jury was instructed that the parties stipulated that D had the prerequisite conviction, there was sufficient evidence that D qualified as a SVF. Held, judgment affirmed.

TITLE: Young v. State
INDEX NO.: O.1.e.
CITE: (3d Dist. 7/18/83), Ind. App., 451 N.E.2d 91
SUBJECT: Stipulations
HOLDING: Tr. Ct. did not err in admitting testimony of decedent's sister identifying picture of decedent as her brother simply because parties had stipulated that decedent was "a George Coleman." Here, D contends testimony was prejudicial because it induced jury to be sympathetic toward witness & biased toward him. Ct. holds Tr. judge has discretion regarding admission/exclusion of evidence. Held, no abuse of discretion. DISSENT by Staton argues stipulation is conclusive upon parties & Ct. Reynolds Metals Co. v. IN Dept. of State Revenue, App., 433 N.E.2d 1. Because identity of victim was not at issue, testimony had no probative value. Staton would reverse & order new trial.

RELATED CASES: Harris, 481 N.E.2d 382 (stipulation to admit polygraph was valid; card at O.12.j).

O. EVIDENCE

O.2. Judicial notice (Ind. Code 35-3-2)

TITLE: Borel v. State
INDEX NO.: O.2.
CITE: (9/30/2015), 44 N.E.3d 791 (Ind. Ct. App. 2015)
SUBJECT: Error denying petition to expunge
HOLDING: Tr. Ct. erred in denying D's petition to expunge, and the related motion to correct error, because the record does not support the Tr. Ct.'s finding that D failed to pay fines, fees, and court costs.

In 1976, D was convicted of Entering a Dwelling with Intent to Commit a Felony. In 2014, he asked the Tr. Ct. to expunge records related to the conviction. The State objected, claiming D failed to show he had paid all fines, fees, and court costs. See Ind. Code § 35-38-9-8(b)(11)(2014) (later amended to remove proof of payment requirement).

The typed entries in the docket do not indicate that any court costs were imposed. There is a handwritten note next to one of the entries consisting of the following: "[illegible word, perhaps 'costs] $37.00." The note was not signed or initialed, and there is no indication when the note was added to the docket over the last thirty years. Thus, there is insufficient evidence that the Tr. Ct. imposed court costs or that court costs remain unpaid. Held, judgment reversed.

TITLE: Brown v. State
INDEX NO.: O.2.
CITE: (04/14/20), 146 N.E.3d 1031 (Ind. Ct. App 2020)
SUBJECT: Trial court may take judicial notice of pleadings signed by defendant
HOLDING: A trial court may take judicial notice that the defendant signed pleadings, and a rebuttable presumption arises which requires the defendant to come forward with any evidence to dispute the presumption. Here, during Defendant's trial, the State offered into evidence a letter purportedly written by Defendant. Defendant objected on the basis that the witness was not familiar with Defendant's handwriting and therefore could not authenticate the letter. The trial court then took judicial notice of two additional letters as having been written by Defendant, one from 2018 and one from 2019, for the jury to use as a handwriting comparison, admitted the first letter and published all of the exhibits to the jury. Following Owens v. State, 396 N.E.2d 376 (1979), Court held that it was reasonable for the trial court to take judicial notice that the handwriting in the two exhibits was Defendant's. The contents of the letter, fact that a hearing was held to address the letter's concerns, that Defendant appeared at the hearing, and that the concerns expressed in the letter were resolved all support the trial court's decision to take judicial notice that the handwriting and signature in the letter from 2018 belonged to Defendant. The 2019 letter was mailed from the jail where Defendant was incarcerated, asked the clerk to send Defendant the CCS, and the handwriting looks like the handwriting in the 2018 letter. The Court concluded that under the circumstances it was reasonable for the trial court to take judicial notice that the documents filed with the court had been written by Defendant.

TITLE: Christie v. State
INDEX NO.: O.2.
CITE: (01-10-1.1), 939 N.E.2d 691 (Ind. Ct. App 2011)
SUBJECT: Courts can take judicial notice of unrelated matters in different courts
HOLDING: In probation revocation hearing, Tr. Ct. properly took judicial notice of a new conviction entered in a different Indiana court, and therefore had sufficient evidence D violated his conditions of community corrections placement. Probation revocation hearings, to which the Evidence Rules do not apply, Evid. R. 101(c)(2), allow even more flexibility in the admission of evidence, and the same more flexible standard applies in community corrections revocation hearings. Cox v. State, 706 N.E.2d 547 (Ind. 1999). However, even in a proceeding governed by the Evidence Rules, a Tr. Ct. may take judicial notice of records of another Indiana Court, and may do so at any stage of the proceeding. Indiana Rule of Evidence 201(b)(5)(effective January 1, 2010). Thus, Henry Superior Court was permitted to take judicial notice of court records showing D's new conviction in Knightstown Town Court. Held, judgment affirmed.

TITLE: Fisher v. State
INDEX NO.: O.2.
CITE: (5th Dist., 12-28-07), Ind. App., 878 N.E.2d 457
SUBJECT: Judicial notice of trial transcript taken by appellate court
HOLDING: In a pro se appeal from the denial of D's Petition for Post-conviction relief, appellate court took judicial notice of the record from D's original appeal. Generally, a post-conviction court may not take judicial notice of the transcript from the original proceeding. However, upon a review of Indiana cases, it is clear that appellate courts can take judicial notice of records on file with that court in relation to a related proceeding. Here, pro se D filed several motions attempting to obtain a copy of the appellate record. The appellate court issued an order that it would provide a copy of the record if the post-conviction court determined it needed the record. Upon D's request of the post-conviction court to request the record from the appellate court, the post-conviction court determined that it did not need a copy of the complete record. Thus, the transcript was never placed into evidence in the post-conviction proceedings. Although it is inequitable to take judicial notice of a record to which the State did not have access at the post-conviction hearing or in preparing its appellate brief, it would be even more inequitable to deny D the ability to effectively appeal the post-conviction court's decision based on that court's decision that it did not need the record. Thus, the appellate court took judicial notice of the transcript & examined it to the extent it contained factual information not subject to reasonable dispute. Upon review of the record & consideration of D's claims, the appellate court affirmed the post-conviction court's denial of D's petition for relief. Held, judgment affirmed.

TITLE: Gray v. State
INDEX NO.: O.2.
CITE: (4th Dist., 08-10-07), Ind. App., 871 N.E.2d 408
SUBJECT: Judicial notice - CCS for a different criminal case
HOLDING: In murder & attempted murder prosecution, Tr. Ct. did not err in refusing to admit into evidence the certified case chronology (CCS) for a different criminal case involving a person who testified on State's behalf. D sought, via judicial notice, the introduction of CCS to show that this person had no opportunity to speak with D on day when he claims D confessed to him that he killed victim. Ind. Rules of Evidence 201(a)(2) has been interpreted to permit judicial notice of Ct. records, which presumably would include a CCS. However, judicial notice should be limited to the fact of the record's existence, rather than to any facts found or alleged within record of another case. Brown v. Jones, 804 N.E.2d 1197 (Ind. Ct. App 2004). Here, D did not seek, via the CCS, judicial notice to establish the fact of State witness's case. Rather he sought judicial notice of certain facts found in record of that case, i.e., what time jurors began deliberating, what time they returned with a verdict, & what time D was in holding cell. Facts in CCS that D sought to prove were in dispute. D's request went beyond judicial notice merely of fact of witness's CCS, but extended impermissibly to facts found or alleged within record of witness's case. Held, judgment affirmed.

TITLE: Grimes v. State
INDEX NO.: O.2.
CITE: (4/30/98), Ind. App., 693 N.E.2d 1361
SUBJECT: Judicial notice - case law
HOLDING: D claimed Tr. Ct. erred in denying his request that ct. take judicial notice of tendered case law under I.R.E. 201, which provides that "court may take judicial notice of law. Law includes (1) the decisional, constitutional, & public statutory law. . . ." Ct. shall take judicial notice if requested by party & supplied w/ necessary information. D further claimed he was prejudiced by ct.'s refusal to take judicial notice because it denied him a corresponding mandatory jury instruction. However, Ct. App. found that because evidence in record did not support jury instruction incorporated in case law, D could not have suffered any prejudice from Tr. Ct.'s decision not to take judicial notice of case. Further, even if D had tendered instruction regarding case law, Tr. Ct. would not have been required to give it because it would not have been supported by evidence. Held, conviction affirmed.

TITLE: Haley v. State
INDEX NO.: O.2.
CITE: (3rd Dist., 10-17-00), Ind. App., 736 N.E.2d 1250
SUBJECT: Taking judicial notice of school - no denial of right to confrontation
HOLDING: In prosecution for dealing controlled substance within 1,000 feet of school property, Tr. Ct. did not deny D his right to confrontation under Indiana Constitution when it took judicial notice that Howe Military Institution in LaGrange County is school. At close of evidence, Tr. Ct. instructed jury that it had taken judicial notice that Howe is school within meaning of statute, but jury was not required to accept fact as conclusive. Indiana Evidence Rule 201(a) provides: "[a] judicially-noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within territorial jurisdiction of Tr. Ct., or (2) capable of accurate & ready determination by resort to sources whose accuracy cannot reasonably be questioned." When Ct. takes judicial notice, a party is entitled, upon timely request, to opportunity to be heard as to propriety of taking judicial notice. Ind. Evidence Rule 201(e).

Certain firmly established evidence rules are not consistent with constitutional right to meet witnesses face to face. Although judicially-noticed facts are contradictory to right of confrontation, they are admissible so long as requirements of Indiana Rule of Evidence 201 are met. By satisfying requirements of this evidence rule, reliability of judicially noticed facts is safeguarded, & thus, their admission does not violate constitutional right of confrontation. Here, D did not argue that requirements of Rule 201 were not met. Fact that Howe is private school is generally known within LaGrange County. Before taking judicial notice of this fact, Tr. Ct. held hearing to provide D with opportunity to be heard on matter. D could have offered evidence at hearing or at trial to contest that Howe is school within meaning of law. Since evidence was admissible under I.R.E. 201, it was sufficiently reliable & therefore, D's constitutional right of confrontation was not violated. Held, judgment affirmed.

TITLE: Horton v. State

INDEX NO.: O.2.

CITE: (4/21/2016), 51 N.E.3d 1154 (Ind. 2016)

SUBJECT: Judicially-noticed case file not entered into record sufficient to support domestic battery enhancement

HOLDING: State presented sufficient evidence that D had previously been convicted of domestic battery to support elevated D-felony offense, despite fact that prior conviction's sentencing order was unsigned and a judicially-noticed case file was never entered into the record. Ind. Evidence Rule 201(b)(5) now permits court to take judicial notice of "records of the court of this state." Although the best practice is to enter the particular documents into the record, Tr. Ct.'s omission of those documents here hindered appellate review but did not constitute error. The judicially-noticed case file showing D's prior conviction was part of the record in this case so Court could procure copies of the file from trial-court clerk--much as the parties could have done under Appellate Rule 32 to resolve disagreements as to the accuracy (including completeness) of the Clerk's Record. Held, transfer granted, Court of Appeals' memorandum opinion vacated, D-felony domestic battery conviction reversed on other grounds and remanded for new trial.

TITLE: Hornback v. State
INDEX NO.: O.2.
CITE: (2nd Dist., 3-16-98), Ind. App., 693 N.E.2d 81
SUBJECT: Judicial notice - may be taken by Ct. sua sponte
HOLDING: Tr. Ct. did not err by taking judicial notice sua sponte of rules & regulations promulgated by Ind. Department of Toxicology. Ct. may take judicial notice of laws, whether requested or not, & shall take judicial notice if requested by party & supplied with necessary information. Ind.R.Evid. 201. Although D contended that Ind.R.Evid. 201 requires request by party when judicial notice is mandatory, Ct. held that discretion granted to Tr. Ct. under first part of rule is not eliminated by second part. In addition, Cts. are required to take judicial notice of regulations concerning breath testing. Ind. Code 4-22-9-3. Held, judgment affirmed in part & reversed in part on other grounds.

TITLE: Matter of D.P.
INDEX NO.: O.2.
CITE: (3/30/2017), 72 N.E.3d 976 (Ind. Ct. App 2017)
SUBJECT: Judicial notice did not provide sufficient evidence that child is a CHINS
HOLDING: DCS failed to present sufficient evidence that D.P. is a CHINS, as it relied solely on Mother's admission that D.P. was CHINS and judicial notice about Father's drug use and pending criminal charges.

DCS alleged that Father has a history of substance abuse. At the fact-finding hearing, which Father did not attend, Mother agreed that D.P. was a CHINS because Father is facing domestic violence charges. A family case manager testified that Father was incarceratedand that she knew this by consulting "the Marion County website." Father's drug use and the fact that he was incarcerated was established solely through Mother's admission and judicial notice of previous filings in the case and that domestic charges had been filed.

While a court may take judicial notice of court documents and the filing of charges, "judicial notice should be limited to the fact of the record's existence, rather than to any facts found or alleged within the record of another case." Brown v. Jones, 804 N.E.2d 1197, 1202 (Ind. Ct. App 2004). Therefore, taking notice of substantive facts contained in preliminary filings in the case exceeded the proper bounds of judicial notice principles. As to the pending charges against Father, DCS presented no documentation regarding the charges, though that is not fatal to taking judicial notice. See Horton v. State, 51 N.E.3d 1154, 1161-62 (Ind. 2016). However, while the Odyssey case management system confirms that Father has been charged with domestic violence, it is inappropriate to delve into the facts supporting the charge. Doing so would cross the line into adopting facts that cannot be readily determined as accurate. See Ind. Evidence Rule 201(a)(1)(B). Therefore, DCS failed to present sufficient evidence that the coercive intervention of the court was necessary. Held, judgment reversed. Kirsch, J., dissenting, contending that D.P.'s family is a family in crisis and that the Tr. Ct. acted appropriately to protect the child.

TITLE: Mayo v. State
INDEX NO.: O.2.
CITE: (6/12/97), Ind., 681 N.E.2d 689
SUBJECT: Judicial Notice of law of another jurisdiction
HOLDING: D challenged his habitual offender enhancement which was based upon 2 Alabama convictions, claiming that there was no proof that escape conviction was felony. Judicial notice may be taken of law of another state "at any stage of proceedings." I.R.E. 201(b), (f). Ind. S.Ct. took judicial notice that Alabama statute in force provided that escape from penal institution was classified as class C felony, a sentence which required D to serve "not more than 10 yrs. or less than 1 yr. & 1 day." Held, conviction constitutes "felony" under Indiana's habitual offender statute.

RELATED CASES: Stewart, 688 N.E.2d 1254 (under I.R.E. 201(b), Tr. Ct. took judicial notice of Kentucky law providing conviction for possession of handgun by convicted felon is classified as D felony & S.ct. judicially noticed that sentence for D felony was not less than 1 yr. nor more than 5 yrs. under Kentucky law).

TITLE: Mullins v. State
INDEX NO.: O.2.
CITE: (1/4/95), Ind., 646 N.E.2d 40
SUBJECT: Judicial Notice - administrative law; breath test
HOLDING: In prosecution for operating vehicle with BAC of at least .10% , Tr. Ct. was entitled to take judicial notice that printout from breath test machine expressed test result as percentage of alcohol by weight in blood which, with printout reading of .20, constituted sufficient evidence to support finding that amount of alcohol in D's blood was greater than .10% by weight. Courts are permitted to take judicial notice of Indiana law. In fact, courts are required to take judicial notice of regulations concerning breath testing. Ind. Code 4-22-9-3. Judicial notice relieves party having burden of establishing particular fact from submitting formal proof of that fact. Because breath test equipment must measure blood alcohol content as percentage of alcohol by weight in blood in order to be certified by Dept. of Toxicology, Tr. Ct. was entitled to take judicial notice that BAC Datamaster printout expressed test result as percentage of alcohol by weight in blood. Held, conviction affirmed.

RELATED CASES: Baran, 639 N.E.2d 642 (See card at O.12.b); Sturgis, App., 654 N.E.2d 1150 (failure to instruct jury about effect of Tr. Ct.'s taking judicial notice of administrative regulations regarding breath testing was harmless error); Berry, App, 720 N.E.2d 1206; Godar, App., 643 N.E.2d 12 (conviction for operating vehicle with BAC > .10% reversed where Tr. Ct. failed to take judicial notice of effect of breath test regulations & instruct jury accordingly); Thurman, App., 661 N.E.2d 900.

TITLE: Patterson v. State
INDEX NO.: O.2.
CITE: (12/21/95), Ind. App., 659 N.E.2d 220
SUBJECT: Judicial notice - facts; probation revocation proceedings
HOLDING: In probation revocation case, Tr. Ct. did not err by failing to take judicial notice of file in probationer's underlying criminal case to show probationer's mental illness. Generally, judicial notice may not be taken of different case, even if before same court & on related subject between related parties. However, this rule has not been strictly applied in probation revocation matters. See Henderson, 544 N.E.2d 507; Szymenski, 500 N.E.2d 213. Nevertheless, Ct. concluded that Tr. Ct. was not required to take judicial notice of underlying criminal case to establish mental illness of probationer through admission of letter by probationer's treating physician (which was inadmissible hearsay) & notice of intent to interpose insanity defense. Letter in file regarding probationer's mental condition would not constitute fact "not subject to reasonable dispute . . .[as] capable of accurate & ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ind. R. Evid. 201. Held, revocation of probation affirmed.

RELATED CASES: Whatley, App., 847 N.E.2d 1007 (in probation revocation hearing, Tr. Ct. did not err when it took judicial notice of a probable cause affidavit from a criminal proceeding filed against D in same Ct. for dealing in & possession of cocaine; see full review at F.1.e.2.c).

TITLE: Ritz v. Indiana & Ohio R.R., Inc.
INDEX NO.: O.2.
CITE: (4/14/94), Ind. App., 632 N.E.2d 769
SUBJECT: Judicial notice of facts
HOLDING: In quiet title action, Ind. Ct. App refused to take judicial notice of specific geographical location. Under this pre-I.R.E. 201 case, Ct. stated that law of judicial notice did not permit court to take judicial notice of exact location of canal or that R.R.'s remote grantor located the railroad lines on canal property w/o additional interests or relocating its line. While Indiana courts will take judicial notice of location of geographic features in general sense, their exact limits & boundaries have routinely been a matter of averment and proof. See Grusenmeyer, 76 Ind. 549, 552. Matters of fact may be subject to reasonable doubt as to their existence, and inasmuch as judicial notice of fact takes place of proof thereof and is of equal force as proof, ct. should exercise extreme caution in taking judicial notice of facts subject to proof, particularly where they are material facts. Held, fact that R.R. has line running through particular county was matter which must have been averred and proved.

RELATED CASES: Larkin, 43 N.E.3d 1281 (Ind. Ct. App. 2015) (court took judicial notice of election results); Rhoades, 675 N.E.2d 698 (refusing to adopt view that a Ct. may judicially notice that if controlled substance is present in urine, it is automatically present in blood); Harden v. Whipker, Ind., 676 N.E.2d 19 (S.Ct. took judicial notice that police officer whose right to serve as both police officer & member of county council was being challenged had been defeated in his party primary election).

TITLE: Smith v. State
INDEX NO.: O.2.
CITE: (1/18/83), Ind., 443 N.E.2d 1187
SUBJECT: Judicial notice - Ct.'s own records
HOLDING: Judge may not take judicial notice of alleged prior adjudication of D's competency in companion case or of any evidence adduced in that proceeding. See Majko 207 N.E.2d 212; Freson v. Combs, App., 433 N.E.2d 55; Treesh v. DeVeny 64 N.E.2d 41; 29 Am. Jur.2d Evidence Section 58. This is true even where record produced was one made in same Ct. in prior, separate case & subject matter & parties were related to instant case. Freson. Here, judge was ordered by Ind. S. Ct. to determine competency of D. Instead of holding hearing, judge judicially noticed outcome of competency hearing in companion case. Ct. holds judicial notice of those proceedings was improper & remands case for full blown competency hearing. Held, remanded.

RELATED CASES: Sanders, App., 782 N.E.2d 1036 (Tr. Ct. properly took judicial notice of letter written to judge from D; trial judge may take judicial notice of pleadings & filings in very case that is being tried, if requirements of Ind. Evidence Rule 201(a) have been met); Hutchinson, 477 N.E.2d 850 (Crim L 429(2), 444; Ct.'s records in prior, separate case can be proper matter for evidence, *citing* Smith; here, based upon examination of entire record, sufficient foundation existed for admission of prior Ct. records); Szymenski, App., 500 N.E.2d 213 (rule that Ct. may not take judicial notice of its own records is not fully applicable in probation revocation hearings); Parrish, App., 498 N.E.2d 73 (Crim L 304(1); although Tr. judge is ordinarily required to disclose that he/she will take judicial notice of some fact, judge need not disclose that judicial fact if such disclosure would be superfluous, *citing* Weinstock v. Ott, App., 444 N.E.2d 1227; here, Ct. rejects D's contention that Tr. judge denied him opportunity to rebut assumed access to PCR remedies while in prison); Brown, App., 458 N.E.2d 245 (Tr. Ct. erred in taking judicial notice, in a proceeding to revoke D's probation (for breach of good behavior), of transcript from D's involuntary manslaughter trial).

TITLE: State v. Hicks
INDEX NO: O.2.
CITE: (7/7/88), Ind., 525 N.E.2d 316
SUBJECT: Judicial notice - Ct.'s own records
HOLDING: PCR Ct. did not err in taking judicial notice of recanted testimony of state's witness in trial of co-D. At D's trial, accomplice offered testimony incriminating D. D was convicted & conviction was affirmed on appeal. At trial of 3d co-D, accomplice testified that he did not recall robbery/murder, nor did he recall giving statements implicating co-Ds. Both D's trial & 3d co-D's trial occurred in PCR Ct. PCR Ct. took judicial notice of this recanted testimony & granted PCR petition. It is well-settled rule Tr. Ct may not take judicial notice of its own records even on related subject with related parties. Hutchinson 477 N.E.2d 850; Szymenski; 500 N.E.2d 213. It was also true that PCR Ct. cannot take judicial notice of transcript of original trial; transcript must be entered into evidence. Smith 366 N.E.2d 170; Jackson 339 N.E.2d 557. However, here, further developments in case clearly indicated that PCR petition would be granted on rehearing. In such case, Ct. is justified in taking judicial notice, rather than wasting judicial time. See 29 Am. Jur. 22 Evidence Section 59. Held, no abuse of discretion. PCR properly granted. DeBruler, J., CONCURS IN RESULT.

RELATED CASES: Withers, 15 N.E.3d 660 (Ind. Ct. App 2014) (in proceeding to terminate placement in a drug court program, Tr. Ct. was authorized to take judicial notice of the attendance reports pursuant to Indiana Evid. Rule 201(b)(5); see full review at E.6.b); West, 938 N.E.2d 305 (Ind. Ct. App 2010) (as in Hicks, P-C court was justified in taking judicial notice of transcript of D's prior trial under exceptional circumstances before the court) Sanders, App., 782 N.E.2d 1036 (Tr. Ct. properly took judicial notice of letter written to judge from D; trial judge may take judicial notice of pleadings & filings in very case that is being tried, if requirements of Ind. Evidence Rule 201(a) have been met.

O. EVIDENCE

O.3. Burden of proof/ presumptions/inferences (Ind. Code 35-41-4-1(a))

TITLE: Chilcutt v. State
INDEX NO.: O.3.
CITE: (3d Dist. 10/16/89), Ind. App., 544 N.E.2d 856
SUBJECT: Driving with .10% blood alcohol content (BAC) - statutory presumption based on subsequent test
HOLDING: Ind. Code § 9-11-4-15(b), which creates rebuttable presumption that where BAC within three hours of alleged offense is at least .10%, BAC at time of offense was at least .10%, is constitutional. D was charged with driving with .10% BAC, based on test conducted within three hours after accident in which D was involved. On appeal, D argues that Ind. Code § 9-11-4-15 relieves state of burden of proving BAC at time of offense & impermissibly shifts burden of proof to D. Fourteenth Amend. requires state to prove each element of offense beyond reasonable doubt. [*Citations omitted*.] Legislature may enact laws declaring that, on proof of one fact, another fact may be inferred or presumed, provided that no constitutional right is destroyed, presumption is rebuttable, & there is some rational connection between fact proved and ultimate fact presumed. 22A C.J.S. Criminal Law Sec. 579. There is rational connection between BAC within three hours of alleged offense and BAC at time of offense. Presumption is rebuttable, and merely shifts burden of going forward with evidence to D. State remains responsible for proving elements of offense. D argues that he bears burden of proving that alcohol was consumed after accident. Post-accident consumption of alcohol is regarded as affirmative defense. Dutcher v. Comm'r of Public Safety (Minn. App. 1987), 406 N.W.2d 333. While state must establish all elements of offense, D legitimately bears burden of going forward with affirmative defenses. Grogan 482 N.E.2d 300. Held, conviction affirmed.

RELATED CASES: Johnson, App., 879 N.E.2d 649 (three-hour presumption was constitutional despite D's argument that the presumed fact lacked a strong logical nexus with the known fact).

TITLE: Hack v. State
INDEX NO.: O.3.
CITE: (1st Dist. 7/14/82), Ind. App., 437 N.E.2d 486
SUBJECT: Presumption of innocence - jury instruction
HOLDING: Tr. Ct. did not err in refusing to charge jury that presumption of innocence operates as evidence in favor of D. Presumption of innocence accorded each D is not "evidence" to support innocence of accused. Rather, it is merely rule of law describing starting point for assessment of evidence. Underhill 423 N.E.2d 759. Held, no error.

TITLE: Hall v. State
INDEX NO.: O.3.
CITE: (2d Dist. 10/11/90), Ind. App., 560 N.E.2d 561
SUBJECT: Driving with .10% BAC - presumption based on later test
HOLDING: Instruction that jury "shall presume" that D had .10% BAC at time of operating vehicle, because he tested at least .10 within 3 hours after arrest, created mandatory presumption & impermissibly shifted burden of proof (BOD) to D. Instruction given parallels Ind. Code 9-11-4-15(b), which was challenged in Chilcutt, App., 544 N.E.2d 856. In Chilcutt, Ct. held statute to be constitutional, because presumption is subject to rebuttal and there is rational connection between fact proved (.10 within three hours of arrest) and ultimate fact presumed (.10 at time of operating). Presumptions in criminal statutes are never considered conclusive and do not affect BOD, although they may impose burden of going forward to rebut presumption. Statute does not create conclusive presumption or shift BOD to D. However, its language does appear to create mandatory, rather than permissive, presumption. Accordingly, although instruction faithfully tracks language of statute, it was subject to interpretation by jury that if D did not rebut or attempt to rebut presumption, jury was compelled to find presumed fact. U.S. S.Ct. has repudiated mandatory & mandatory rebuttable presumptions. Francis v. Franklin (1984), 471 U.S. 307, 105 S.Ct. 1965. Held, reversed & remanded.

RELATED CASES: Pattison, 54 N.E.3d 621 (Ind. 2016) (mandatory rebuttable jury instruction on OWI presumption did not improperly shift burden of proof; see full review, this section); Johnson, App., 879 N.E.2d 649 (three-hour presumption was constitutional despite D's argument that the presumed fact lacked a strong logical nexus with the known fact); Jarrell, App., 852 N.E.2d 1022 (presumption set forth in Ind. Code 9-30-6-15(b) that a person has a BAC equivalent to at least .08 grams at time of driving if person tested at least .08 grams within three hours of driving applies to trials on Class A misdemeanor operating with .15 BAC); Bordenkecher, App., 562 N.E.2d 49 (where record indicates Tr. Ct., acting as finder-of-fact, believed presumption was mandatory, reversal is warranted).

TITLE: Pattison v. State
INDEX NO.: O.3.
CITE: (6/22/2016), 54 N.E.3d 361 (Ind. 2016)
SUBJECT: Jury instruction on OWI presumption did not improperly shift burden of proof
HOLDING: At D's trial for operating a vehicle with an alcohol concentration equivalent (ACE) of 0.08 or more, Tr. Ct. did not err in giving jury a mandatory rebuttable presumption to presume D's ACE at the time of the offense based on a chemical test conducted within three of hours of being stopped by police. Tracking the language of I.C. § 9-30-6-15(b), the instruction told the jury it "shall presume" that D had an ACE of 0.08 or more at the time he operated the vehicle, yet also stated, "the presumption is rebuttable." Court rejected D's argument that the instruction improperly relieved the State of its burden to prove each element beyond a reasonable doubt. The presumption of instruction does not relieve the State of its obligation to prove D's ACE, but merely negates the need for live testimony explaining retrograde extrapolation as a method to estimate his ACE at the time of driving. Because the presumption is rebuttable, a D may present evidence in his defense. Held, transfer granted, Court of Appeals' opinion at 47 N.E.3d 621 vacated, conviction affirmed.

TITLE: Thompson v. State
INDEX NO.: O.3.
CITE: (4th Dist. 2-13-95), Ind. App., 646 N.E.2d 687
SUBJECT: Driving with .10% BAC - rebuttable presumption
HOLDING: Presumption created by evidence that D was driving with .10% BAC at time of arrest does not disappear from case upon introduction of contradictory evidence. Arresting officer testified as to results of BAC test within 3-hour time limit of Ind. Code 9-30-6-2(c). A rebuttable, permissive presumption that D was driving with .10% BAC at time of arrest arose, pursuant to Ind. Code 9-30-6-15(b). On cross-examination, officer admitted that he did not know what D's BAC was at time of arrest, conceding that it could have been under .10%. Tr. Ct. properly instructed jury that BAC presumption was rebuttable, that jury was free to accept or reject presumption, even if no rebuttal evidence was introduced. Evidence was sufficient to sustain D's conviction. Held, conviction affirmed.

RELATED CASES: Disbro, App., 791 N.E.2d 794 (Tr. Ct. did not err in giving jury presumptive instruction based on Ind. Code 9-30-6-15(b) & Ind. Code 9-30-6-2, relating D's blood alcohol content level at time his chemical test was performed to his BAC level at time of his driving; instruction properly informed jury that presumption was rebuttable); Weida, App., 693 N.E.2d 598 (intoxication at time D operated vehicle was properly presumed); Finney, App., 686 N.E.2d 133 (evidence was sufficient to support conviction for operating vehicle with at least .10% BAC. D's expert witness failed to rebut presumption that her BAC was at least .10% at time she operated her vehicle. BAC test was administered within 3 hours of time D was operating vehicle).

TITLE: Walker v. State
INDEX NO.: O.3.
CITE: (3d Dist. 8/29/84), Ind. App., 467 N.E.2d 1248
SUBJECT: Presumption - check deception
HOLDING: Person who signs check in representative capacity can be held liable under Ind. Code 35-43-5-5. Cooper, App., 391 N.E.2d 841. Statutory presumption in Ind. Code 35-43-5-5 that one who writes subsequently dishonored check knew it would be dishonored does not shift burden of proof to D. Presumptions are valid in criminal cases if fact presumed is more likely than not to flow from fact on which presumption is based. US v. Kelly (CA7 1974), 500 F.2d 72. Ct. finds statute properly shifts burden of production to D to show no requisite knowledge. Kelly; Cooper. Held, conviction affirmed.

O. EVIDENCE

O.4. Relevancy

O.4.a. General rules

TITLE: Allen v. State
INDEX NO.: O.4.a.
CITE: (4th Dist., 8-9-04), Ind. App., 813 N.E.2d 349
SUBJECT: Erroneous exclusion of relevant evidence - right to present defense
HOLDING: In murder prosecution, Tr. Ct.'s exclusion of a defense witness's testimony indicating that someone other than D had committed the offenses was reversible error. D has a right to present evidence tending to show that someone other than accused committed the charged crime & exclusion of such evidence cannot be deemed harmless error. Joyner v. State, 678 N.E.2d 386 (Ind. 1997). Here, Tr. Ct. erroneously excluded a defense witness's statement he had given outside presence of jury indicating that Crenshaw & some other individuals were actual perpetrators of murders. Witness refused to testify for defense at trial & Tr. Ct. halted his testimony before D's direct examination had concluded, but his out-of-Ct. statements were admissible under Indiana Evidence Rule 804(b)(2), because he had been under oath & was subject to cross-examination by prosecutors who were trying the case. Record supported conclusion that this witness's testimony was exculpatory, unique, & critical to defense as there was no other source for D to rely upon to present this part of his defense that another individual had committed crimes. Ct. also found error in Tr. Ct.'s exclusion of certain reconstructive evidence & tests that had been offered by defense expert who challenged an eyewitness's identification of D while witness drove through an intersection on morning of murders. These reconstructive tests, & expert's testimony regarding results of those tests, was type of evidence that prevented D from presenting a meaningful opportunity to present a complete defense. Kubsch v. State, 784 N.E.2d 905 (Ind. 2003). Held, convictions reversed & remanded for new trial.

TITLE: Anderson v. State
INDEX NO.: O.4.a.
CITE: (6-19-97), Ind., 681 N.E.2d 703
SUBJECT: Evidence of marijuana use - relevancy
HOLDING: Tr. Ct. did not err in admitting evidence that D smoked marijuana on night of victim's death before she went to bed. In statement to police, D claimed that he struck victim only once & that he did not believe it was hard enough to hurt her. His use of marijuana was relevant under Indiana Evidence Rule 401 to assist jury in evaluating & understanding D's claim in contrast to evidence of blunt force injuries resulting in victim's death. Admission of marijuana use on night victim died did not violate Indiana Evidence Rule 404(b). It was within Tr. Ct.'s discretion to find that danger of unfair prejudice did not outweigh probative value of this evidence. However, evidence that D hid drug paraphernalia after calling 911 was not admissible because it was not relevant & only went to show D's bad character. Admission of this evidence did not require reversal of conviction, because it did not affect substantial rights of D. Fleener, 656 N.E.2d 1140. Held, conviction affirmed.

TITLE: Badelle v. State
INDEX NO.: O.4.a.
CITE: (6/13/83), Ind., 449 N.E.2d 1055
SUBJECT: Relevancy - prior possession of weapon
HOLDING: Tr. Ct. did not err in allowing witness to testify D possessed handgun (described as similar to one D was seen carrying at murder scene) & had discharged it at witness' place of business. Here, 2 witnesses at scene observed D carrying long-barreled, silver-colored pistol. Ct. holds it is always proper to show instruments used in crime were owned or possessed by D. Corroborative evidence of how & where D obtained instruments is proper. Byrd, 204 N.E.2d 651. See also Maldonado, 355 N.E.2d 843. Evidence admissible for one purpose is not rendered inadmissible simply because it coincidentally discloses/suggests other criminal activity. Armstrong, 412 N.E.2d 1207; Samuels, 372 N.E.2d 1186. Held, no error.

RELATED CASES: Boyd, App., 650 N.E.2d 745 (although possession of knife had no relevance or connection to crime charged, evidence was admissible to contradict D's statement that he had never owned knife).

TITLE: Bland v. State
INDEX NO.: O.4.a.
CITE: (10/9/84), Ind., 468 N.E.2d 1032
SUBJECT: Relevancy - pointing to another's guilt
HOLDING: Tr. Ct. did not err in excluding testimony proffered by Anderson firefighter that D's son, who lived several blocks from scene of fire, was a confessed arsonist. D may establish his innocence by showing that some other person(s) committed crime charged (Stout, (1910), 174 Ind. 395); but mere possibility that some third person did act is not enough. Fortson, 379 N.E.2d 147. Evidence tending to incriminate another must be competent/confined to substantive facts creating more than mere suspicion that other person committed crime. Fortson. Here, proffered testimony was hearsay evidence of mere suspicion of son's guilt. Held, no error.

RELATED CASES: Joyner, 678 N.E.2d 386 (reversible error to prevent D from presenting evidence supporting his theory that another person committed murder; see card, this section); Griffin, App., 692 N.E.2d 468, aff'd, 717 N.E.2d 73 (testimony that witness heard another claim he wanted to kill someone was irrelevant in D's robbery trial); Campbell, 622 N.E.2d 495 (in trial for A felony burglary, it was error for Tr. Ct. to exclude evidence of subsequent burglary at same address, committed while D was in jail. D argued evidence tended to show someone else committed instant offense. Ct. found although evidence had little probative value, it was minimally prejudicial to State, & should have been admitted); Kucki, App., 483 N.E.2d 788 (Tr. Ct. erred in excluding newspaper article with picture of person resembling D; it was relevant to show mistaken identification; card at R.6); Hinds, App., 469 N.E.2d 31 (held, D's evidence of similar modus operandi insufficient to connect third party with crime charged, *citing* Brown, 416 N.E.2d 828).

TITLE: Brown v. State
INDEX NO.: O.4.a.
CITE: (4th Dist., 5-7-01), Ind. App., 747 N.E.2d 66
SUBJECT: Erroneous admission of irrelevant evidence
HOLDING: In prosecution for carrying handgun without license, Tr. Ct. committed reversible error in admitting evidence & testimony relating to shotgun, ski masks, & duct tape found in vehicle at time of arrest. Shotgun, duct tape, & ski masks had no relevancy to issue of D's guilt or innocence on charge of possessing unlicensed handgun, nor did they prove or disprove any material fact in this case. Even assuming evidence were relevant, Ct. determined that evidence was prejudicial because probative value was outweighed by danger of unfair prejudice, by causing confusion of issues, & misleading jury. Indiana Evid.R. 403. Held, conviction reversed & remanded for new trial.

TITLE: Clifford v. State
INDEX NO.: O.4.a.
CITE: (2/22/85), Ind., 494 N.E.2d 963
SUBJECT: Relevancy - evidence admitted to bolster witness credibility
HOLDING: Tr. Ct. did not err in admitting evidence seized from D's home (sexual paraphernalia). Here, D was charged with criminal deviate conduct against 12-year-old daughter, who testified D showed her pornographic films & magazines during assaults & inserted rubber sexual devices in her vagina. Tr. Ct. held evidence was admissible to corroborate victim's testimony. Tr. Ct. admonished jurors (at D's request) that evidence was admitted for sole purpose of assisting them in determining credibility of witnesses. Held, no error. Hunter CONCURS IN RESULT without opinion.

TITLE: Commonwealth v. Hawk
INDEX NO.: O.4.a.
CITE: 709 A.2d 373 (Pa. 1998)
SUBJECT: Relevance -- Negative Results of Rape Kit
HOLDING: Forensic scientist's testimony concerning negative results of rape kit administered to complainant in rape prosecution should have been admitted. Although such evidence is inconclusive, it is relevant to material issue of whether sexual intercourse occurred. D here presented alibi defense and claimed that he had not had sexual intercourse with complainant. Tr. Ct. had excluded expert's testimony regarding rape kit, reasoning that, at best, testimony would increase only possibility, not probability, that sexual intercourse did not occur. According to appellate court, relevance requires that evidence support a reasonable inference regarding existence of material fact. Experts testimony that there was possibility sexual intercourse had not occurred supported reasonable inference that it had not. Concurring justice reasons that negative results at least supported reasonable inference that penetration had not occurred.

TITLE: Connell v. State
INDEX NO.: O.4.a.
CITE: (11/16/84), Ind., 470 N.E.2d 701
SUBJECT: Relevancy - harassment of witness
HOLDING: Tr. Ct. did not err in admitting testimony that D had shot at Butler's house & fled from police who arrived on scene. Here, D contends evidence is not relevant to crime of burglary & theft of property from Wilson home. Butler called police & asked them to remove items from her home which she believed were stolen. D, who stayed with Butler periodically, had stored these items there. Three days after police removed property, Butler called police because someone was shooting at her home. Ct. finds D's act of shooting at home gave rise to inference he was threatening/harassing a potential witness & thus is relevant on issue of guilt. See Gray 437 N.E.2d 983. Held, no error.

TITLE: Gambill v. State
INDEX NO.: O.4.a.
CITE: (6/26/85), Ind., 479 N.E.2d 523
SUBJECT: Examples of irrelevant evidence
HOLDING: Letter in which D threatened witness with legal action if witness did not return chair to D was not relevant to any issue in case. However, it is only when error has caused prejudice that case will be reversed. Watkins, 460 N.E.2d 514. Here, Ct. finds in light of evidence, D was not prejudiced by admission of letter. Held, conviction affirmed.

RELATED CASES: Carter, 932 N.E.2d 1284 (Ind. Ct. App. 2010**)** (Wal-Mart's SOP for detaining shoplifters was irrelevant in a theft case; where D followed Wal-Mart policy does not change the illegality of D's actions); Redmon, App., 734 N.E.2d 1088 (no error in excluding evidence that burglary victim was D's custodial parent; D *cited* no authority for proposition that dependent child cannot be found guilty of burglarizing custodial parent's home, regardless of whether child actually lives with that parent); Cline, 726 N.E.2d 1249 (case worker's opinion that mothers whose babies die of crib death do not repeatedly state that they did not hurt their babies was irrelevant because D never claimed baby died from crib death); Maiden 477 N.E.2d 275 (Tr. Ct. erred in allowing evidence D had choked girlfriend into unconsciousness during D's homicide trial; evidence was irrelevant but harmless, *citing* Loy, 436 N.E.2d 1125 & Miller 436 N.E.2d 1113); Gitary, App., 503 N.E.2d 1241 (how police became involved in case not relevant to jury's determination of D's guilt; held, conviction affirmed); Burns, App., 500 N.E.2d 1243 (Tr. Ct. erred by admitting witness' testimony that Gibson had been convicted of promoting prostitution; Gibson's criminal activity bore no direct relation to D's procurement of woman to have sex for money with friend; held, harmless error; DISSENT argues evidence was prejudicial); Coburn, App., 461 N.E.2d 1154 (not error to exclude evidence of D's offer to repay loan; evidence had no logical tendency to prove/disprove whether D intended to obtain loan from victim by creating false impression as to his needs); Gaston, App., 451 N.E.2d 360 (past physical intimacy between D & witness is of no logical relevance in proving D gave/sold cocaine to witness; testimony highly prejudicial & conviction reversed on other grounds); Romack, App., 446 N.E.2d 1346 (Tr. Ct. erred in admitting rifle seized during police search of jeep following D's arrest for sale of marijuana; possession of weapon not element of offense & no evidence existed it was used in commission of crime; Ct. finds D fails to show prejudice & affirms conviction); Drossos, App., 442 N.E.2d 1 (Ind. case law justifies exclusion of evidence that victim of reckless homicide/DWI resulting in death had traces of drugs & alcohol in blood stream, where testimony (during offer of proof) indicated level of drugs/alcohol would have insignificant effect on victim's driving performance; DISSENT argues evidence was relevant.

TITLE: Haggenjos v. State
INDEX NO.: O.4.a.
CITE: (11/4/82), Ind., 441 N.E.2d 430
SUBJECT: Relevancy - nature / extent of injuries
HOLDING: Victim's testimony concerning length of stay in hospital (Arnett 244 N.E.2d 912) & surgery communicating nature & extent of wounds inflicted upon her was relevant to show D's intent to kill her. Gayer, 210 N.E.2d 852; Washington, App., 379 N.E.2d 1032; Smith, App., 330 N.E.2d 384. Here, victim testified she left hospital on the 8th day after having exploratory surgery & 2 operations & described purpose of surgeries. Ct. finds testimony relevant to prove intent to kill. Held, attempted murder conviction affirmed. CONCURRING IN RESULT, Hunter recognizes evidentiary rule that extent of victim's injuries is admissible to prove intent to kill, but argues curative measures & hospital confinement are outside evidentiary rule because of great potential of prejudice to D. Hunter concludes that error is rendered harmless by direct & circumstantial evidence of D's guilt.

RELATED CASES: McMurry, 467 N.E.2d 1202 (victim's testimony re current condition & 2 surgeries (removal of bullet from head & replacement of bone removed in first surgery) properly admitted; character & severity of wounds relevant to issue of D's intent to commit murder).

TITLE: Hare v. State
INDEX NO: O.4.a.
CITE: (8/22/84), Ind., 467 N.E.2d 7
SUBJECT: Relevancy - reason police officer at scene
HOLDING: Tr. Ct. did not err by admitting testimony of police officer concerning robbery in which 2 Marion County sheriff's deputies were killed where testimony merely explained that officer went to hotel on tip that killers were there & apprehended D instead. Here, D contends testimony was prejudicial in his trial for armed robbery of drug store in Shelby County. Ct. finds circumstances of D's arrest were necessary to jury's understanding of police encounter which resulted in arrest/charge. Held, no error. DeBruler, joined by Prentice, CONCURS. No legitimate purpose was served by such testimony, which "can easily carry prejudicial implications."

RELATED CASES: Kindred, 973 N.E.2d 1245 (Ind. Ct. App. 2012) (error to permit investigator to discuss her requirement of corroboration before filing charges; such is irrelevant-it does not make it more or less probable that D committed the acts alleged by the child; nor was the investigator's charging criteria at issue).

TITLE: Henson v. State
INDEX NO.: O.4.a.
CITE: (9/7/84) Ind., 467 N.E.2d 750
SUBJECT: Relevancy - testimony re victim's absence from trial
HOLDING: Tr. Ct. did not err in allowing victim's son to testify re reason for mother's absence from trial (broken arm, unrelated to incident) & fact that her house was for sale. Here, D contends information was irrelevant. Tr. Ct. has wide latitude in ruling on relevancy of evidence. See Armstrong, 429 N.E.2d 647; Chittenden, 436 N.E.2d 86. Ct. finds testimony re victim's absence was proper & in no way jeopardized D. Ct. finds testimony re fact victim's house was for sale relevant to show she had been placed in fear by D & was in continuing fear. Even assuming information was irrelevant, its effect was harmless because other independent evidence of guilt supports conviction. Howell, 413 N.E.2d 225. Held, no error.

TITLE: Hollen v. State
INDEX NO.: O.4.a.
CITE: (1st Dist.; 12-15-00), Ind. App., 740 N.E.2d 149, *aff'd* 761 N.E.2d 398
SUBJECT: Relevancy - subsequent battery in different county is irrelevant
HOLDING: In trial for battery against police officer, Tr. Ct. erred by admitting into evidence probable cause affidavit that alleged second battery for which D was not charged. Charging information must set forth, among other things, nature & elements of offense charged in plain & concise language without unnecessary repetition, & must state place of offense with sufficient particularity to show that offense was committed within jurisdiction of Ct. where charge is to be filed. Ind. Code 35-34-1-2(a)(4). Here, D was specifically charged with battery that occurred in Crawford County. However, in probable cause affidavit, officer noted that he had another altercation with D at hospital. Because hospital where second altercation occurred is not in Crawford County, charging information was not broad enough to encompass this second altercation with officer, & thus, second altercation was irrelevant to battery charged. Although Tr. Ct. erred in admitting irrelevant probable cause affidavit into evidence, error was harmless due to overwhelming evidence of D's guilt. Held, judgment affirmed.

Note: Also, object to admissibility of probable cause affidavit on hearsay grounds. Moreover, purpose of probable cause affidavit is to justify arrest, detainment or search, which are matters for judge, not jury. Guajardo, 496 N.E.2d 1300 (Ind. 1986).

TITLE: Hughes v. State
INDEX NO.: O.4.a.
CITE: (1st Dist. 6/8/87), Ind. App., 508 N.E.2d 1289
SUBJECT: Relevancy - D's beliefs about victim
HOLDING: Tr. Ct. did not err in allowing testimony re D's belief that adoptive son was possessed by a demonic spirit (she had exorcism performed on him), her comparative lack of affection for him, & her concerns about his parentage (she apparently believed child was result of incestuous relationship between her husband's sister & the woman's stepfather). Such testimony was relevant to show D's attitude toward child & possible motivation for her to commit crimes charged (neglect of a dependent, battery, & involuntary manslaughter). Kahn, App., 493 N.E.2d 790. Held, conviction affirmed.

TITLE: Hyser v. State
INDEX NO.: O.4.a.
CITE: (10/17/2013), 996 N.E.2d 443 (Ind. Ct. App. 2013)
SUBpsJECT: Erroneous exclusion of relevant evidence - denial of right to present a defense
HOLDING: In child molesting prosecution, Tr. Ct. improperly denied D a meaningful opportunity to present a complete defense. Throughout the trial, D attempted to present a defense that the allegations and testimony against him were fabricated as a retaliatory act in response to a report he made to DCS that he believed complaining witness (C.W.) was being abused by C.W.'s mother's boyfriend (Marner). D wished to elicit testimony from two witnesses who observed Marner strike C.W., and from a detective that the report to DCS was made by D and that it prompted C.W.'s allegations that D had molested him. In addition, D wished to present evidence that Marner was a registered sex offender to show Marner knew how the system worked and that J.M. could be taken away from him if a new charge was filed against him.

Court concluded that this evidence was relevant under Ind. Evidence Rule 401 as it had, at a minimum, the tendency to show that the molestation allegations against D were untrue and were made, or caused to be made by C.W. through the influence of Marner, in retaliation or in response to D making a child abuse report regarding Marner. Evidence regarding report to DCS was not inadmissible hearsay because D did not wish to present it to prove truth of matter asserted, but instead to demonstrate he had made the report against Marner a few days prior to time he was first accused of the molestations, and report provided a motive for Marner to fabricate the molestation allegations and influence C.W. to testify against D. Dyson v. State, 692 N.E.2d 1374 (Ind. Ct. App. 1998). Probative value of the evidence was not outweighed by danger of unfair prejudice, and exclusion of the evidence is inconsistent with substantial justice and therefore not harmless. The evidence D wished to elicit and present was exculpatory, unique, and critical to his defense. D had a right, as a fundamental element of due process of law, to present his own witnesses to establish a defense and to present his version of the facts. See Kubsch v. State, 784 N.E.2d 905 (Ind. 2003); Allen v. State, 813 N.E.2d 349 (Ind. Ct. App. 2004). Held, convictions reversed and remanded for new trial.

TITLE: Joyner v. State
INDEX NO.: O.4.a.
CITE: (3-31-97), Ind., 678 N.E.2d 386
SUBJECT: Erroneous exclusion of relevant evidence
HOLDING: Tr. Ct. committed reversible error when it prevented D from presenting evidence supporting his theory that another person committed murder. In his offer to prove, D sought to present evidence that: Bowens, who worked at same place as victim & D, was having affair with victim; Bowens had sex with victim on night before murder; Bowens had lied to his wife about where he was that evening & later told his wife that he had argument with victim on last day she was seen alive; & Bowens came in late to work on morning after murder & lied about his tardiness on his time card. Some evidence admitted at trial, including expert testimony regarding hair analysis, was consistent with D's theory that crime was committed by Bowens.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. Evidence which tends to show that someone else committed crime logically makes it less probable that D committed crime, & thus meets definition of relevance in Rule 401. In this case, it was error to prevent D from offering proposed evidence. Some of proffered testimony could have established motive (argument) & opportunity (unexplained absence/cover-up). Erroneous exclusion of evidence was inconsistent with substantial justice & could not be deemed harmless error. Ind. Trial Rule 61. Held, reversed & remanded for new trial.

RELATED CASES: Bryant, App., 802 N.E.2d 486 (evidence offered in attempt to establish that D's father was person who killed victim was properly excluded); Smith, 754 N.E.2d 502 (D only sought to present (mostly hearsay) evidence of various threats made by victim himself; there was absolutely no effort to present any evidence of any behavior by any other person suggesting existence of another suspect; thus, evidence D sought to present falls well short of test for admissibility enunciated by Joyner); Roop, 730 N.E.2d 1267 (no error in excluding evidence that D's father-in-law may have molested D's wife when she was child).

TITLE: Lycan v. State
INDEX NO.: O.4.a.
CITE: (2nd Dist., 9-25-96), Ind. App., 671 N.E.2d 447
SUBJECT: Admissibility of weapons not used in commission of crime
HOLDING: Given close temporal relationship between D's possession of semi-automatic pistol & shooting, considered with D's incriminating statement immediately following shooting & testimony that he never retreated from confrontation with victim, evidence concerning possession of pistol had at least some probative value to rebut D's claim of self-defense. Although introduction of weapons not used in commission of crime & not otherwise relevant to case may have prejudicial effect, evidence here was relevant to conflicting theories of case. Given tendency of pistol to corroborate vital aspects of State's case, its prejudicial impact did not outweigh probative value to extent it should have been excluded. Held, no error.

RELATED CASES: Stringer, App., 853 N.E.2d 543 (fact that D possessed handgun at time of arrest & admitted firing the gun shortly before arrest was irrelevant & highly prejudicial in a possession of controlled substance & resisting by fleeing case); Simmons, App., 717 N.E.2d 635 (fact that D owned rifle & ammunition not used in crime was relevant to show that D was familiar with guns).

TITLE: Mateo v. State
INDEX NO.: O.4.a.
CITE: (9/17/2012), 981 N.E.2d 59 (Ind. Ct. App. 2012)
SUBJECT: Gang activity evidence properly excluded
HOLDING: In aggravated battery prosecution, Tr. Ct. did not err in excluding evidence alleging that several of State's witnesses were members of a criminal gang. D argued that gang evidence was admissible to show State witnesses' motives for starting a fight with D, *citing* Williams v. State, 690 N.E.2d 162 (Ind. 1997) for the proposition that gang evidence is routinely admitted as proof of motive to commit an alleged violent crime. However, Williams is a narrow exception to general prohibition against use of character evidence to show action in conformity therewith. Here, motive for confrontation between D and victims is readily explainable: D had recently slashed the tires of the victims' friends' vehicle for no apparent reason. If membership in a gang was at all relevant to show motive, it would have established why D showed up at party wanting to cause trouble. D opposed introduction of any evidence suggesting that he was a member of a gang, thus he benefitted as much or more from the exclusion of evidence at trial concerning gang membership than the State did. Held, judgment affirmed.

TITLE: Miller v. State
INDEX NO.: O.4.a.
CITE: 36 S.W.3d 503 (Tex. Crim. App. 2001)
SUBJECT: Post-Offense Assault on D Relevant to Claim of Duress
HOLDING: Evidence that a D accused of a drug sale was afterward assaulted by a man she said had coerced her into making the sale was admissible on the issue of duress. The timing of the assault bears only on the weight to be given the evidence, not its admissibility.

TITLE: Price v. State
INDEX NO.: O.4.a.
CITE: (4-10-02), Ind., 765 N.E.2d 1245
SUBJECT: Relevancy - photographs of D at time of crime

HOLDING: In murder prosecution, Tr. Ct. erred in admitting two photographs which showed D at a club gesturing in a manner that could be interpreted as a gang sign. Photographs showing how a D looked at time of crime are frequently probative. Here, however, pictures largely invited jurors to evaluate guilt based on whether D looked like the type of person who would commit this sort of crime. There was no contention that D changed his appearance as part of his efforts to evade capture, or to otherwise foil identification before or during trial Because identification was not at issue, photographs were irrelevant. Ind. Evidence Rule 402. A D does not open door to otherwise inadmissible character evidence merely by dressing & grooming in a manner appropriate for Ct. Given overwhelming evidence of D's guilt, Ct. concluded that erroneous admission of this evidence was harmless. Held, judgment affirmed.

TITLE: Rafferty v. State
INDEX NO.: O.4.a.
CITE: (1st Dist., 03-22-93), Ind. App., 610 N.E.2d 880
SUBJECT: Sexual exhibits & testimony irrelevant & inadmissible
HOLDING: In D's trial for child molesting it was reversible error to admit various exhibits & testimony relating to sexually explicit paraphernalia, because materials were not shown to have been used in crime & therefore were irrelevant. At D's trial for molesting her son's friend, sexually explicit books, magazines & tapes from D's husband's room, & sexual device hidden under D's mattress were admitted over objection. Alleged victim (AV) admitted D never showed him any of materials, & that they belonged to her husband, not her. Further, AV discovered device accidentally without D's knowledge & it was never used in any of alleged sexual acts. For physical evidence to be admissible, witness who observed it must be able to state at least that it is like instrumentality used in crime, & there must be showing that item is connected to D & commission of crime, Andrews, 532 N.E.2d 1159. Although evidence need only constitute small link in chain of evidence connecting D to crime, here it did not pass either part of test & didn't constitute even small link to crime. Evidence was therefore irrelevant & inadmissible, as was any testimony about evidence. Because remaining evidence went to question of credibility, error in admission required reversal. Held, convictions reversed.

RELATED CASES: Tynes, 650 N.E.2d 685 (erroneous admission of unrelated weapons evidence was harmless because evidence was merely cumulative & had been referred to several times without objection); Biberstine, App., 632 N.E.2d 377 (Erroneous admission of sexually explicit evidence in child molesting trial was not fundamental error. Although evidence was irrelevant because it was not tied to crime, no objection to admission of evidence was made. Ct. distinguished Rafferty on this ground, & because there was other evidence of D's guilt.)

TITLE: Riley v. State
INDEX NO.: O.4.a.
CITE: (10/28/82), Ind., 441 N.E.2d 190
SUBJECT: Relevancy - videotaped statements
HOLDING: If videotaped statement is relevant, it is admissible against D. Here, D & co-Ds broke into victim's home; victim was pushed to floor by D, resulting in subdural hematoma. Muncie Police videotaped interrogation. D was asked whether victim hit head when victim fell; D speculated victim hit back of head. D objected to admission of this portion of videotape, maintaining that question was leading & invited speculation. Ct. holds Tr. Ct. did not abuse discretion in admitting statements; weight/significance could be attacked by D in cross-examination & final argument. Bond, 403 N.E.2d 812, Perry, 266 N.E.2d 4. Ct. also holds any error in admission harmless because of co-D's testimony & corroborative medical evidence. Pollard, 388 N.E.2d 496. Held, Class A robbery conviction affirmed.

TITLE: Robinson v. State
INDEX NO.: O.4.a.
CITE: (4th Dist.; 12-28-99), Ind. App. 720 N.E.2d 1269
SUBJECT: Relevancy - evidence of consciousness of guilt
HOLDING: Tr. Ct. did not err in admitting audiotape of statements D made during breathalyzer test and booking. Relevant evidence is evidence having any tendency to make existence of any fact that is of consequence to determination of action more probable or less probable than it would be without evidence. Ind. R. Evid. 401. Evidence of consciousness of guilt has historically been admissible as relevant evidence. Here, while officer had stopped D in parking lot to determine whether D was driving under influence, D made repeated statements to officer about whether officer knew who D was and D's friendship with county prosecutor, deputy prosecutor and sheriff. Because D's attempts to intimidate officer with his purported status in community could reasonably be interpreted by jury as evidence of his consciousness of guilt, evidence was relevant. In addition, statements were not so inflammatory that they resulted in unfair prejudice that outweighed their probative value. Held, conviction affirmed.

RELATED CASES: Whitman, 49 N.E.3d 162 (Ind. Ct. App. 2015) (D's jailhouse phone conversation with his mother was relevant and admissible to show D's consciousness of guilt)

TITLE: Shane v. State

INDEX NO.: O.4.a.

CITE: (9-22-99), Ind., 716 N.E.2d 391

SUBJECT: Evidence of conversation regarding how to accomplish "perfect murder" - harmless error

HOLDING: Tr. Ct. erred in permitting witness to testify as to conversation she overheard between D & Co-D concerning commission of "perfect murder." Discussion did not evidence plan to murder victim, nor was it probative of agreement to kill victim. Murder in this case was not accomplished in way described in "perfect murder" scenario. However, erroneously admitted evidence did not require reversal because jury was not swayed by it. D's animosity toward victim was revealed through admissible evidence. Held, convictions affirmed; Sullivan, J., dissenting.

TITLE: Snow v. State
INDEX NO.: O.4.a.
CITE: (12/29/2016), 65 N.E.3d 1129 (Ind. 2016)
SUBJECT: Admissibility of handgun concealed during struggle and later found at scene
HOLDING: In prosecution for battery against a public safety official, trial court did not abuse its discretion in admitting evidence that Defendant had a handgun during her altercation with police officer. Defendant complained to police that Harris, her boyfriend, was sitting in the back seat of her car in her driveway refusing to leave. Harris argued and struggled with the officer who tried to remove him from the car; when Harris began striking the officer on the head and body, Defendant started shouting and cheering him on. The officer handcuffed Harris and told Defendant to be quiet and identify herself. Defendant continued shouting at the officer and daring him to arrest her. When the officer tried to arrest Defendant, she struggled and swung at him. After Defendant was handcuffed, police noticed a handgun on the driveway that the officers believed had fallen out of Defendant's clothing during the struggle. One officer believed Defendant had gone into the house and retrieved the gun after the police arrived at her house. Defendant testified the gun had been in her purse, in the car, and had fallen onto the ground from there.

On appeal, Defendant argued that the presence of a handgun had no relevance to the question of her guilt or innocence. The fact a concealed weapon fell from Defendant's person during the scuffle has at least some tendency to show that Defendant was acting in an aggressive manner. "A defendant is not entitled to have her actions sanitized when evidence is presented to a jury." Reaves v. State, 586 N.E.2d 847, 859 (Ind. 1992). Court could not say the trial court abused its discretion in admitting testimony regarding Defendant's possession and concealment of a gun on her person at the time she shouted at and physically struggled with the officer. Moreover, any error in admission of this evidence is, at most, harmless. Held, judgment affirmed. Vaidik, C.J., dissenting, noted that this cased boiled down to officer's word against Defendant's and the admission of the gun could have tipped the scales in favor of the State. She found the admission, and the State's "inflammatory characterization of the gun as 'unregistered' and 'literally against the law,'" to not be a harmless error. Dissent also questioned the State's argument, wondering why Snow would choose to attack a police officer if she was trying to hide her gun. In addition, she legally possessed the gun as she had it on her own property.

RELATED CASES: Harris v. State, 66 N.E.3d 628 (Ind. December 29, 2016) (it is unlikely the jury was significantly influenced by the testimony regarding discovery of co-defendant's gun in light of the other evidence regarding Defendant's actions; thus, any error in admitting the evidence was, at most, harmless).

TITLE: Stephenson v. State
INDEX NO.: O.4.a.
CITE: (4/23/2015), 29 N.E.3d 111 (Ind. Ct. App. 2015)
SUBJECT: Evidence of suicide attempt admissible
HOLDING: Tr. Ct. did not abuse its discretion in admitting evidence of D's suicide attempt. D had borrowed money from Leigh Jennings and knew she kept substantial amounts of cash at her house in two safes. D was heavily indebted to other creditors, who threatened imminent legal action against D. A few days later, Jennings was found dead in her home, having been bludgeoned to death; all cash had been removed from the safes. After the police questioned D a few days later, he tried to kill himself. Police found a suicide note, in which D talked about his grave financial problems but denied killing Jennings. At trial, D's suicide note and related testimony were admitted.

The attempted suicide evidence was relevant and admissible because it explained a possible motive for D to kill Jennings, his dire financial circumstances. See Evidence Rule 401 and Evidence Rule 402. Further, the evidence was not evidence of a prior bad act, i.e., inadmissible character evidence. And even if it was character evidence, it would have been admissible under the motive exception to the general prohibition against admission of character evidence. See Evidence Rule 404(b)(2). Held, judgment affirmed.

TITLE: Thompson v. State
INDEX NO.: O.4.a.
CITE: (2nd Dist., 05-18-93), Ind. App., 613 N.E.2d 461
SUBJECT: Evidence not relevant to show victim's state of mind or third party liability
HOLDING: In trial for murder, it was not error to refuse to allow defense witness to testify that two days prior to death, victim told her he believed his wife was "trying to get somebody to do something to" him. D sought to admit testimony to show victim's state of mind prior to death & that victim's wife was viable suspect in his murder. Ct. acknowledged that, if legally relevant, statements offered to show victim's state of mind are admissible, Lock, (1991), 567 N.E.2d 1155, cert. denied, but found Tr. Ct. did not abuse its discretion in finding testimony was not legally relevant. Testimony would have revealed that victim may have felt threatened by estranged wife, but even if that was his state of mind, it did not relate to relationship with D or circumstances surrounding victim's death. Ct. also held there was no abuse of discretion in excluding evidence on ground it was not relevant to show third party committed crime, because such evidence must "do more that cast suspicion or raise a conjectural inference that a third party committed the crime; it must directly connect the third party to the crime charged." Held, conviction affirmed.

TITLE: Whitham v. State
INDEX NO.: O.4.a.
CITE: (12/30/2015), 49 N.E.3d162 (Ind. Ct. App. 2015)
SUBJECT: Prior attacks on victim and expert's opinion regarding injuries admissible
HOLDING: In attempted murder prosecution, complaining witness's (C.W.'s) testimony regarding two prior attacks demonstrated D's pattern of hostility toward C.W. and his motive for the charged attack. Where, as here, D and the victim have a frequently hostile relationship, evidence of those prior hostilities are "usually admissible" under Indiana Evidence Rule 404(b). Hicks v. State, 690 N.E.2d 215, 222-23 (Ind. 1997). D did not challenge the admission of this evidence under Rule 403 on appeal. Held, judgment affirmed in part, reversed in part on other grounds.

TITLE: Wiggins v. State
INDEX NO.: O.4.a.
CITE: (1st Dist.; 4-10-00), Ind. App., 727 N.E.2d 1
SUBJECT: Relevancy - nonsupport; salary from prior years
HOLDING: Tr. Ct. erred in admitting evidence of D's earnings over twenty-four year period.

Evidence is relevant if it has any tendency to make existence of any determinative, consequential fact more probable or less probable than it would be without evidence. Shane, 716 N.E.2d 391. Here, D who was charged with Nonsupport of Dependent argued that he was unable to work in 1992 & 1993 &, thus, fell behind in child support payments. By offering into evidence D's annual earnings from 1973 to 1996, State attempted to show that D's underemployment in 1992 & 1993 was voluntary & not result of sickness & lack of job opportunities. Because it is unclear how knowing D's income from 1985, much less 1975, would aid jury in evaluating D's claim that he could not work very much in 1992 & 1993 because of depression associated with divorce, this evidence was irrelevant & should not have been admitted. However, error was harmless because D admitted at trial that his nonpayment was by choice rather than necessity & that his debt to his wife was at bottom of his list of financial priorities. Held, conviction affirmed.

TITLE: Zanussi v. State
INDEX NO.: O.4.a.
CITE: (12/20/2013), 2 N.E.3d 731 (Ind. Ct. App. 2013)
SUBJECT: No error in admitting letters D wrote while incarcerated awaiting trial
HOLDING: In criminal recklessness and battery prosecution, Tr. Ct. did not commit fundamental error in admitting letters D wrote to complaining witness (C.W.) while in jail before trial, encouraging her not to cooperate in his prosecution. D did not indicate specifically how the admission of the letters deprived him of a fair trial. The letters were highly probative, as they include statements indicating D was guilty and asking C.W. not to testify. C.W.'s mention that the letters were sent from jail was fleeting, as it happened once, and the State agreed to redact portions of the letters that indicated D was in jail. As the letters were not more prejudicial than probative, their admission was not an abuse of discretion and did not amount to fundamental error. Held, judgment affirmed.

O. EVIDENCE

O.4. Relevancy

O.4.b. Prejudicial impact or probative value

TITLE: Atwell v. State
INDEX NO.: O.4.b.
CITE: (2nd Dist., 11-21-00), Ind. App., 738 N.E.2d 332
SUBJECT: Prior misconduct evidence admissible - doctrine of completeness
HOLDING: In attempted murder prosecution, Tr. Ct. did not abuse its discretion in admitting victim's statement that D had battered D's girlfriend several days before shooting. State clearly offered this statement to rebut D's misleading inference that victim had threatened him before shooting. Victim's statement was admissible under doctrine of completeness, which provides that when writing or recorded statement or part thereof is introduced by party, adverse party may require at that time introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it. Indiana Evidence Rule 106. This rule is designed to avoid misleading impressions caused by taking statement out of its proper context or otherwise conveying distorted picture by introduction of only selective parts. Lieberenz, App., 717 N.E.2d 1242. However, immaterial, irrelevant or prejudicial material, including prior misconduct evidence, must be redacted from portions of statement which are admitted. Stanage, App., 674 N.E.2d 214. Here, victim's statement was clearly relevant & probative of lack of provocation & victim's credibility as witness. Moreover, unfairly prejudicial effect of victim's testimony did not substantially outweigh its probative value, given that battery was mentioned only tangentially in course of explaining to jury context of victim's statement. Held, no error.

RELATED CASES: Johnson, 959 N.E.2d 334 (Ind. Ct. App. 2011) (probative value of D's statement that he was afraid he would hurt his dependent outweighed its prejudicial effect; the statement demonstrated D's anger problems and how those problems might affect his dependent).

TITLE: Bennett v. State
INDEX NO.: O.4.b.
CITE: (5th Dist., 04-09-08), Ind. App. 883 N.E.2d 888
SUBJECT: Evidence of D's flight admissible
HOLDING: In child exploitation/molesting prosecution, Tr. Ct. did not err in allowing evidence of D's failure to appear for trial, the investigation to locate D, and the ultimate discovery of D's whereabouts in Mississippi living under an assumed identity. Evidence established that D fled to Mississippi on October 15, 2004 while facing a trial date of October 24, 2004 and was relevant evidence of consciousness of guilt. Holding in Dill v. State, 741 N.E.2d 1230 (Ind. 2001) does not require that flight occur shortly after commission of crime or to avoid prosecution in order to be admissible. Evidence did not involve D's propensity or "other wrongs" under Rule 404(b) and was prejudicial under Rule 403 only in the sense that it was highly probative of D's perpetration of charged offenses. Held, judgment affirmed.

RELATED CASES: Rasnick, 2 N.E.3d 17 (Ind. Ct. App 2014) (probative value of GPS evidence tracking D's movements during crime period exceed prejudicial impact; evidence placed D at crime scene; prejudicial impact was minimized by parties' pre-trial stipulation that jury would not be advised that D was on parole).

TITLE: Bowman v. State
INDEX NO.: O.4.b.
CITE: (3/29/2017), 73 N.E.3d 731 (Ind. Ct. App 2017)
SUBJECT: Removal of prosthetic eye in front of jury permissible to show "protracted" injury"
HOLDING: In an issue of first impression, the Court of Appeals ruled that the Tr. Ct. did not abuse its discretion in allowing the victim to remove her prosthetic eye in the presence of the jury to demonstrate her "protracted injury."

Defendant's mother asked Defendant why she had been smoking marijuana in her (the mother's) home. Defendant responded, "I don't give a fuck." The mother took offense, confronted Defendant, and a fight ensued. Others separated the two, but Defendant retreated to her car, retrieved some sort of object, and struck her mother in the eye with the object, damaging hereye so severely that doctors had to remove it. Defendant's mother was later fitted with a prosthetic eye. Defendant was convicted of Aggravated Battery, a level 3 felony, and Battery Resulting in Serious Bodily Harm, a level 5 felony.

Defendant argued she was prejudiced when the Tr. Ct. permitted her mother to remove her prosthetic eye in the presence of the jury to demonstrate the severity of her injury. The State had already admitted, without objection, photographs of the eye injury. Defendant argued the relevancy of a live demonstration was substantially outweighed by the prejudicial effect of the gruesome injury and inflamed the passions of the jury, in violation of Evidence Rule 403. The Court acknowledged that a "conventional alternative," a picture of the mother's severely damaged eye, was already in front of the jury - see Crain v. State, 736 N.E.2d 1223, 1234 (Ind. 2000) - yet the State carried the burden to prove more, that the mother suffered a "protracted injury." Therefore, "the prosthetic eye was relevant and probative given the State's burden to prove a protracted injury." See Ind. Code § 35-42-2-1.5(2). Held, judgment affirmed.

RELATED CASES: Crain, Ind., 736 N.E.2d 1223 (trial court did not abuse discretion in allowing victim to remove her prosthetic eye in presence of the jury to demonstrate her "protracted injury"; see full review, this section).

TITLE: Carson v. State
INDEX NO.: O.4.b.
CITE: (3rd Dist., 12-21-95), Ind. App., 659 N.E.2d 216
SUBJECT: Evidence of drive-by shooting inadmissible under Evid.R. 403
HOLDING: Tr. Ct. erred in admitting evidence of D's alleged participation in drive-by shooting of murder victim's mother's house. Ct. rejected State's assertion that evidence was admissible under motive exception to Evid.R. 404(B), noting that D's motive was not even an element that State was required to prove. Interpreting drive-by shooting as act intended to intimidate victim's family from cooperating with police, State also argued that evidence was admissible to show D's consciousness of guilt. Ct. held that this justification for admission of drive-by shooting failed Evid.R. 403 balancing test. Evidence had very little probative value to prove D's consciousness of guilt, because: 1) evidence linking D to crime was not overly persuasive, & 2) there was no evidence that attempted murder victims or any other witness to charged crime were in attendance at mother's home during drive-by shooting. Moreover, potential for unfair prejudice was apparent, as evidence "could not help but inflame the passions of the jury." Reversal was not warranted because convictions were supported by independent evidence of guilt such that evidence of drive-by shooting played no part in jury's verdict. Held, conviction affirmed.

RELATED CASES: Steinberg, 941 N.E. 2d 515 (Ind. Ct. App 2011) (in murder trial, Tr. Ct. committed harmless error in admitting a 2003 email in which D asked whether there were any "extenuating circumstances relating to murder that negate personal liability"); Jackson, 712 N.E.2d 986 (evidence that witness took marijuana into jail to give to D was inadmissible under Ind.R.Evid. 403 in murder trial); Daniels, 683 N.E.2d 557 (admission & use of calendar confiscated from D's home had clear prejudicial effect under Ind. Evid.Rule 403 because of its gang-related statements & drawing of guns; error held harmless); Anderson, 681 N.E.2d 703 (evidence that D hid drug paraphernalia after calling 911 was not admissible because it was not relevant & only went to show D's bad character).

TITLE: City of Kalispell v. Miller
INDEX NO.: O.4.b.
CITE: (3/24/2010), Mont. S. Ct., 2010 MT 62
SUBJECT: Irrelevant References to D's Homosexuality
HOLDING: Montana Supreme Court finds that prosecutor's repeated references to D's homosexuality had little relevance to charged crime of obstructing a police officer, and had significant potential for prejudicing jury against D. Charges arose from incident that began at a bar where D, her girlfriend and several friends were drinking. After the girlfriend got kicked out of the bar for playing with her gun, a friend called police because she was worried about her welfare -- the girlfriend was depressed and had a gun. Worried that her girlfriend would lose her city job if pulled over by police, D called them to say the prior call had been a prank, and that the girlfriend was with them at the bar. Between the two calls, however, the girlfriend had been involved in a traffic accident. D was charged with obstructing a police officer as a result of her phone call. The state argued that the nature of the relationship between the two was important context in which the jury could evaluate the motivation of D's phone call to police. The Court disagreed, in light of the potential prejudice, and reversed D's conviction.

TITLE: Clemons v. Walls
INDEX NO.: O.4.b.
CITE: 202 F.Supp.2d 767 (N.D.Ill. 2002)
SUBJECT: Expert Testimony on Gangs Violated Right to Fair Trial
HOLDING: Admission of expert testimony on history, organization and activities of criminal street gang to which D belonged, at D's trial for murder of rival gang member, violated D's right to fair trial. Expert testimony was highly prejudicial, and its probative value was limited, as it tended to show merely that a member of D's gang, not D in particular, had committed murder.

TITLE: Crain v. State
INDEX NO.: O.4.b.
CITE: (10-20-00), Ind., 736 N.E.2d 1223
SUBJECT: Relevancy - admission of victim's skull into evidence
HOLDING: Tr. Ct. did not abuse its discretion in admitting pieces of victim's skull into evidence as visual aide to supplement State's expert witness testimony. Instead of using actual skull of victim, Ct. acknowledged that State could have just as easily supplemented its witness testimony with other conventional exhibits -- such as high-resolution photographs, video, & charts. However, in this case, skull was neither particularly gruesome nor ominous as it lay in three separate pieces. Furthermore, it was relevant given D's claim of accidental death & State's corresponding need to show those injuries occurring at time of death and/or absence of injuries. After carefully balancing probative value against potential prejudicial impact, Tr. Ct. did not abuse discretion in finding this evidence admissible. Held, conviction affirmed, remanded for resentencing.

RELATED CASES: Bowman, 73 N.E.3d 731 (Ind. Ct. App 2017) (Tr. Ct. did not abuse discretion in allowing victim to remove her prosthetic eye in presence of the jury to demonstrate her "protracted injury"; see full review, this section.).

TITLE: Dubria v. Smith
INDEX NO.: O.4.b.
CITE: (11/19/99), 9th Cir.,197 F.3d 390
SUBJECT: Officer's Prejudicial Statements as Part of D's Statement
HOLDING: While Tr. Ct. properly admitted portion of D's pre-arrest interview, it should have redacted statements of interrogating officer as to his opinion of D's guilt. D was charged with drugging, raping, and murdering a travelling companion. Evidence showed the victim died of an overdose of chloroform. Portions of the D's pre-arrest interview were played for the jury to show that he could not explain the presence of lethal levels of chloroform in the victim's body. The tape included lengthy and repeated statements from the interrogating officer that there was conclusive evidence of the D's guilt, that the officer believed that the D was guilty, and that no jury would believe the D's story. On habeas review, the 9th Circuit holds that the officer's statements were so prejudicial as to deprive the D of a fair trial, and that the Tr. Ct.'s failure to redact them violated the D's due process rights and required D's conviction to be set aside.

TITLE: Ex parte Sneed
INDEX NO.: O.4.b.
CITE: 783 So.2d 863 (Ala. 2000)
SUBJECT: Bruton Statement -- Editing Unduly Prejudicial to Declarant
HOLDING: Editing of statement of non-testifying co-D to render it admissible under Bruton altered it to such an extent as to render make it unduly prejudicial to declarant in capital murder trial. In statement, declarant admitted participation in robbery, but claimed he did not intend for anyone to get hurt, that co-D drove car, brought weapon, chose robbery target, provided masks, and did the shooting. Statement was edited so that all references to co'D were removed, and word "we" was changed to "I." D's theory of defense mirrored his original statement. Viewed in that light, majority finds that admission of edited confession was so prejudicial as to constitute abuse of Tr. Ct.'s discretion. From the edited version, it appeared that declarant drove the car, obtained the weapon, selected the target, devised the masks, and induced his co-D to carry the weapon into the store. Other evidence, including a videotape showing the declarant opening the convenience store door and co- D immediately shooting clerk, did not overcome the "distorted statement's" contradiction of declarant's claim of lack of intent to kill. Majority holds that redaction violates rule of completeness where it distorts statement's meaning or excludes substantially exculpatory information. Majority further concludes that admission of the edited statement violated the declarant's 5th Amendment privilege against compelled self-incrimination. Although the declarant's statement was voluntary, the significant alteration effectively compelled his testimony as to matters to which he did not agree when he gave the statement. Declarant's rights cannot be sacrificed merely to serve state's interest in joint trial. Held: Murder conviction and death sentence reversed.

TITLE: Fletcher v. People
INDEX NO.: O.4.b.
CITE: 179 P.3d 969 (Colo. 2007)
SUBJECT: Evidence of rape complainant's prior virginity unfairly prejudiced D
HOLDING: Colorado Supreme Court held that evidence that a rape complainant was a virgin was inadmissible under Colo. R. Evid. 403 to prove that the sex was nonconsensual. Court decided that the probative value of the virginity evidence was outweighed by its potential for unfair prejudice. To be relevant, any evidence of sexual activity or abstinence by the complainant would have to be recent enough to have caused the injuries. "Because evidence that a victim is a virgin spans such a lengthy period of time it includes . . . non-probative evidence and thus, is too broad and over-inclusive to be admissible given its prejudicial effect." The source of the unfair prejudice is that evidence of virginity "suggests that the D 'deflowered' a victim and may evoke jurors' sympathy and moral judgment."

TITLE: Johnson v. State.
INDEX NO.: O.4.
CITE: (4th Dist. 5/16/89), Ind. App., 544 N.E.2d 164
SUBJECT: Prejudicial impact - evidence of prior violent acts
HOLDING: Even if evidence of prior violent acts against victim were admissible under common scheme or plan exception, it would be inadmissible because its prejudicial impact outweighs probative value. D was charged with battery, & during 1st stage of trial, evidence of prior acts of violence against victim, not including evidence of prior conviction, was admitted. D's trial was bifurcated to prevent evidence of prior conviction from unduly prejudicing jury during determination of guilt on present charge. Evidence of earlier crime without evidence of conviction may in fact be more prejudicial, since jury may conclude that D has escaped justice once & should not go unpunished now. State argues that evidence was admissible under common scheme or plan exception. Even if that were true, evidence still must be excluded if prejudicial impact outweighs probative value. Montgomery 412 N.E.2d 793. Ct. must first determine what evidence tends to prove. If that fact is within common scheme or plan exception, Ct. must determine whether matter is genuinely in issue, & what value evidence has in proving it. Here, evidence has little, if any, probative value, & serious prejudicial impact. Held, reversed.

TITLE: Kelley v. State
INDEX NO.: O.4.b.
CITE: (11/27/84), Ind., 470 N.E.2d 1322
SUBJECT: Relevancy - prejudicial impact; murder; victim's family
HOLDING: Tr. Ct. erred in allowing state to elicit testimony from murder victim's wife re number of children she & victim had. Such testimony is irrelevant, prejudicial & not a proper part of state's case. Rowe 237 N.E.2d 576. Error is reversible only if it substantially influenced jury's verdict. Miller 436 N.E.2d 1113. Here, in light of evidence of D's guilt (confession corroborated by physical evidence), Ct. finds testimony did not contribute to verdict. Dickerson 276 N.E.2d 845. Held, conviction affirmed.

TITLE: Love v. State
INDEX NO.: O.4.b.
CITE: (1-23-02), Ind., 761 N.E.2d 806
SUBJECT: Admissibility of evidence - prejudicial effect; inference based on speculation
HOLDING: In child molesting prosecution, Tr. Ct. did not err in admitting evidence that it was possible D could have obtained medication for sexually transmitted disease from another inmate while incarcerated. Complaining witness (CW) had suffered from trichomonas, a sexually transmitted disease. Tr. Ct. ordered jail personnel to test D for disease, & when he was finally tested, D tested negative for trichomonas. D pointed to his test results as evidence that he did not have sex with victim. State was allowed to present evidence that, because inmates were responsible for administering their own medication, another inmate could have given medication to D. D argued that jury was permitted to speculate improperly that D received medication from another inmate while in jail. An inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility. Vasquez v. State, 741 N.E.2d 1214 (Ind. 2001). Although supervisor of county jail medical department did testify that inmates without medicine have access to other inmates' medicine if other inmates allow it, he did not speculate as to whether D obtained medication in jail. Held, judgment affirmed; Rucker & Dickson, J., concurring in part & dissenting on this issue.

RELATED CASES: Filice, App., 886 N.E.2d 24 (where State did not argue that D gave Rohypnol to rape victim and admitted there was no evidence of such, the risk that the jury would infer D gave the victim Rohypnol was substantially outweighed by the probative value of evidence of Rohypnol in victim's system to show her state of unawareness).

TITLE: McClain v. State
INDEX NO.: O.4.b.
CITE: 898 N.E.2d 409 (Ind. Ct. App. 2008)
SUBJECT: Stipulation to sex offender status precludes admission of registration form
HOLDING: In trial for failure to register as sex offender, Tr. Ct. abused its discretion when it admitted sex offender registration form into evidence over D's objection and despite his offer to stipulate to his sex offender status. Registration form contained prejudicial details of D's prior sexual battery conviction. In light of D's offer to stipulate, the probative value of the registration form was outweighed by the danger of unfair prejudice. Although prosecution is entitled to prove its case by evidence of its own choice, and criminal D may not stipulate his way out of full evidentiary force of case against him, this general rule does not apply where point at issue is D's legal status that is independent of criminal behavior later charged against him. Old Chief v. United States, 117 S.Ct. 644 (1997); Sams v. State, 688 N.E.2d 1323 (Ind. Ct. App 1997).

Court found that reasoning in Old Chief applies and held that D's offer to stipulate that he is a sex offender precludes admission of registration form at trial. Court could not say beyond reasonable doubt that probable impact of prejudicial evidence upon jury was sufficiently minor so as not to affect D's substantial rights. Held, conviction reversed and remanded for new trial.

TITLE: Mercer v. U.S.
INDEX NO.: O.4.b.
CITE: 724 A.2d 1176 (D.C. 1999)
SUBJECT: Prejudicial Effect of Testimony Suggesting Ds' Intimidation of Witnesses
HOLDING: Where answers to questions asked of prosecution witnesses in murder case created prejudicial inferences that witnesses had been intimidated by Ds or their associates contributed to decision to reverse conviction. One witness was impeached with prior inconsistent statement, and prosecution rehabilitated her by asking questions that elicited testimony that she had felt intimidated by D's girl-friend, and that she testified only under subpoena. These questions were proper, but prosecutor began to cross line by asking witness if she was "happy to be in court." Witness replied that she was not, because after she left "y'all might never see me again." Second witness contradicted earlier grand jury testimony implicating Ds. He was properly asked reasons for changing his testimony and his unwillingness to cooperate. However, state again crossed line by asking him questions highlighting presence of friends of Ds in back of courtroom. Court of Appeals holds that even these two instances of improper questioning may not have been reversible error when their prejudicial impact was weighed against their probative value. However, reversible error as to one D occurred when he was denied severance after co-D's lawyer indicated he wanted to ask third witness why she had joined witness protection program in order to show that she had done it for the money. Her reply to his questioning was that she had received a death threat. This was harmless error as to D whose attorney asked question, but as to co-D who was denied severance, it added up to reversible error.

TITLE: Messel v. State
INDEX NO.: O.4.b.
CITE: (6/29/2017), 80 N.E.3d 230 (Ind. Ct. App 2017)
SUBJECT: Admission of speculative murder weapon evidence - harmless error
HOLDING: In appeal of murder conviction, Defendant argued that Tr. Ct. erred in admitting evidence that he once possessed a mag flashlight, which the State posited may have been the murder weapon. Assuming the admission of this speculative evidence was erroneous, Court found it harmless due to overwhelming independent evidence of Defendant's guilt. Defendant's 80-year aggregate sentence for murder and habitual offender enhancement was not inappropriate given the nature of the offense and Defendant's character. Held, judgment affirmed.

TITLE: Old Chief v. U.S.
INDEX NO.: O.4.b.
CITE: 519 U.S. 172, 117 S.Ct. 644; 136 L.Ed.2d 574 (1997)
SUBJECT: Unfair prejudice -- R.Ev. 403; Stipulation to Prior Felony Conviction Status
HOLDING: In prosecution under 18 U.S.C. 922(g)(1) for possession of a firearm by a felon, where prior conviction is for offense likely to lead jury to convict on some improper ground, Tr. Ct. abused its discretion by admitting into evidence the name and nature of the prior conviction despite D's offer to admit to felon-status element. Pursuant to Fed.R.Ev. 403, Tr. Ct. should have excluded this evidence because its probative value was substantially outweighed by the danger of unfair prejudice. In performing weighing required by Fed.R.Ev. 403, "when a given evidentiary item has the dual nature of legitimate evidence of an element and illegitimate evidence of character..., the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives. Generally, a D's stipulation to an element of a charged offense does not carry the same evidentiary value and "richness" as testimony and tangible evidence, nor does it provide the jury with the sort of proof it expects to establish the state's burden. These considerations, however, have "virtually no application when the point at issue is a D's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him. There is little difference in the quality or character of evidence which the state and the D wish to provide. The matter to be proved is simply the D's legal status. Proving status by admission does not create a break in the "story" which the jury expects the state to present to it. Here, where D's prior conviction was for assault with serious bodily injury, "the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available. ... [T]his will be the general rule when proof of convict status is at issue..." O'Connor, Rehnquist, Scalia, and Thomas, JJ., DISSENT.

TITLE: People v. Maldonado
INDEX NO.: O.4.b.
CITE: 97 N.Y.2d 522, 769 N.E.2d 1281 (N.Y.Ct. App. 2002)
SUBJECT: Admitting Composite Sketch of Perpetrator
HOLDING: N.Y. Ct. App. holds that prejudicial impact of composite sketch of shooting, made by police artists working with victim, outweighed its probative value such that admission of sketch at D's attempted murder trial was reversible error. On cross-examination of victim, defense showed her photograph of D's brother, and she twice identified brother as shooter. The state sought to admit the composite sketch to rehabilitate the victim's identification, but Tr. Ct. refused. Later, on cross-examination of police detective who had conducted photo-array with victim, defense brought out fact that victim had not been shown photograph of another possible suspect. In response, state again attempted to admit composite sketch, and Tr. Ct. allowed it. During final argument, the state likened the sketch to a commissioned portrait of D. Appellate Court reasons that, had D's questions on cross of victim and detective suggested that either had recently fabricated victim's identification of D, sketch would have been admissible akin to a prior consistent statement. Here, however, sketch had little if any probative value, and tremendous potential for prejudicial impact.

TITLE: Sams v. State
INDEX NO.: O.4.b.
CITE: (2nd Dist., 12-19-97), Ind. App., 688 N.E.2d 1323
SUBJECT: Stipulation to lifetime license suspension - harmless error
HOLDING: Tr. Ct. abused its discretion in admitting into evidence D's entire motor vehicle driving record instead of allowing D to admit that his license was suspended for life. Although prosecution is entitled to prove its case by evidence of its own choice, & criminal D may not stipulate his way out of full evidentiary force of case against him, this general rule does not apply where point at issue is D's legal status that is independent of criminal behavior later charged against him. Old Chief v. United States, 117 S.Ct. 644 (1997). Thus, pursuant to Indiana Evidence Rule 403, Tr. Ct. should have excluded this evidence because its probative value was substantially outweighed by danger of unfair prejudice. However, error in admitting evidence was harmless because of strong evidence of D's guilt & because he did not request limiting instruction. Held, convictions affirmed; Darden, J., dissenting.

RELATED CASES: McClain, App., 898 N.E.2d 409 (Tr. Ct. abused its discretion when it admitted sex offender registration form into evidence over D's objection and despite his offer to stipulate; see full review at K.3.e); Lewis, App., 883 N.E.2d 847 (D charged with criminal recklessness cannot force stipulation to serious bodily injury element in order to avoid evidence that victim ultimately died from his injuries); Hollowell, 753 N.E.2d 612 (so long as done consistent with applicable rules of evidence, evidence of two predicate felonies in face of stiplation is admissible during habitual offender stage of trial); Herrera, App., 710 N.E.2d 931 (D's Rule 403 objection & his evidentiary concession could not prevail over State's choice to offer evidence showing D's guilt & all circumstances surrounding charged offense).

TITLE: Scifres-Martin v. State
INDEX NO.: O.4.b.
CITE: (1st Dist., 06-13-94), Ind. App., 635 N.E.2d 218
SUBJECT: Evidence of cover-up inadmissible - not linked to D
HOLDING: Admission of evidence of cover-up of crime was error where there was no evidence linking D to cover-up. In D's trial for manslaughter, State was allowed to elicit evidence from its witnesses (D's family) that they had participated in conspiracy to conceal crime. There was no evidence, however, that D had knowledge of, or authorized, cover-up. While manufacture, destruction, or suppression of evidence can be considered as an admission of D's guilt or guilty knowledge, Cox, App., 422 N.E.2d 357, trans. denied, for such evidence to be admissible, there must first be foundation laid showing such knowledge or authorization. Here Tr. Ct. instructed jury to consider evidence only for limited purpose of evaluating credibility of witnesses, but State argued on closing that jury should consider evidence of D's family's involvement in cover-up in finding D guilty. Ct. found evidence was so prejudicial that neither admonishment from Ct. nor curative instruction could remove prejudice. Although State argued evidence was admissible because it could impeach its own witnesses who are declared hostile, Ct. noted that Ind. Code 34-1-14-15 limits impeachment of own witnesses to proof of contradictory statements. Additionally, rule allowing impeachment of party's own witness can't be used as artifice to reveal inadmissible matter to jury under guise of impeachment, The Pelican, Inc. v. Downey, App., 567 N.E.2d 847, trans. denied. Error in admission of evidence was not harmless, because other evidence of D's guilt was largely circumstantial, & inadmissible evidence could have tipped scale against D. Held, reversed & remanded for new trial.

RELATED CASES: Larry, App., 716 N.E.2d 79 (no error in admitting evidence that, after co-D made statements to police implicating D in charged crime, D called co-D a “snitch” & beat him up).

TITLE: State v. Adcock
INDEX NO.: O.4.b.
CITE: 2002 Iowa App.LEXIS 1175 (Iowa Ct. App. 2002)
SUBJECT: Domestic Abuse D's Prior Abusive Conduct Too Prejudicial
HOLDING: Evidence of a domestic abuse D's prior acts of abuse toward the complainant was relevant for several purposes, such as showing motive, intent, or absence of mistake, but its prejudicial effect outweighed its probative value. Court looked at the actual need for prior acts evidence, and found that there was sufficient other evidence of charged abuse, and that case did not come down to victim's word against D's. Also, the prior acts evidence came from the complainant and was uncorroborated by independent evidence, so that it added little to show motive, intent, or absence of mistake beyond complainant's testimony regarding charged abuse. Finally, because alleged prior bad acts were more brutal than charged abuse, the potential for prejudicial impact was significant.

TITLE: State v. Bryant
INDEX NO.: O.4.b.
CITE: 633 S.E.2d 152 (S.C. 2006)
SUBJECT: Admission of past firearm convictions improper -- self-defense theory prejudiced
HOLDING: South Carolina Supreme Court held that evidence of D's prior convictions for unlawful possession of a weapon by a convicted felon and pointing and presenting a firearm was inadmissible for impeachment purposes at his trial for murder and unlawful possession of a weapon by a convicted felon, where those priors had nothing to do with his credibility and were more prejudicial than probative. D, who was confined to a wheelchair, met the victim at a strip club. In the early morning, the two went to D's hotel room. Later, D asked another hotel resident to get help because he had been injured in a fight, and while the hotel clerk called the sheriff's department she heard gun shots. Police arrived to find the victim lying in the breezeway shot six times and bleeding. After a stand-off, a SWAT team rushed D's room to find him lying on the floor with a self-inflicted gunshot wound. The State sought to introduce evidence of: a 1984 voluntary manslaughter; 1992 shoplifting; 1994 bad check charge; 1997 possession of an unlawful weapon by a convicted felon; and 1998 pointing and presenting a firearm. D argued for exclusion of the manslaughter conviction because it was over 10 years old and that the two weapons convictions had nothing to do with truthfulness and, therefore, had little probative value, and their similarity to the current charges made them highly prejudicial. The State argued that the convictions served to impeach D and a pattern of getting in trouble every few years. The firearm convictions were allowed to be introduced and D stipulated to a conviction for a violent crime in 1984, although the manslaughter conviction was not specifically introduced. Court found that the prior firearms convictions did not involve dishonesty, and the trial judge failed to address the similarity of the prior convictions to the present charges in relation to unfair prejudice. Court found that error was not harmless because it significantly influenced D's defense of self-defense. As evidence existed both supporting and undermining self-defense, the credibility of D was essential to this defense and thus not harmless.

TITLE: State v. Hamlet

INDEX NO.: O.4.b.

CITE: 944 P.2d 1026; 133 Wash.2d 314 (Wash. 1997)

SUBJECT: Disclosure that Witness Called by State was First Hired by D -- Prejudice Outweighs Probative Value

HOLDING: Evidence that psychiatrist called by prosecution had originally been hired by defense was overly prejudicial and should not have been admitted at D's assault trial. Introduction of this evidence invited jury to infer that D had shopped around for favorable expert and that expert ultimately presented at trial was less credible than one first hired and discarded. However, error here was harmless, because damage to expert's credibility due to fact that D did not tell him same story he told state's expert, would have been same regardless of whether jury knew D had first hired state's expert.

TITLE: State v. Pona
INDEX NO.: O.4.b.
CITE: 948 A.2d 941 (R.I. 2008)
SUBJECT: Rule 403 - prejudice found in playing entire tape of murder victim
HOLDING: Rhode Island Supreme Court held that Tr. Ct. erred in allowing prosecutors to play the entire tape recording of a witness's bail hearing testimony in another case. D was facing murder and conspiracy charges for his alleged role in the slaying of a witness in an earlier murder case against him. Court determined that even if the evidence does pass muster under Rule 404(b), Rule 403 requires exclusion if the potential for unfair prejudice outweighs the evidence's probativeness. The teenage witness witnessed the aftermath of a fatal shooting and identified D as the man she saw fleeing the scene, but she also testified at length referring to him as the murderer even though she did not see the actual killing. D was released on bail, and the day before the witness was to testify in the previous case, D's half-brother killed her. Although the defense offered to stipulate that the girl was the prime and only state witness in the earlier case, the trial judge allowed prosecutors to play the entire tape of her bail hearing testimony. Court found the admission of the entire tape to be reversible error. Evidence of the girl's testimony was certainly admissible to demonstrate the event that led to her death, as it was at that proceeding that D and his associates learned who she was, where she lived, and what she saw. "By allowing hours of testimony from a teenage 'voice from the grave,' without engaging in the exercise of comparing its prejudice with its probative value, the Court failed to strike a balance that would allow the state to present its case without depriving the D of his right to a fair trial by an impartial jury."

TITLE: State v. Vue
INDEX NO.: O.4.b.
CITE: 606 N.W.2d 719 (Minn. 2000)
SUBJECT: Expert Testimony Linking Ethnicity to Domestic Violence
HOLDING: Expert testimony that members of particular ethnic group have a culture that condones domestic violence and discourages reporting of it is inherently prejudicial and may not be admitted in criminal trial. D here was charged with raping woman to whom he was married at time of alleged offense. Even if testimony was needed to explain complainant's reluctance and delay in reporting rape, testimony here went beyond such explanation, extending to generalized statements about male domination and widespread domestic abuse. While some of expert's testimony was relevant to complainant's reluctance to come forward, its probative value was based on idea that D belonged to "guilty class," while complainant belonged to "victim class." Testimony boiled down to assertion that D was more likely to have raped victim because of his ethnicity, and as such was impermissible.

TITLE: Stone v. State
INDEX NO.: O.4.b.
CITE: (4th Dist. 4/10/89), Ind. App., 536 N.E.2d 534
SUBJECT: Prejudicial impact - cumulative Patterson testimony
HOLDING: Tr. Ct. abused its discretion in allowing alleged child molest victim's story to be repeated six times through Patterson-type testimony. Here, victim testified that D molested him. Victim's sister, mother, a police officer, and two doctors testified that victim had told them same story, repeating details. D argues that this testimony was cumulative and that its prejudicial impact outweighed its probative value. In Buttram 382 N.E.2d 166, Ind. S.Ct. found no error in allowing three witnesses to repeat child victim's story; no IN cases have discussed six repetitions. Patterson testimony is prosecutorial equivalent of self-serving declaration. D's prior consistent statements are not admissible because D should not be able to enhance credibility in this way, and because of possibility of fabrication. Martz 432 N.E.2d 18. Allowing repetition of victim's statement through Patterson testimony presents same problems. See Miller, Ind. Evidence, at 126-27. It is universal rule that evidence should be excluded if its prejudicial impact outweighs its probative value. Here, repetition unduly emphasized inflammatory aspects of state's case, perhaps causing jury to decide case on emotional basis. Additionally, repetition enhanced alleged victim's credibility. [Foreign citations omitted.] While it was not *per se* error to admit some statements, it was error to admit all. Tr. Ct. must balance probative value of statements against prejudicial impact. Held, reversed & remanded. Garrard, J., CONCURS IN RESULT, noting that it is time to reevaluate Patterson's usefulness.

RELATED CASES: Norris, 53 N.E.3d 512 (Ind. Ct. App 2016) (no fundamental error or impermissible "drumbeat of repetition" by letting two witnesses testify about matters related to child's abuse where child's videotaped statement was played after the witnesses testified; testimony confirmed but did not elaborate on child's statement nor embellish the child's allegations); Willis, App., 776 N.E.2d 965 (detective's testimony about victim's statements was less than one-third of twenty pages of testimony. Under these circumstances, admission of testimony and videotaped interview did not amount to drumbeat repetition); Modesitt, 578 N.E.2d 649 (Patterson hearsay exception overruled; see full review at O.9.b).

TITLE: United States v. Sine
INDEX NO.: O.4.b.
CITE: 483 F.3d 990 (9th Cir. 2007)
SUBJECT: Critical remarks of civil judge unfairly prejudicial to D
HOLDING: Ninth Circuit Court of Appeals held that extremely critical remarks a civil trial judge had made about a fraudster that a prosecutor later brought out during cross-examination of D at his criminal trial were more unfairly prejudicial than probative and hence should have been barred under Fed. R. Evid. 403. Using such evidence in this manner was tantamount to formally introducing it. Additionally, Court held that the civil judge's statements were inadmissible hearsay. D, a lawyer, was accused of helping run a pyramid scheme that defrauded victims of millions of dollars. Once the scheme started to unravel, D began to weave a bogus "good faith" defense to his actions. In support of his claims, D filed lawsuits, which were rejected by a federal district judge. The judge held D in contempt and denounced on the record his "chicanery, mendacity, deceit, and pretense." During cross-examination of D and other witnesses at his criminal trial, the prosecutor repeatedly referred to the factfinding and derogatory character assessments offered by the civil judge, with many statements as or more harsh than the ones above. Court held that "by presenting the thrust of [the civil judge]'s order to the jury through its cross-examination technique, the government used a tactic that had the potential unfairly to prejudice [the D]. It also impermissibly placed hearsay evidence before the jury."

TITLE: United States v. Stout
INDEX NO.: O.4.b.
CITE: 509 F.3d 796 (6th Cir. 2007)
SUBJECT: Admission of voyeurism conviction unfairly prejudicial in child porn case
HOLDING: Sixth Circuit Court of Appeals held evidence that D accused of possessing child pornography had, in an unrelated case, surreptitiously videotaped a teen-age neighbor as she bathed should have been excluded as more prejudicial than probative. Government in federal prosecution for receiving and possessing sexually explicit images of minors sought to introduce evidence that D pleaded guilty in state court to secretly videotaping his 14-year-old female neighbor. The district court declared the evidence inadmissible under Fed. R. Evid. 403 due to its highly prejudicial nature. Court agreed and quoted the district court in stating that the evidence was "both inflammatory and distracting. It is more lurid and frankly more interesting than the evidence surrounding the actual charges. Any jury will be more alarmed and disgusted by the prior acts than the actual charged conduct." Majority noted that Congress's addition of Rules 413, 414, and 415 indicate its intention to allow greater admissibility of other acts evidence to show propensity, but only in circumstances that were not present in this case.

TITLE: Warner v. State
INDEX NO.: O.4.b.
CITE: (10/22/91), Ind., 579 N.E.2d 1307
SUBJECT: Inadmissibility of confession - uncharged crimes unduly prejudicial
HOLDING: Although finding that D's confession as to charged acts was voluntary & therefore admissible, Ct. held admission for impeachment of entire confession, which included accounts of numerous crimes for which D was not being tried, was unduly prejudicial & erroneous. At trial, excerpt from D's confession relating to crimes charged was introduced as substantive evidence. During direct examination D testified that he was forced to make confession due to promises of leniency & withholding of medical treatment. On cross-examination, State admitted entire 51 page confession to impeach D on these issues. Only 7 pages of confession related to crimes charged, but rest of confession discussed some 17 additional crimes not at issue. Ct. found admission of entire confession for impeachment was improper, as it did not fit within any recognized common scheme or plan, identity, motive, or similar exception, & its moderate probative value was outweighed by prejudicial effect. Held, conviction reversed & remanded for new trial.

TITLE: Williams v. State
INDEX NO.: O.4.b.
CITE: (4th Dist., 3-18-97), Ind. App., 677 N.E.2d 1077
SUBJECT: Erroneous admission of prior misconduct evidence
HOLDING: Admission of charging informations & petition to revoke D's probation, which contained references to previous convictions, was abuse of discretion. In its case in chief, State sought to show that D committed Intimidation when he threatened to do harm to witness if witness testified against him. In so doing, State offered three exhibits: (1) Charging informations outlining four alleged prior offenses; (2) Amended Petition for Probation Revocation; & (3) written statement submitted by witness outlining act referenced in exhibit (1) which he allegedly witnessed. Exhibits (1) & (2) contained references to other crimes, wrongs, or acts. Ct. held that taken together, exhibits (1) & (3) were relevant to show intent & motive, making fact of threat supporting intimidation charge more probable. However, admission of exhibit (1) required reversal because probative value of specific charging informations was substantially outweighed by any of factors set forth in Indiana Evidence Rule 403. State could have established existence of charge related to intimidation charge through testimony of officer or county clerk. Admission of charging informations in exhibit (1) was "blatant overkill," & served to focus attention of jury upon other offenses rather than offense for which D was charged. This change of focus confused issues & misled jury. However, admission of exhibit (3) was not prohibited by Indiana Evidence Rule 403, because admission of details of offense committed in witness's presence served to properly show that offenses occurred & that they were sufficiently serious to motivate D to intimidate witness. Details also served to show why witness would be intimidated. Although probation revocation petition contained in exhibit (2) was arguably relevant to intimidation prosecution, Ct. found that descriptions of extrinsic offenses listed in petition were clearly irrelevant & prejudicial. It was therefore error to admit exhibit (2) without redaction of references to irrelevant extrinsic offenses. Ct. held that erroneous admission of substantial evidence of prior misconduct in this case warranted reversal, as evidence undoubtedly focused jury's attention on D's character rather than conduct for which he was being prosecuted. Held, reversed & remanded for new trial; Chezem, J., concurring in result with separate opinion.

TITLE: Wilson v. State
INDEX NO.: O.4.b.
CITE: (1/28/2014), 4 N.E.3d 670 (Ind. Ct. App 2014)
SUBJECT: Evidence of nicknames admissible
HOLDING: In sexual misconduct with a minor prosecution, Tr. Ct. did not abuse its discretion when it ruled as admissible on cross-examination evidence as to D's use of nicknames and aliases. D testified during direct examination as to his use of the nickname “Mike,” thus opening the door to questioning during cross-examination as to his use of other nicknames. Further, none of the nicknames explored by the State carry any implication of wrongdoing. Distinguishing Edgecomb v. State, 673 N.E.2d 1185 (Ind. 1996), Court concluded use of nicknames "did not create a connotation of criminality sufficient to thwart the fairness of a trial." Held, judgment affirmed.

TITLE: Yurina v. State
INDEX NO.: O.4.b.
CITE: (2/21/85), Ind., 474 N.E.2d 93
SUBJECT: Relevancy - prejudicial impact vs. probative value
HOLDING: Tr. Ct. did not err in permitting drugstore owner to testify that robbers took schedule II controlled substance during armed robbery. Here, D contends prosecutor attempted to prove crime apart from one charged/prejudicial effect outweighed probative value. Ct. finds testimony relevant to issue of taking another's property/ identification of D as perpetrator. Probative value outweighed prejudicial effect. Hedrick 430 N.E.2d 1150. Held, no error.

RELATED CASES: Shoultz, 995 N.E.2d 647 (Ind. Ct. App. 2013) (probative value of girlfriend's testimony that D shot his own dog, used to rehabilitate girlfriend after D suggested she had no reason to fear him, outweighed its prejudicial impact because jury had already heard substantial testimony about D's cruelty to dogs) Link, App., 648 N.E.2d 709 (blood stained sheet & blanket admissible to show truth of victim's testimony regarding pain of D's penetration & her inability to cry out because of D's threat to kill her; physician's testimony re injuries likewise outweighed prejudicial effect).

O. EVIDENCE

O.4. Relevancy

O.4.c. Character evidence

TITLE: Jones v. State
INDEX NO.: O.4.c.
CITE: (08-25-93), Ind., 619 N.E.2d 275
SUBJECT: Soliciting reputation evidence not fundamental error - no objection
HOLDING: Although questioning about D's reputation as troublemaker was improper, error was not fundamental because D eventually put his reputation at issue. At trial, D claimed victim attacked him & he fired in self-defense, but he was convicted of attempted murder. State solicited testimony about D's reputation as troublemaker & fighter, but no objection was made. In rejecting claim question was fundamental error, Ct. noted mere fact D asserted self-defense did not automatically put character at issue, & therefore at time of State's questioning, if objection was made, it should have been sustained. Failure to object waived issue in this case, however. When D later took stand, counsel specifically asked if he had reputation as being tough guy. Ct. found D's reputation therefore become issue, & there was also independent evidence of guilt, precluding finding of fundamental error. D also objected to instruction telling jury it was correct to consider character of both D & victim for peace & quietude when self-defense was raised. Ct. found that had D objected to testimony & not proceeded to place his reputation in issue, instruction would have been error, but because reputation was at issue by time instructions were given, instruction was not error.

TITLE: Tate v. State
INDEX NO.: O.4.c.
CITE: (01-28-21), Ind. Ct. App.,161 N.E.3d 1225
SUBJECT: Fundamental error claims rejected in LWOP case
HOLDING: In murder and LWOP prosecution, trial court did not commit fundamental error in allowing detective and medical provider's testimony regarding the underlying incident and investigation, including the investigatory tactics used by police and the impressions of medical providers about what happened once Defendant and the child victim arrived at the hospital. Defendant failed to explain how the testimony was improper character evidence contrary to Indiana Rule of Evidence 404(a)(1) or how it was used impermissibly to establish Defendant's propensity to molest and kill children. Even had Defendant developed this argument, Rule 404(a)(1) does not prohibit eyewitnesses from describing their perceptions of a defendant’s demeanor and behavior during the events giving rise to the charged conduct.

TITLE: Wallace v. State
INDEX NO.: O.4.c.
CITE: (3rd Dist., 11-08-05), Ind. App.,836 N.E.2d 985
SUBJECT: Admission of character evidence - harmless error
HOLDING: In voluntary manslaughter prosecution, D's denial that he shot victim contrasted with his respectful conduct & dress during trial did not permit State to offer character evidence in rebuttal under Ind. Evidence Rule 404(a)(1). Tr. Ct. allowed State to use the cover of D's CD, as well as a poster, which depicted D wearing a dark cap, t-shirt, & baggy dark pants, with one hand grabbing his crotch &, with the other hand, he is shown holding a firearm at his side. Ct. App. disagreed that D's appropriate dress for Ct. & respectful Ct. Room conduct & demeanor was a character assertion made by D that the State should be allowed to rebut. Rebuttal evidence is limited to that which tends to explain, contradict, or disprove evidence offered by the adverse party. Schwestak v. State, 674 N.E.2d 962 (Ind. 1996). State will not be allowed to attack D's choice of clothing & display of appropriate Ct. Room demeanor, without more, to be considered character "evidence" which State may rebut. However, even if Tr. Ct. had committed error by allowing State to use CD & poster as character evidence, the error was harmless. Both items had been admitted into evidence, without objection by D. Jury had already seen images of D & his company on the poster & CD & any differences in D's appearance & demeanor at trial were obvious to jury. Held, judgment affirmed.

O. EVIDENCE

O.4. Relevancy

O.4.c.1. General rules

TITLE: Russell v. State
INDEX NO.: O.4.c.1.
CITE: (06/28/91), Ind., 577 N.E.2d 567
SUBJECT: Character evidence – self-defense claim
HOLDING: Tr. Ct. erred in excluding D's testimony that victim had just been released from prison. D put forth claim of self-defense. In such circumstances D is not limited to submitting evidence of specific acts of violence by victim, expanding McCraney 447 N.E.2d 589. "Any fact which reasonably would place a person in fear or apprehension of death or great bodily injury is admissible." Fact that someone had just been released from prison could place person in fear or apprehension because it is not unreasonable to assume such a person may have violent character.

RELATED CASES: Eldridge, App., 627 N.E.2d 844 (Evidence of specific bad acts of victim are not admissible unless self-defense claim focuses on reasonableness of D's actions, & he first offers evidence of his prior knowledge of victim's bad character through reputation evidence).

TITLE: Sevits v. State
INDEX NO.: O.4.c.1.
CITE: (3rd Dist., 5-24-95), Ind. App., 651 N.E.2d 278
SUBJECT: Testimony regarding religious education
HOLDING: Tr. Ct. did not err in allowing State's witness to testify as to his religious education & training. Ct. noted that common law & Ind. Evidence Rule 610 indicates that evidence of belief or opinions of witness on matters of religion is not admissible for purpose of enhancing credibility or bolstering character. Lax v. State, Ind., 414 N.E.2d 555. D argued that testimony improperly bolstered witness's credibility & violated his fundamental right to fair trial. Ct. held that credibility was not enhanced in this case because testimony was not expression of witness's religious opinions & beliefs but was only recitation of his religious education. Moreover, testimony regarding prior training in interviewing & counseling was relevant to rebut implication that witness improperly coerced D's confession. D failed to show that testimony was so prejudicial that but for its admission, outcome of proceedings would have been different. Ballin v. State, Ind. App., 610 N.E.2d 846. Held, judgment affirmed, Garrard, J., concurring.

O. EVIDENCE

O.4. Relevancy

O.4.c.2. Victim (rape shield law, IRE 412, Ind. Code 35-37-4-4)

TITLE: Brand v. State
INDEX NO.: O.4.c.2.
CITE: (4-29-02), Ind. App., 766 N.E.2d 772
SUBJECT: Evidence of victim's violent character admissible
HOLDING: In murder prosecution, Tr. Ct. committed reversible error in not allowing D to present evidence that victim had dealt drugs, been gang member, & had offered to sell D firearm. When D claims he acted in self-defense, evidence of victim's character may be admitted, to show that victim had violent character giving D reason to fear him. Holder v. State, 571 N.E.2d 1250 (Ind. 1991). Here, evidence was relevant to show reasonableness of fear or apprehension of victim, was proper character evidence, & did not constitute hearsay as it was not offered for truth of matter asserted. Jury should have been afforded opportunity to consider circumstances surrounding fatal shooting as they appeared to D. Any bad light this would have placed victim in was substantially outweighed by probative value of evidence. Held, conviction reversed & remanded for new trial.

RELATED CASES: Littler, 871 N.E.2d 276 (in murder prosecution, Tr. Ct. erroneously excluded evidence of specific prior acts committed by victim upon which D claimed he reasonably relied for his belief that victim posed a threat of serious bodily injury or death); Welch, App., 828 N.E.2d 433 (events which occurred after stabbing could not be relevant to D's state of mind or reasonable fear at time of stabbing).

TITLE: Brooks v. State
INDEX NO.: O.4.c.2.
CITE: (7-24-97), Ind., 683 N.E.2d 574
SUBJECT: Exclusion of victim's prior bad acts - no error
HOLDING: Tr. Ct. did not err in excluding testimony that victim had been charged with two counts of battery, one of which resulted in conviction. D argued that evidence regarding victim's violent propensities would have supported his claim that victim was initial aggressor in confrontation. Ind. Evidence Rule 405 permits proof of violent character of victim by reputation or opinion testimony. Evidence of specific incidents is permissible only on cross-examination of character witness pursuant to Rule 405(a), or when character is essential element of charge, claim, or defense pursuant to Rule 405(b). Neither situation was presented in this case. Held, no error.

RELATED CASES: Guillen, App., 829 N.E.2d 142 (in battery prosecution, Tr. Ct. properly excluded evidence demonstrating victim's alleged character trait of recklessness when intoxicated; victim's character was not an essential element of D's defense under 405(b)); Bell, App., 820 N.E.2d 1279 (no error in excluding D's specific-incident character trait evidence under IRE 404(a)(2)); Price, 765 N.E.2d 1245 (Tr. Ct. properly refused to admit evidence of victim's prior conduct to show that he had violent propensities).

TITLE: Broome v. State
INDEX NO.: O.4.c.2.
CITE: (5th Dist., 11-14-97), Ind. App., 687 N.E.2d 590
SUBJECT: Character evidence - victim
HOLDING: Tr. Ct. did not err when it excluded from evidence testimony describing another man's sexual encounter with victim & victim's reputation for picking up heterosexual men & attempting to have sex with them. Evidence is relevant when it tends to make more or less probable existence of fact which is of consequence to determination of action. Ind. R. Evid. 401. To prevail on claim of self-defense, D must prove that he had reasonable fear of death or great bodily harm. Here, neither reputation nor prior bad act evidence was relevant to self-defense claim. Witness was not going to testify that victim had reputation for physically injuring, or using force against, objects of his sexual advances, & second witness was going to testify only to consensual homosexual encounter in which victim did not use force. Thus, testimony was not probative of D's self-defense claim & was inadmissible. Held, conviction affirmed.

TITLE: Brown v. Commonwealth
INDEX NO.: O.4.c.2.
CITE: 29 Va.App. 199, 510 S.E.2d 751 (Va.Ct. App. 1999)
SUBJECT: Rape Shield Law -- Complainant's "Strikingly Similar" Testimony in Prior Case
HOLDING: Rape shield law should not have prevented rape D from using complainant's testimony from prior, unrelated rape case involving separate D, to impeach her testimony at trial. In both cases, complainant testified that she met her attacker on the day of the rape, she drove each man around in her car, conversed, drank alcohol and socialized with them, and she asked to use the bathroom after each man began to assault her. Court holds that strikingly similar character of testimony went to complainant's credibility, suggesting fabrication. Evidence was limited to complainant's prior testimony, did not address her sexual conduct.

TITLE: Clark v. State

INDEX NO.: O.4.c.2.

CITE: (5th Dist.; 5-18-00), Ind. App., 728 N.E.2d 880, *overruled on other grounds* by D'Paffo v. State, 778 N.E.2d 798 (Ind. 2002)

SUBJECT: Rape shield law - infringement on right to cross

HOLDING: Tr. Ct. erred in using Rape Shield law to prohibit his defense from developing facts in support of its theory that D inserted his finger in victim's vagina to ascertain whether she had been sexually active. State may not apply rule mechanistically to prohibit defense from either offering its version of facts or assuring through cross-examination that trier of fact has satisfactory basis for evaluating truth of witnesses' testimony. Saylor, App., 559 N.E.2d 332. Here, D claimed that he & his wife had discovered letters in which victim had revealed to her friends that she had sexual relations with neighborhood boy. D claimed that he inserted his finger in her vagina in order to determine whether she had had sexual relations. During direct examination, victim testified that her parents had found some letters of hers. However, on cross, Ct. would not allow D to question victim as to contents of letter. Rape shield law does not preclude evidence which merely establishes basis for D's belief as to victim's past sexual conduct because evidence of basis for belief is not same as evidence of actual prior sexual activity by victim. Thus, leaving unanswered questions jury might have regarding existence & contents of letters & resulting beliefs D may have held constituted infringement on D's right to cross-examine. Held, conviction reversed & remanded for new trial on other grounds; Riley, J., dissenting on basis that letters should have been excluded under Rape Shield law because they did not fall under exceptions.

TITLE: Conrad v. State
INDEX NO.: O.4.c.2.
CITE: (12-17-10), Ind. Ct. App, 938 N.E.2d 852
SUBJECT: Past sexual conduct evidence properly excluded
HOLDING: In criminal deviate conduct prosecution, Tr. Ct. did not err in excluding evidence of complaining witness's (CW's) past sexual conduct under Evidence Rules 412 and 403. D argued that evidence CW was "making out" with another man (Nagle) shortly before D himself became involved with her was "contemporaneous" with charged conduct, thus Rule 412's proscription against "past sexual conduct" did not apply. Court first noted that D's failure to provide timely written notice required exclusion of any evidence related to any sexual conduct involving CW and Nagle. Moreover, although events occurred in "a very close period of time," they were not contemporaneous, as D did not claim that he and Nagle were simultaneously engaged in activity of a sexual nature with CW. Thus, sexual conduct between CW and Nagle cannot be considered anything other than "past sexual conduct." Finally, D did not claim that Nagle, not he, assaulted CW, nor did he seek the shelter of any other exception to Rule 412. Rather, D claimed that CW consented to sexual activity with him and he would have used excluded evidence to impeach CW's credibility and memory. Court concluded that D's rights under U.S. and Indiana Constitutions to effectively impeach and cross-examine witnesses were not infringed upon by exclusion of this evidence. Held, judgment affirmed.

TITLE: Hogan v. State
INDEX NO.: O.4.c.2.
CITE: (3rd Dist., 06-28-93), Ind. App., 616 N.E.2d 393
SUBJECT: Prior rape allegations inadmissible - not demonstrably false
HOLDING: Because prior rape allegations made by complaining witness (CW) against others were not demonstrably false, they were inadmissible to impeach CW in D's rape trial, & any error in State's failure to disclose documentation about them was harmless. After D's conviction for rape, he filled MCE alleging State failed to divulge evidence that CW had previously made two allegations of sexual assault. In one instance investigating officer indicated CW's story sounded "fishy," that she didn't seem completely honest, & that further investigation was necessary to determine legitimacy of case. In other incident officer had opinion that allegation was false report. Although there was some question as to whether evidence of prior allegations had been disclosed to defense, Ct. assumed for review that they had not been. Under some circumstances, victim's false allegations of similar sexual misconduct are admissible to impeach credibility, despite rape shield law, Hall (1978), App. 374 N.E.2d 62, Little (1980), App., 413 N.E.2d 639. In Stewart (1988), 531 N.E.2d 1146, however, Ct. clarified prior decisions, limiting admissibility of allegations to situations where either victim admitted falsity of allegations, or they were shown to be demonstrably false. Apparently, so long as there is any question as to falsity of allegations, they will not be admissible. Because CW did not admit falsity of prior allegations & they were not proven to be false, Ct. found they were inadmissible. Therefore, any error in State's failure to disclose documents about allegations to defense was harmless. Held, conviction affirmed.

TITLE: Jackson v. State
INDEX NO.: O.4.c.2.
CITE: (7/13/89), Ind., 540 N.E.2d 1232
SUBJECT: Character evidence -- victim; rape shield
HOLDING: At rape trial, State was granted motion in limine pursuant to Rape Shield Law, Ind. Code 35-37-4-4, preventing testimony of man that he had had sexual intercourse with victim at her home day before charged rape. D claims that this ruling was error as it prevented him from impeaching her, and that door for impeachment on this point was opened when victim testified that she had spent day preceding rape cleaning her home. Ct. held that because testimony from that witness would tend to show innocent source of semen and scratches, it would tend to have slight impeaching force. Therefore, order excluding evidence was proper. Held, conviction affirmed.

RELATED CASES: Williams, 681 N.E.2d 195 (evidence precluded by Rape Shield Statute includes purported incidents with other men at other times offered simply to show that victim had consented in past in hope that inference will be drawn that she consented here); Badgley, 527 N.E.2d 713 (Tr. Ct. correct in excluding any reference to prior sexual history of 12 year-old victim who had written letter to friend stating that her stomach hurt and that she thought she might be pregnant).

TITLE: Jarrett v. State
INDEX NO.: O.4.c.2.
CITE: (7/17/84), Ind., 465 N.E.2d 1097
SUBJECT: Rape shield law - protects victim's past sexual activity
HOLDING: Tr. Ct. did not err in denying D's motion to suppress evidence based on rape shield law. Here, D sought to exclude evidence that 5-year-old victim & friend, were found attempting anal intercourse some time after D allegedly molested child. Ct. finds incident relevant in establishing sequence of events leading to discovery by victim's parents that he had been molested. Statute in effect (Ind. Code 35-1-32.5-1) shielded victim of sex crimes from general inquiry into history of past sexual activity. Kelly, 452 N.E.2d 907. Held, no error.

RELATED CASES: Knisley, 474 N.E.2d 513 (witness' testimony re D's past molestations of her was not prohibited by Ind. Code 35-37-4-4; statute is designed to protect witnesses & victim, not to provide defense for D, *citing* Forrester, 440 N.E.2d 475 & Skaggs, App., 438 N.E.2d 301); Hall, App., 504 N.E.2d 298 (evidence of D's subsequent attempt to rape victim was admissible in his trial for raping her); Killian, App., 467 N.E.2d 1265 (Ct. rejects D's contention that statute is inapplicable where it bars admission of victim's past sexual conduct contained in legal history; here, Tr. Ct. properly excluded evidence of charge of child molesting against victim).

TITLE: Johnson v. State
INDEX NO.: O.4.c.2.
CITE: (2nd Dist., 10-25-96), Ind. App., 671 N.E.2d 1203
SUBJECT: Specific incident testimony re: victim's violent character inadmissible
HOLDING: Specific incident testimony regarding victim's aggressive behavior towards third parties shortly before murder was not admissible in murder prosecution where D asserted self- defense. Although evidence of victim's character for violence was pertinent to D's self-defense claim, this could only be accomplished by reputation or opinion testimony under Ind. Evidence Rule 405(a), and not through specific incident testimony. Specific incident testimony is permissible only on cross-examination under Rule 405(a) or Rule 405(b) when character is essential element of charge, claim, or defense. Held, no error.

TITLE: Johnson v. State
INDEX NO.: O.4.c.2.
CITE: (4/10/2014), 6 N.E.3d 491 (Ind. Ct. App 2014)
SUBJECT: Must file pretrial notice of rape shield evidence to preserve exclusion for appeal
HOLDING: D waived for appellate review the Tr. Ct.'s exclusion of victim's sexual history with D because he did not file a pretrial notice of his intent to introduce rape shield evidence. There are certain exceptions to Evidence Rule 412 (rape shield evidence), including where the evidence relates to the victim's prior sexual conduct with the D. However, even if an exception to Rule 412 applies, D must submit a written motion that includes a description of the evidence at least ten days before trial in order to offer evidence of past sexual conduct during the trial.

TITLE: Kielblock v. State
INDEX NO.: O.4.c.2.
CITE: (2nd Dist., 1-18-94), Ind. App., 627 N.E.2d 816
SUBJECT: Prior sexual experimentation inadmissible under Rape Shield statute
HOLDING: In trial for child molesting, Tr. Ct. properly excluded D's evidence that his brother had allegedly witnessed sexual incident involving complaining witness (CW) & D's son approximately 2-3 years previous to instant incident. Brother would have testified that when he was babysitting for CW who was then 4 years old, her 7 year old brother, & D's 7 year old son, he saw them commit sexual act dissimilar to act D was charged with. Ct. found evidence was precluded by Rape Shield statute & was highly prejudicial. Ct. distinguished Wood, App., 534 N.E.2d 1146 (see separate card) because here, there was no evidence CW was confused as to perpetrator, & witnessed act was different in nature, occurred elsewhere, & was long before charged acts occurred.

RELATED CASES: Turner, App., 720 N.E.2d 440 (Tr. Ct. properly excluded evidence that D saw child molest victim in back yard with neighbor boy with pants pulled down because there was no evidence that neighbor & victim engaged in sexual activity and victim had no confusion as to who as perpetrator); Little, App., 650 N.E.2d 343 (Ct. refused graft additional exceptions to rape shield statute or Evid.R. 412, even for independent purpose of showing D's belief as to victim's age).

TITLE: Killian v. State
INDEX NO.: O.4.c.2.
CITE: (06-03-20), Ind. Ct. App., 149 N.E.3d 1189
SUBJECT: Witness's prior conviction for similar crime properly excluded under Rape Shield Rule
HOLDING: In a criminal case involving alleged sexual misconduct, evidence of specific instances of a victim's or witness's sexual behavior is admissible under Indiana Evidence Rule 412(b)(1)(A) if offered to prove that someone other than the defendant was the source of the semen, injury, or other physical evidence. Here, Defendant convicted of sexual misconduct with a minor after impregnating his granddaughter wanted to introduce evidence at trial that his son was convicted of sexual misconduct with a minor in 1994, arguing it should be introduced under Rule 412 (b)(1)(A). But trial court did not err in excluding this evidence because the 1994 conviction could not have been the "source" of the victim's current pregnancy and was being introduced merely to add speculation that because the son had a prior conviction for the same offense he may have been the perpetrator here.

TITLE: McVey v. State
INDEX NO.: O.4.c.2.
CITE: (4th Dist., 03-30-07), Ind. App., 863 N.E.2d 434
SUBJECT: Exclusion of CW's prior sexual history
HOLDING: In child molesting prosecution, Tr. Ct. properly excluded evidence of complaining witness's (CW's) prior sexual history under Indiana Evidence Rule 412. Relying on Davis v. State, 749 N.E.2d 552 (Ind. Ct. App 2001), D argued that because another man had been charged with molesting CW after she made allegations against D, he should have been allowed to question CW about any sexual contacts with this other man. Distinguishing Davis, Court noted that D was charged with offenses allegedly committed between October 1998 & August 2001. State filed molestation charge against other man, alleging that he molested CW in June of 2002, approximately a year after molestations by D occurred.

Court concluded that unlike Davis, the challenged evidence does not show that possible other perpetrator molested CW between October 1998 & August 2001. Even though defense witness, in an offer to prove, testified to other man's alleged access to & inappropriate conduct with CW during this period, witness's own testimony nevertheless downplayed the incident's importance as he continued to testify that CW's mother tends to exaggerate. Record lacked specific evidence required to support a reasonable inference that some person other than D had committed the charged acts. Allowing cross-examination merely because of witness's testimony relating to a single incident, which he did not witness, could not remember the specific date, & its importance he downplayed, "would hand [D] a fishing rod to go after hypothetical perpetrators of a young girl." *See* Steward v. State, 636 N.E.2d 143 (Ind. Ct. App 1994), *aff'd*, 652 N.E.2d 490 (Ind. 1995). Held, judgment affirmed in part & reversed in part on other grounds.

TITLE: Maldonado v. State
INDEX NO.: O.4.c.2.
CITE: (1st Dist., 06-29-09), 908 N.E.2d 632 (Ind. Ct. App 2009)
SUBJECT: IAC claim - failure to introduce CW's statements about sex with imaginary brother
HOLDING: In child molesting prosecution, trial counsel was not ineffective for failing to attempt to introduce evidence of complaining witness's (CW's) alleged statements about a sexual relationship with an imaginary brother. Even if these statements had fallen under the purview of Indiana's Rape Shield Rule, they would have been admissible under the common-law exception allowing evidence of prior demonstrably false accusations of sexual misconduct. See State v. Walton, 715 N.E.2d 824 (Ind. 1999). Although CW's statements arguably do not qualify as "accusations," Court found that purpose of exception--to enable Ds to offer impeachment evidence while still protecting the victim from being tried on her sexual history--is implicated on these facts. CW's statements would not have been introduced to raise questions about her sexual past, but rather to question the veracity of her allegations against D and impeach her parents' testimony that she had never made up stories of a sexual nature in the past. However, fact that evidence would have been admissible does not necessarily mean that trial counsel performed deficiently. Counsel could have made a strategic decision to keep this evidence out of the record for fear of evidence that D coached his six-year-old son to fabricate the entire story prior to son's deposition. Court will not second-guess that decision and will defer to trial counsel's analysis of her client and her case. Held, denial of post-conviction relief affirmed.

TITLE: Michigan v. Lucas
INDEX NO.: O.4.c.2.
CITE: 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991)
SUBJECT: Notice requirements - rape shield law
HOLDING: "The right to present relevant testimony is not without limitation. The right `may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" Rock v. Arkansas, (1987), 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 [other citations omitted]. Here, D failed to comply with notice requirement of rape shield statue which may permit introduction of evidence of D's past sexual conduct with victim if D files offer of proof within ten days after arraignment. D's defense was consent. Tr. Ct. refused to grant in camera hearing to determine relevance of such evidence because D failed to file notice. Legitimate state interests support notice/hearing requirements. Rape victims deserve heightened protection against surprise, harassment, & unnecessary invasions of privacy. Statute also protects against surprise to prosecution. However, restrictions on D's right to confront adverse witnesses & to present evidence "may not be arbitrary or disproportionate to the purposes they are designed to serve." Rock, supra. Court explicitly expresses no view on whether length of notice requirement (ten days after arraignment) is unconstitutional. Held, 6th Amend. does not prohibit in some cases, exclusion of rape shield evidence resulting from D's failure to comply with notice requirement. Case remanded for determination as to whether preclusion was justified under facts presented here. Blackmun, CONCURRING IN JUDGMENT; Stevens, joined by Marshall, DISSENTING.

TITLE: Munn v. State
INDEX NO.: O.4.c.2.
CITE: (3/25/87), Ind., 505 N.E.2d 782
SUBJECT: Rape shield law - victim's prior relations with D
HOLDING: Tr. Ct. did not err in granting state's motion in limine prohibiting D from questioning victim about their past sexual relations. Here, Ct. finds because D presented alibi defense, excluded evidence was irrelevant to any issue related to victim's consent. D argued evidence was relevant to show victim's jealously as possible motive for her accusation against D. Tr. Ct. expressly permitted D to cross-examine victim & to present other evidence showing details re nature/duration of their relationship. Ct. finds no abuse of discretion. Ct. rejects D's contention that by testifying on cross-exam that she never dated D, victim opened door to their prior sexual relationship. Ct. finds if D was harmed by jury's hearing her denial of a dating relationship, it was he who bore responsibility, as it was, he who asked question. Lewis, 440 N.E.2d 1125. Held, conviction affirmed.

RELATED CASES: Collins, App., 740 N.E.2d 143 (although IRE 412 permits evidence of victim's prior sexual relationship with D, such evidence is relevant only to issue of guilt; existence of prior physical relationship between D & victim cannot serve as mitigator when Tr. Ct. considers sentence).

TITLE: McKim v. State
INDEX NO.: O.4.c.2.
CITE: (4/19/85), Ind., 476 N.E.2d 503
SUBJECT: Rape shield law - evidence of propensity for false accusations
HOLDING: Tr. Ct. did not err in refusing to permit witness to testify re lack of sexual relations with victim. Here, purpose of testimony was to show victim's propensity to falsely accuse others of having sex with her. Little, App., 413 N.E.2d 639 & Hall, App., 374 N.E.2d 62 (sexual assault victims later recanted accusations). D testified daughter told him she & witness had sex. Ct. finds D's version of episode self-serving & finds no evidence of recantment. There was some indication that victim & witness "played around," but such evidence was properly excluded pursuant to rape shield law since it touched on victim's promiscuous background. Held, no error.

TITLE: Morrison v. State
INDEX NO.: O.4.c.2.
CITE: (2nd Dist., 03-31-05), Ind. App., 824 N.E.2d 734
SUBJECT: No error in excluding rape shield evidence
HOLDING: In criminal deviate conduct prosecution, Tr. Ct. did not abuse its discretion by excluding evidence of past sexual incident between complaining witness (CW) & his male coworker, wherein coworker touched CW's penis. Evidence of CW's past sexual conduct was inadmissible under Indiana Evidence Rule 412, as none of exceptions to Rule's general prohibition of inquiry into victim's sexual history applied in this case. D argued that this evidence directly impacted prosecution's inference that CW was ignorant of sexual matters, especially the possibility of sex between two men. However, Tr. Ct. did not impinge upon D's right of confrontation inasmuch as it allowed him to explore extent of CW's knowledge regarding relations between individuals. Distinguishing Davis v. State, 749 N.E.2d 552 (Ind. Ct. App 2001), Ct. noted that D's identity was never an issue at trial, & record did not reveal that CW manufactured the sexual incident that occurred in this case, as it was witnessed by others. Further, evidence reveals that CW did not confuse the incidents in question, as prior event involved solely the touching of CW's penis, while charged incident involved oral sex, attempted anal intercourse & "humping" as well as touching. Held, judgment affirmed in part & remanded in part on other grounds.

TITLE: Oatts v. State

INDEX NO.: O.4.c.2.

CITE: (2nd Dist., 01-20-09), Ind. App., 899 N.E.2d 714

SUBJECT: Rape shield rule - Sixth Amendment & admissibility of CW's prior sex acts under sexual innocence inference theory

HOLDING: In child molesting prosecution, Tr. Ct. did not abuse its discretion by excluding evidence that complaining witness (CW) had previously viewed an allegedly pornographic video and had previously been molested by a different person. Evidence did not fall into one of the enumerated exceptions of Ind. Evidence Rule 412 or under common law prior false allegation exception, thus exclusion was not erroneous under Indiana's Rape Shield Statute and Rule. Tague v. State, 539 N.E.2d 480 (Ind. 1989).

When considering effect of precluded evidence on D's Sixth Amendment rights, Court initially determines relevance of evidence. Borosh v. State, 336 N.E.2d 409, 412 (Ind. Ct. App 1975). Here, there was no evidence other than CW's testimony that sexual contact occurred. D argued that excluded evidence was relevant to demonstrate that CW had knowledge of nature of sex acts and the investigative process, i.e., the sexual innocence inference theory. Acknowledging split in jurisdictions as to whether this theory of logical relevance can trump Rape Shield Law, Court held that D has burden to show that prior sexual act occurred and that it was sufficiently similar to present sexual act to give the victim the knowledge to imagine the molestation charge.

In this case, D failed to show that either the prior molestation or the videotape, were similar to the current offense. Defense attorney only stated that two alleged touchings occurred while CW was in bed. D also failed to show that evidence was relevant or that the probative value outweighed the prejudicial effect. Thus, Court could not say that exclusion of evidence violated D's right to cross examine witnesses under Sixth Amendment of U.S. Constitution and Article 1, ' 13 of Indiana Constitution. Held, judgment affirmed.

RELATED CASES: Watson, 134 N.E.3d 1038 (Ind. Ct. App. 2019) (Tr. Ct. properly excluded evidence of C.W.'s internet searches on topics related to the allegations); Alvarado, 89 N.E.3d 442 (Ind. Ct. App 2017) (no error in excluding evidence that C.W. had been molested by her mother's new boyfriend after D molested her; while not rejecting "sexual innocence inference" theory, Ct. suggested that concerns about jury unduly inferring sexual innocence could be addressed in voir dire).

TITLE: Pribie v. State
INDEX NO.: O.4.c.2.
CITE: (12/4/2015), 47 N.E.3d 629 (Ind. Ct. App 2015)
SUBJECT: Evidence of unknown male's DNA found in rape kit properly excluded by rape shield law
HOLDING: In rape prosecution, Tr. Ct. properly excluded evidence of an unknown male's DNA revealed by the complaining witness's (C.W.'s) rape kit. Tr. Ct. excluded the evidence under Evidence Rule 412 as "evidence offered to prove that a victim or witness engaged in other sexual behavior." The jury did hear evidence that the rape kit was done and that it did not reveal D's DNA.

Version of Rule 412 in effect on date of alleged offense barred evidence of "past sexual conduct" of witnesss in sex crime prosecutions. D sought to admit evidence of subsequent, rather than past, sexual conduct with another person hours after incident, and argued that this evidence does not fall within the previous version of Rule 412. However, Court found that the newly-amended version of Rule 412 can constitutionally be applied in D's case and that the evidence of unknown male DNA falls squarely into the current language of the Rule. No exceptions apply to admit it, as State did not present any physical evidence to convict D and did not open the door in its direct examination of C.W. or a biologist. Moreover, the evidence could have been excluded on Rule 403 grounds alone, so any error in Tr. Ct.'s 412 analysis was harmless. Held, judgment affirmed.

TITLE: Redding v. State
INDEX NO.: O.4.c.2.
CITE: (5th Dist., 04-04-06), Ind. App., 844 N.E.2d 1067
SUBJECT: Evidence of prior molestation improperly excluded
HOLDING: In child molesting prosecution, Tr. Ct. erred in preventing D from introducing evidence regarding a prior molestation of complaining witness. D made offers of proof to introduce evidence of prior molestation of child by another individual pursuant to Ind. Evidence Rule 412(2). D also wanted to introduce this evidence through State's expert witness, who testified about evidence related to the child's hymenal tissue & that this may result from a penetrating injury, although she could not determine when this would have occurred or by whom. The expert's testimony did not leave the jury with the inference that only D could have caused the injury, but that is not conclusive to the issue. The issue is whether the jury would "likely presume" that hymenal damage to a young girl was the result of the alleged molestation. See Tague v. Richards, 3 F.3d 1133 (7th Cir. 1993). In the context of the Rape Shield Statute & the 6th Amendment right to confrontation, this is known as the risk of "partial corroboration." Indiana Cts. & the 7th Circuit have noted once evidence is produced that sexual contact occurred, the witness's credibility is automatically "bolstered." "In other words, the risk of partial corroboration arises when the State introduces evidence of the victim's physical or psychological condition to prove that sexual contact occurred &, by implication, that the D was the perpetrator." Turney v. State, 759 N.E.2d 671, 676 (Ind. Ct. App2001). Tr. Ct. also misunderstood the issue as to whether the child could be crossed on the other molestation when the Tr. Ct. determined the child understood that the molestation by the other individual was a separate incident at a different time. The issue was whether D should have been allowed to rebut the inference that he caused the child's injuries. Held, judgment reversed & remanded for new trial.

TITLE: Rohm v. State
INDEX NO.: O.4.c.2.
CITE: (9/5/90), Ind., 558 N.E.2d 1100
SUBJECT: Rape shield - evidence of victim's future sexual intentions
HOLDING: While Ind. S. Ct. was "favorably inclined toward" D's contention that Rape Shield Act did not apply to evidence about victim's statements about future sexual intentions, evidence was properly excluded because D did not establish its relevance. D was charged with rape, & evidence showed that victim was friend of D's wife. D went to victim's home early one morning & talked with her about their marital problems, then pulled victim to floor & had sexual intercourse with her. Victim testified that she had resisted & that D had threatened to beat her to death, while D testified that victim consented. At trial, D attempted to elicit testimony from his wife regarding conversation with victim 2 days prior to charged incident, in which victim asked to use D's home to have sex with another man on her birthday. Tr. Ct. made initial ruling that evidence was not admissible under Rape Shield Act. D made offer to prove, after which Tr. Ct. noted absence of evidence that D had any knowledge of this conversation & ruled that testimony would be excluded. On appeal, D argues that evidence does not violate Rape Shield Act because it does not concern "past sexual conduct" of victim, but rather her future sexual intentions. He further argues that evidence is relevant because it indicates state of mind of victim & bears upon issue of consent. Ind. S. Ct. indicates that it is "favorably inclined toward" D's contention that Rape Shield Act does not apply to this evidence. However, offer to prove did not establish that D had overheard victim's statement, nor did statement itself indicate any desire for sexual activity between victim & D. Evidence was irrelevant & was properly excluded. Held, conviction affirmed.

TITLE: Runyon v. State
INDEX NO.: O.4.c.2.
CITE: (4/6/88), Ind., 520 N.E.2d 1265
SUBJECT: Rape Shield Statute -- jury instruction and voir dire improper
HOLDING: Tr. Ct. did not err in refusing to allow D to question jury during voir dire regarding Rape Shield Statute and in refusing his tendered instruction regarding statute. It is inappropriate to instruct jury concerning existence of Rape Shield Statute. Protection afforded witnesses in rape prosecution concerning their past sexual conduct is question of law to be applied by Tr. Ct. and not question for jury's consideration. Brown, 417 N.E.2d 333. Held, conviction affirmed.

TITLE: Saylor v. State
INDEX NO.: O.4.c.2.
CITE: (1st Dist. 9/6/90), Ind. App., 559 N.E.2d 332
SUBJECT: Rape shield - prior molestation of child victim
HOLDING: Use of Rape Shield Act to bar evidence that victim had been molested 2 years prior to meeting D violated D's 6th Amend. confrontation right & denied him due process of law. D was charged with fondling & engaging in sexual intercourse with his mildly mentally retarded stepdaughter. D testified that he had touched victim but denied that he did so to gratify sexual desires, & he denied alleged acts of sexual intercourse altogether. In part, D maintained that victim was substituting D as perpetrator of incidents that had actually occurred earlier, because of her inability to fully comprehend time. D attempted to offer evidence that victim had reported sexual molestation to Lexington, Kentucky, police 2 years before meeting D, after physicians treating her for unrelated matter discovered that her vagina was enlarged. However, Tr. Ct. excluded this evidence. State offered testimony of victim's treating counselor that aspects of victim's behavior corroborated allegations of sexual abuse, & also offered medical evidence that D's physical condition was consistent with past vaginal penetration. D succeeded in proving that one of victim's learning disabilities was with time, but without critical information that victim had been molested by another individual at earlier time, this information appeared to go solely to victim's inability to state with certainty when alleged molestations by D had occurred. Very real risk existed that jury would rely upon corroboration of fact of abuse to infer trustworthiness of entire account. At minimum, due process includes opportunity to examine state's witnesses for purpose of challenging their testimony as well as right to put before jury evidence that might influence determination of guilt. Chambers v. Mississippi (1973), 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297. These rights are not absolute, but state-imposed restrictions may not be arbitrary or disproportionate to their purpose. Rock v. Arkansas (1987), 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37. See also Davis v. Alaska (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347. Ind.'s Rape Shield Act complies with dictates of confrontation & due process clauses only if it does not actually impinge upon cross-examination. Lagenour 376 N.E.2d 475. Proscribed evidence was vital to D's defense. Tr. Ct. violated D's rights of confrontation & due process, & Ct. App. cannot find from record that error was harmless. Held, convictions reversed. Ratliff, J., DISSENTS.

RELATED CASES: Stephens v. Miller, 989 F.2d 264 (7th Cir. 1993) (reversing Stephens, 544 N.E.2d 137 (Ind. 1990) & holding that D's statements during sexual intercourse regarding his belief about her prior sexual conduct were not introduced as evidence of victim's prior sexual conduct but rather to support D's defense that victim fabricated rape accusation because she was angry about the statements).

TITLE: Shaffer v. State
INDEX NO.: O.4.c.2.
CITE: (1/20/83), Ind., 443 N.E.2d 838
SUBJECT: Rape shield law - prior sexual conduct; offer to prove
HOLDING: D's request that 2 surprise witnesses be allowed to testify that prosecutrix had been seen hooking at infamous intersection in Gary was properly refused because substance of that testimony falls within proscription of rape shield statute. Here, D contends on appeal that rape shield statute (Ind. Code 35-1-32.5-1) violates equal protection, an argument found meritless in Cherry 414 N.E.2d 301. D also contends tendered testimony was erroneously excluded in that it was admissible under Section 2 of statute (inflammatory N.E.2d prejudicial nature does not outweigh probative value). Ct. finds D made no formal offer to prove (thus no basis for reversal; excluded testimony must appear in record). "An offer to prove must be certain & must definitely state the facts sought to be proved, & must show the materiality, competency & relevancy of the evidence offered." Tope 362 N.E.2d 137. Even assuming D's representation of witness's testimony constituted adequate offer to prove, Ct. finds testimony is prohibited by rape shield statute. Held, no error.

RELATED CASES: Whited, App., 645 N.E.2d 1138 (D waived rape shield exclusion issue because he failed to offer to prove excluded evidence at trial).

TITLE: State v. Walton
INDEX NO: O.4.c.2.
CITE: (8-26-99), Ind., 715 N.E.2d 824
SUBJECT: Rape Shield -prior false allegation exception
HOLDING: Common law exceptions to Rape Shield Rule permitting introduction of evidence of prior false accusations of rape survived adoption of Ind. Rules of Evidence. Exceptions provide that evidence of prior false accusations of rape are admissible if either: 1) complaining witness (CW) had admitted that prior accusation was false; or 2) her prior accusation was "demonstrably false." Stewart, 531 N.E.2d 1146. Evidence of prior false accusations of rape made by CW does not constitute "prior sexual conduct" for rape shield purposes. Rather, D seeks to prove for impeachment purposes that CW has previously made false accusations of rape. Viewed in this light, such evidence is more properly understood as verbal conduct, not sexual conduct. Little, App., 413 N.E.2d 639. To extent D offers evidence of prior false allegations of rape to impeach credibility of witness, its admission does not run afoul of Rape Shield Rule. Ind. Evidence Rule 608(b), which would otherwise prohibit evidence of specific acts of untruthfulness to impeach accusing witness's credibility, must yield to D's Sixth Amendment right of confrontation & right to present full defense.

In this case, Tr. Ct. did not abuse discretion in concluding that sufficient foundation was laid to justify admission of "demonstrably false" prior accusations of rape. Two witnesses testified that CW told them that she had been raped on two separate occasions involving two different individuals. This was adequate to support factual determination that accusations were in fact made. CW testified that rapes had not occurred, & further denied having ever made accusations. Tr. Cts.' discretion in determining credibility of this witness should be honored. Held, transfer granted, Ct. App.' opinion at 692 N.E.2d 496 vacated, & Tr. Ct.'s ruling on reserved question of law affirmed.

RELATED CASES: Hall, 36 N.E.3d 459 (Ind. 2015) (Tr. Ct. erred by denying D's motion to compel witness to answer questions regarding daughter's possible prior false accusation as it may have led to admissible evidence at trial); McCullough, 973 N.E.2d 62 (Ind. Ct. App 2012) (trial counsel was not ineffective for admitting into evidence of CW's prior accusation of molestation by D without admitting evidence demonstrating its falsity, i.e., CW's mother; the falsity of the accusation can be determined on its face); Candler, App., 837 N.E.2d 1110 (CW did not admit the falsity of the prior charges & the charges were not demonstrably false, where CW alleged that her stepfather inappropriately touched her & this made her feel uncomfortable); Fugett, App., 812 N.E.2d 846 (evidence of prior allegation consisted of CW's mother's testimony that CW accused a man of touching her breast, which was contradicted by other evidence. D failed to show that CW made a prior allegation, or that she disavowed a prior allegation, or that the allegation was demonstrably false); Williams, App., 779 N.E.2d 610 (no abuse of discretion in excluding testimony which led to only inference that CW's prior accusation of rape was false; unlike Walton, there was no evidence that CW had made contrary statements about whether or not sexual misconduct occurred); Graham, App., 736 N.E.2d 822 (notice-and-hearing

requirement of Ind. Evidence Rule 412(b) applies to common-law Rape Shield Rule exception allowing evidence of prior false rape allegations; here D's failure to file written notice at least 10 days prior to trial was fatal to his attempt to introduce evidence of prior false allegations).

TITLE: Steward v. State
INDEX NO.: O.4.c.2.
CITE: (1st Dist., 06-14-94), Ind. App., 636 N.E.2d 143
SUBJECT: D's right to exculpatory evidence - rape shield
HOLDING: Tr. Ct. erred in denying D right to present evidence that complaining witness (CW) accused 4 others of molesting her around same time as she accused D, because evidence went to rebutting inference of his guilt from expert testimony that CW's behavior was consistent with one who had been molested. At trial, State was allowed to admit "child sexual abuse syndrome" evidence through expert testimony (see, card at O.7.a.1). Psychologist testified as to common traits of those who have been sexually abused, & that CW's behavior was consistent with those traits, & evidence was corroborated by witnesses from institution where CW was referred due to behavioral problems. Tr. Ct. refused to let D present evidence of CW's allegations of molestation by others, however, because they did not fit into any of exceptions to Rape Shield Statute (RSS).

While rejecting D's argument on unconstitutionality of RSS on its face, Ct. noted need to consider constitutionality of statute as applied, Tague v. Richards (7th Cir., 1993), 3 F.3d 1133, & Saylor, App., 559 N.E.2d 332. RSS "complies with the dictates of the Confrontation & Due Process Clauses only if it does not actually impinge upon [the D's right to] cross-examination." Saylor at 335. Given facts of D's case, Ct. found his 6th Amend. right to confrontation was violated because he was denied full, adequate, & effective cross-exam.

Ct. found D's claim was even more compelling than those asserted in Saylor & Tague, because here child sexual abuse syndrome evidence not only tended to prove contact occurred, but that CW's behavior improved after she reported D molested her. As result of evidence, suggested inference was that improvement in CW's behavior was directly attributable to D's absence from her presence. Ct. therefore found this evidence opened door to D's introduction of exculpatory evidence that she had reported 4 other men had molested her at about same time. By excluding evidence of other molestations, jury was left with distinct impression that D caused CW's behavioral problems & that improvement in her behavior was due to reporting his abuse, when both could have been due to other alleged molestations & reports of them. State was allowed to take advantage of inculpatory conclusion from evidence, but D was prohibited from presenting possibly exculpatory conclusion. Ct. noted State could not use RSS as both shield & sword, & that rule cannot be applied "mechanistically to prohibit the defense from either offering its version of the facts or assuring through cross-examination that the trier of fact has a satisfactory basis for evaluating the truth of the witnesses' testimony.", *citing* Saylor, 559 N.E.2d at 335. Ct. concluded it was unconstitutional denial of D's Sixth Amend. right of cross-examination to exclude evidence of prior molestations & prohibit proof of other possible explanation for CW's behavior, which was still consistent with victim of sexual abuse. Held, conviction on this count reversed & remanded for new trial. **Note:** Decision summarily affirmed on transfer at 652 N.E.2d 490. For other issue, see, card at O.7.a.1.

RELATED CASES: Davis, App., 749 N.E.2d 552 (erroneous exclusion of evidence of CW's prior sexual conduct unfairly bolstered CW's testimony, inasmuch as inference arises that, because CW was accurate in stating that sexual contact had occurred, as disclosed by physical examination, she also must have been accurate in stating that D was perpetrator of charged offenses); Hook, App., 705 N.E.2d 219 (Ct. rejected D's argument that prosecutor's opening statement created false impression that CW's conduct

with D was new experience for her, & that this constituted waiver of RSS & opened door for D to offer evidence of CW's past sexual conduct).

TITLE: Tague v. State
INDEX NO.: O.4.c.2.
CITE: (6/16/89), Ind., 539 N.E.2d 480
SUBJECT: Rape shield - child molest; previous molestation by third-party
HOLDING: Tr. Ct. did not err in excluding evidence that victim had been molested several years earlier by her father. D was charged with child molest, deviate sexual conduct and/or sexual intercourse. Victim testified that on two difference occasions, D had gotten on top of her & put his penis between her legs, but she was unsure whether penetration was accomplished. On one of these occasions, D also forced victim to perform fellatio. Medical evidence showed that victim had tear in hymen, which had healed, & suffered from sexually transmitted disease. D sought to introduce evidence that victim's father had molested her several years earlier, but Tr. Ct. excluded this evidence under rape shield statute. Ind. S. Ct. finds that this evidence does not fit any exception to rape shield statute. Further, fact that victim's physical condition could have been caused by her father is not crucial, since it was not necessary for state to prove penetration. Ct. does not discuss inferences jury may have drawn from evidence re victim's physical condition. Held, conviction affirmed. **NOTE:** Although denying habeas corpus relief, 7th Cir. Ct. App., in Tague v. Richards (7th Cir., 1993), 3 F.3d 1133, found exclusion of this proffered evidence violated D's 6th Amend. right to confrontation.

TITLE: Turney v. State
INDEX NO.: O.4.c.2.
CITE: (12-13-01), Ind. App., 759 N.E.2d 671
SUBJECT: Rape Shield Statute concerns yield to Sixth Amendment rights
HOLDING: In child molesting prosecution, State committed Brady violation where it did not disclose complaining witness's (CW) prior sexual misconduct after introducing evidence of child sexual abuse accommodation syndrome, which made disclosure mandatory. D should have been made aware of CW's prior sexual misconduct under Brady because it could have been used for impeachment purposes & went to credibility of victim. State argued that even if information had been disclosed it would not have been admissible under Rape Shield Statute, Ind. Evidence Rule 412(a). Rape Shield Statute concerns must yield to Sixth Amendment right to cross-examination where it is posited that D was perpetrator & where it is apparent there could have been another possible source for acts of molestation. Steward v. State, 652 N.E.2d 490; Davis v. State, App., 749 N.E.2d 552. Therefore, D was entitled to impeach child sexual accommodation syndrome evidence through cross-examination that could have established another possible source for CW's emotional upset. Held, judgment reversed & remanded for new trial.

TITLE: Williams v. State
INDEX NO.: O.4.c.2.
CITE: (6-6-97), Ind., 681 N.E.2d 195
SUBJECT: Evidence of victim's prior conduct properly excluded
HOLDING: Tr. Ct. did not abuse discretion in excluding evidence of victim's prior drug use & sexual conduct. Indiana Evidence Rule 401 permits evidence relevant to broader range of facts, but does not change concept of relevance. Here, victim testified that she did not use drugs on day of incident. Jury had ample opportunity to assess credibility of her testimony, as defense counsel repeatedly challenged accuracy of her memory. Moreover, there was no showing that victim's consumption of drugs on prior occasions was of such degree that it substantially affected her current ability to perceive, remember, or testify.

Tr. Ct. also properly excluded testimony that on prior occasions victim had committed acts of prostitution in exchange for money or cocaine. None of exceptions to Indiana Evidence Rule 412's general prohibition of inquiry into victim's sexual history applied in this case. Rule does not permit D to base his defense of consent on victim's past sexual experiences with third persons. Exclusion of this evidence did not violate D's constitutional right to confrontation & to present witnesses. Held, transfer granted, Ct. App.' opinion at 669 N.E.2d 178 vacated, convictions affirmed.

TITLE: Wood v. State
INDEX NO.: O.4.c.2.
CITE: (4th Dist. 3/16/89), Ind. App., 534 N.E.2d 1146
SUBJECT: Rape shield statute - evidence someone other than D molested child victim
HOLDING: Tr. Ct. erred in excluding evidence that someone other than D molested child victim. D was charged with molesting child on Christmas Eve 1985 & sometime during April 1986. D moved for pre-trial ruling on admissibility of evidence that someone other than him committed acts charged. Tr. Ct. granted state's motion in limine barring evidence of past sexual conduct of child or witness other than accused, & any opinion or reputation evidence regarding such witnesses. At trial, D attempted several times to present exhibits & to elicit testimony on cross-examination indicating someone else committed molestation. Purpose of rape shield statute is to protect victims of sex crimes from general inquiry into past sexual conduct, Kelly 452 N.E.2d 907, & evidence of prior molestation by another person has been excluded. Baughman 528 N.E.2d 78; Parrish 515 N.E.2d 516. D argues that Tr. Ct.'s exclusion of evidence violated 6th Amend. right to confrontation. Ind. Cts. have held that rape shield statute does not violate confrontation right absent actual impingement on cross-examination. Here, evidence D sought to introduce fell squarely within exception to rape shield statute. It was clearly relevant to fact in issue, & probative value outweighed any prejudicial impact. D was prevented from fully, adequately, & effectively cross-examining several witnesses on material fact in issue, creating actual impingement on confrontation right. Held, reversed & remanded.

TITLE: Woodford v. State
INDEX NO.: O.4.c.2.
CITE: (2/11/86), Ind., 488 N.E.2d 1121
SUBJECT: Rape shield law (RSL) - does not violate right to confront
HOLDING: Tr. Ct. properly granted state's motion in limine excluding evidence pursuant to RSL. RSL does not violate right to confrontation absent showing of actual impingement on cross-examination (CX). Thomas 471 N.E.2d 677; Kelly 452 N.E.2d 907; Moore 393 N.E.2d 175; Lagenour 376 N.E.2d 475. Here, D wished to present evidence that victim was prostitute, had been promiscuous, that enticement existed & prior relationship with another person (to discredit victim's character). Tr. Ct. did allow CX re her past relationship with D. Defense did not suggest she was engaged in prostitution at time of offense. Ct. requires specific line of questioning reasonably suggest victim's behavior at time of offense was product of prior sexual conduct. Lagenour. Held, no error.

RELATED CASES: Thomas 471 N.E.2d 681 (Rape 40(3); where evidence clearly indicated victim had been raped (police found victim in car, nude, screaming & crying), prejudicial impact outweighed slight probative value of any evidence of consensual sexual activity with boyfriend earlier in day).

TITLE: Zawacki v. State
INDEX NO.: O.4.c.2.
CITE: (8-10-01), Ind. App., 753 N.E.2d 100
SUBJECT: Rape Shield Law - evidence admissible for impeachment purposes
HOLDING: In prosecution for sexual misconduct with minor, evidence of letters written by complaining witness (CW) to D's daughter suggesting that they form a lesbian relationship was improperly excluded by Tr. Ct. under Rape Shield Law. Ind. Evidence Rule 412; Ind. Code 35-37-4-4. D's theory was that CW had motive to lie about sexual misconduct allegations because CW had been denied permission by D & his wife to carry on a lesbian relationship with their daughter. Tr. Ct. excluded evidence under Rape Shield Law, finding that the evidence involved past sexual activity of CW which Rape Shield Law is designed to protect against. Little v. State, 650 N.E.2d 343 (Ind. Ct. App. 1995). Here, the evidence should have been admitted because what was offered did not concern any actual prior sexual activity or conduct on CW's part, rather it was intended to impeach CW's credibility by demonstrating bias, prejudice, or an ulterior motive. Error was not harmless because CW's credibility was central issue in case. Held, conviction reversed, remanded for new trial; Riley, J., dissenting.

RELATED CASES: Sallee, App., 777 N.E.2d 1204 (no error in excluding evidence under rape shield law, which D sought to introduce evidence to counteract State's assertion that victim was sexually naive & to attack her credibility; D made no claim that precluded evidence was exculpatory & D was able to vigorously attack CW's credibility).

O. EVIDENCE

O.4. Relevancy

O.4.c.3. D

TITLE: Bacher v. State
INDEX NO.: O.4.c.3.
CITE: (10-9-97), Ind., 686 N.E.2d 791
SUBJECT: Misconduct admissible to show motive - jealousy toward victim
HOLDING: Evidence of D shouting at & being physically restrained from witness was properly admitted, to show D's motive for killing his wife. Ind. R. Evid. 404(b) excludes evidence of misconduct where it is offered solely for purpose to show D possesses certain character traits & acts in conformity with those traits but does not exclude evidence that shows motive for crime. Overprotectiveness & jealously can show motive of crime. Haggenjos, 441 N.E.2d 430. Here, witness who was old friend of victim testified that D started shouting at him & needed to be restrained from him after D saw victim talking to witness at bar. Although D's actions may not have amounted to misconduct, they illustrated D's jealousy, which was probative of D's motive to kill his wife. Held, conviction affirmed, remanded for resentencing; Dickson & Boehm, JJ., dissenting on other grounds.

TITLE: Bayes v. State

INDEX NO.: O.4.c.3.

CITE: (11-27-02), Ind. App., 779 N.E.2d 77

SUBJECT: Possession of firearm by serious violent felon (SVF) - not fundamental error to refer to D's status as SVF; character evidence

HOLDING: Tr. Ct. did not commit fundamental error by referring to D as SVF in prosecution for offense of unlawful possession of firearm by SVF. D had been convicted of arson in 1982, which served as underlying conviction supporting current charge. During voir dire & closing, Tr. Ct. & State repeatedly referred to D's conviction for serious violent felony & status as violent, or SVF. D argued these references invited jury to infer he was of bad character, thereby depriving him of presumption of innocence. Ind. Code 35-47-4-5 states that SVF who knowingly or intentionally possesses firearm commits unlawful possession of firearm by SVF. As such, legal status of offender is essential element of crime, & act (possession) is illegal if performed by one occupying that status. Spearman, App., 744 N.E.2d 545.

Tr. Ct. can limit prejudicial effect of evidence of prior conviction by excluding evidence regarding underlying facts of prior felony & limiting prosecutorial references to them. Id. Here, underlying facts of D's prior conviction were not made known to jury, evidence of conviction was admitted on direct examination without objection, & D himself admitted to having been convicted of crime. Moreover, State's multiple references to D as SVF were accompanied by statements that State must prove both possession & prior felony conviction, which may or may not have sufficiently minimized clearly prejudicial effect of repeated references to D's status as SVF. Nevertheless, without timely objection to allow Tr. Ct. to assess prejudicial impact on jurors at time status references were made, Ct. was restrained to hold that prejudice did not amount to fundamental error. Ct. could not say that potential for impermissible inference that D was of bad character & as such possessed firearm was substantial & amounted to fundamental error. Held, judgment affirmed.

RELATED CASES: Ray, App., 846 N.E.2d 1064 (in unlawful possession of firearm by SVF prosecution, Tr. Ct. abused its discretion when it instructed jury that D had a prior robbery conviction; see full review at K.10).

TITLE: Bell v. State
INDEX NO.: O.4.c.3.
CITE: (3/25/2015), 29 N.E.3d 137 (Ind. Ct. App 2015)
SUBJECT: D's statement constituted bragging, not character evidence
HOLDING: Tr. Ct. did not err in admitting D's statement to police officer that he could "read" people because the statement was a boast, not inadmissible character evidence. D, Cody Semenick, and seventeen-year-old C.M. gathered in a hotel room to smoke marijuana and drink vodka. C.M. became so intoxicated she had trouble moving her legs, had a blank look on her face, and vomited and passed out several times. When Semenick left the room, D raped C.M. At trial, one of the key issues was whether D knew C.M. was so incapacitated that she was unaware that sexual intercourse was occurring. To establish D's awareness of C.M.'s mental condition, an officer testified that D told him he "could read a person by the way they acted, by the way they looked, by their actions." This testimony was not character evidence because it was not "a generalized description of [D's] disposition." See Malinski v. State, 794 N.E.2d 1071, 1072 (Ind. 2003). Rather, it was a form of bragging, a statement regarding D's ability, not his character. Held, judgment affirmed.

TITLE: Camm v. State
INDEX NO.: O.4.c.3.
CITE: (1st Dist., 8-10-04), Ind. App., 812 N.E.2d 1127
SUBJECT: Character evidence - D's adultery as evidence of motive to kill spouse; reversible error
HOLDING: In murder prosecution, Tr. Ct. committed reversible error by allowing State to present extensive evidence of extramarital sexual activity by D. D was convicted of murdering his wife & two children. In State's case-in-chief, it presented testimony of twelve women who had had various types of relationships with D from 1991 to 1997, ranging from prolonged sexual relationships to overt & implied sexual advances. Admission of this evidence was an attack on D's character, not admissible for any proper purpose under Indiana Evidence Rule 404(b), & unfairly prejudiced him.

Although motive is always relevant when proving a crime, this does not mean State can introduce questionable character evidence simply by labeling it evidence of "motive." If State's claim of relevance to motive is too strained & remote to be reasonable, then extrinsic act evidence is inadmissible. Bassett v. State, 795 N.E.2d 1050 (Ind. 2003). *Citing* Henson v. State, 530 N.E.2d 768 (Ind. Ct. App 1988) & cases from other jurisdictions, Ct. held that evidence of a D's marital infidelity is not automatically admissible as proof of motive in a trial for murder or attempted murder of the D's spouse. Instead, to be admissible as proof of motive, evidence of a D's extramarital affairs should be accompanied by evidence that such activities had precipitated violence or threats between the D & victim in the past, or that D was involved in an extramarital relationship at time of completed or contemplated homicide. Admissibility of such evidence may be further constrained by concerns of chronological remoteness, insufficient proof of extrinsic act, or general concern that unfair prejudicial effect of certain evidence might substantially outweigh its probative value in a particular case.

Here, although there was sufficient proof of D's philandering, & at least some of his activities took place relatively near in time to wife's murder, there was no evidence of a violent or hostile relationship between D & his wife, nor any evidence that he ever threatened her with harm. There was no evidence that D was involved with an extramarital relationship at time of wife's murder. State virtually conceded on appeal that this evidence was introduced to establish that D was a person of poor character who was more likely to commit murder because of that character, which is precisely what Evidence Rule 404(b) prohibits. State's rebuttal testimony from jail guard who testified she was propositioned by D was also improper, & D did not open door to this inadmissible evidence on cross examination. Tr. Ct.'s admonishments & limiting instruction in this case did not cure error in admission of evidence of D's adultery. Finally, error was not harmless, as State's portrayal of D as an immoral, self-centered individual of poor character because of his philandering was central to its case, & evidence was far from overwhelming. Held, convictions reversed & remanded.

RELATED CASES: Allen, 925 N.E.2d 469 (Ind. Ct. App 2010) (not only did the State present evidence that the affair was on-going at the time of D's wife and child's deaths, but also that D would refer to his wife as "monster" and his three-month-old child as a "hollering, greedy motherf***er"; D also told his friend that he was "going to kill somebody close to [him]" and that "he wanted to be a paid assassin"; the affair was relevant to motive and the probative value of the evidence substantially outweighed its prejudicial effect).

TITLE: Clark v. State
INDEX NO.: O.4.c.3.
CITE: (10-15-09), Ind., 915 N.E.2d 126 (Ind. Ct. App 2009)
SUBJECT: Prior misconduct evidence - D's MySpace postings
HOLDING: In murder prosecution, Tr. Ct. did not err in admitting evidence that D boasted of his lawlessness on the website MySpace.com, as well as prosecutor's reference to the Hell's Angels' code about hurting babies. D was charged with beating to death a two-year-old who was in his care. He testified at trial that his conduct was reckless, but that he had no intention to kill the victim. To rebut that testimony, prosecutor introduced evidence of an entry D made on his MySpace page describing himself: "Society labels me as an outlaw and criminal....To those people I say, if I can do it and get away. Bull S***. And with all my obstacles, why the f*** can't you." On cross-examination, the prosecutor also asked Clark if he was familiar with the Hell's Angels and their code about hurting babies.

Indiana Rule of Evidence 404(b) excludes evidence of crimes and other bad acts when the evidence is introduced to prove the "forbidden inference" of demonstrating the D's propensity to commit the charged crime. Camm v. State, 908 N.E.2d 215, 223 (Ind. 2009). However, otherwise inadmissible evidence may be admitted where the D opens the door to questioning on that evidence.

Court rejected D's argument that the MySpace statement was inadmissible character evidence, concluding that the MySpace entry was admissible because it contained statements only about himself and there was no reference to prior criminal acts. As to the prosecutor's reference to the Hell's Angels code about hurting babies, Court held that Clark's response that he was familiar with the group and his willingness to talk about the group "led rather naturally to the State's follow-up question about the gang's code on hurting children." Even after the Tr. Ct. sustained an objection by defense counsel, D insisted that he wanted to answer the question. Thus, Court found no error in the admission of D's testimony about the Hell's Angels. Held, conviction affirmed.

TITLE: Maslin v. State
INDEX NO.: O.4.c.3.
CITE: (2nd Dist., 11-15-99), Ind. App., 718 N.E.2d 1230
SUBJECT: Prior misconduct evidence admissible - rebuttal of D's testimony
HOLDING: In rape prosecution, evidence of D's uncharged misconduct with State's rebuttal witness was admissible under Ind.Evidence Rule 404(a). During D's testimony, he stated that he believed complaining witness (CW) had consented to have sex with him, & that he "would never do something like [rape] to hurt my mom, my dad." On cross examination, D stated he would never force a woman to do anything against her will & unequivocally denied every detail of uncharged incident with rebuttal witness. If accused in criminal case offers evidence of pertinent trait of his own character pursuant to Ind.Evidence Rule 404(a)(1), State may offer evidence in rebuttal. Rebuttal evidence is limited to that which tends to explain, contradict or disprove evidence offered by adverse party. Schwestak., 674 N.E.2d 962.

In this case, D's defense & his representation that he would never commit rape opened door to State to present evidence in rebuttal. Rebuttal witness's testimony that D sexually assaulted her two years earlier tends to rebut D's claim that he would not commit rape, & his denial of incident during his cross examination made it proper subject for impeachment. Because of high probative value of testimony for D's character & truthfulness, prejudicial effect did not substantially outweigh probative value under I.R.E. 403. Held, no error.

RELATED CASES: Payne, App., 854 N.E.2d 7 (mere remark in D's opening statement that "this young lady [is] gullible, easily misled, [&] very trusting of all individuals," without more, is insufficient for State to introduce character evidence to the contrary as there is no evidence yet "to rebut.").

TITLE: People v. Robbie
INDEX NO.: O.4.c.3.
CITE: 92 Cal.App. 4th 1075 (Cal.Ct. App. 2001)
SUBJECT: Expert Testimony -- Rapist Profile Evidence
HOLDING: Testimony of expert witness that D's polite and solicitous behavior fit profile of certain type of sex offender was erroneously admitted. State argues that testimony was necessary and appropriate to disabuse jury of misconception that rapists behave brutally. Court reasons that expert could have testified that rapists behave in various ways, thus properly refuting idea that all rapists act with brutality. Here, however, expert testified that some sex offenders behave exactly as evidence indicated D did. This did not simply assist the jury in evaluating the evidence, but rather suggested to jury that D was guilty because he fit the profile. Held, conviction reversed.

TITLE: Schwestak v. State
INDEX NO.: O.4.c.3.
CITE: (12-23-96), Ind., 674 N.E.2d 962
SUBJECT: Character evidence - D's reputation for violence when drinking
HOLDING: Tr. Ct. did not err in permitting State to introduce evidence of D's reputation for violence when drinking, where D had previously presented evidence as to his good character. Evidence of D's character is not generally admissible, except when offered by prosecution to rebut character evidence first offered by defense. Indiana Evidence Rule 404(a)(1). Rebuttal evidence is limited to that which tends to explain, contradict or disprove evidence offered by adverse party. Isaacs v. State, 659 N.E.2d 1036 (Ind. 1995). Evidence of person's character may be offered by testimony of reputation. Indiana Evid. R. 405(a). Here, D first offered testimony that he was hard-working, decent & peaceful individual. State then questioned defense witness on cross-examination regarding D's reputation for violent behavior while drinking. Tr. Ct. admitted reputation testimony over D's objection. Ct. found that State was allowed to rebut D's character evidence with contrary testimony as to D's reputation. Held, no error.

TITLE: Smith v. State
INDEX NO.: O.4.c.3.
CITE: (02-03-20), Ind. Ct. App., 140 N.E.3d 363
SUBJECT: Evidence of rape victim's post-assault sexual history properly excluded
HOLDING: The subject matter of post-assault sexual history must be introduced by the State at trial for the exception to the Rape Shield law permitting admissibility to apply. Moreover, while a defendant has a constitutional right to present a defense, that defense must still comply with the Indiana Rules of Evidence. Marley v. State, 747 N.E.2d 1123, 1132 (Ind. 2001). Here, complaining witness (C.W.) underwent a sexual assault examination which revealed injuries consistent with strangulation by ligature and vaginal digital penetration. The Post-Assault Sexual History portion of the medical records contained information that C.W. had engaged in numerous consensual sexual acts with her current boyfriend. At a pretrial hearing, C.W. denied having post-assault sexual contact with her boyfriend and denied reporting she had to the nurse. The nurse testified that she doubted the accuracy of the printout of that portion of her examination because it had been taken during the transition to electronic charting and that at times printouts of medical records did not match the data that had been input on the electronic chart, including the appearance of data in the wrong location of the printout. A jury convicted Defendant of Level 1 felony rape, criminal confinement, strangulation, and domestic battery.

The Court of Appeals held that because the State did not introduce any evidence of the injury to C.W.'s vagina at trial, there was nothing for Defendant to rebut with the Post-Assault Sexual History evidence and the exception to the Rape Shield, Ind. Evidence Rule 412 does not apply. It further held that Defendant's constitutional right to present a defense was not unfairly curtailed because although evidence of C.W.'s post-assault sexual contact with her boyfriend may have supported Defendant's defense theory, its probative value was greatly outweighed by the chance C.W.'s sexuality would be put on trial in precisely the way Rule 412 is meant to prohibit. The Court also declined to reverse the exclusion of the medical records on the basis they were so unreliable as to be inadmissible, noting that an appellate court will not reverse a trial court's evidentiary ruling if it is sustainable on any ground.

The trial court granted Defendant's motion in limine preventing C.W. from testifying about a protective order she had previously obtained against him. During her direct examination by the State, C.W. mentioned the order and Defendant moved for a mistrial, declining the court's offer to strike the testimony or admonish the jury as insufficient to cure the error. The Court of Appeals clarified that waiver of a mistrial claim occurs when there was neither a request for admonishment nor a motion for mistrial and where a defendant has moved for mistrial, the claim is not waived. However, reference to the protective order probably had little persuasive effect on the jury and there was no abuse of discretion when the trial court denied Defendant's motion for mistrial.

TITLE: State v. Perkins
INDEX NO.: O.4.c.3.
CITE: (3d Dist. 1/27/83), Ind. App., 444 N.E.2d 878
SUBJECT: Character evidence - D; opinion on truthfulness
HOLDING: Tr. Ct. erred in admitting testimony of psychiatrist that it was his "strong impression" that D was telling the truth & that deception of any significance was outside the D's capability. Here, the state appeals a reserved question of law following D's acquittal of robbery. In finding that the Tr. Ct. erred, the Ct. points out that once put in issue, a D may introduce character evidence to show general reputation for truth & veracity, but neither evidence of specific acts nor an individual's opinion based on his/her own experience is admissible. Held, state's appeal sustained; judgment affirmed.

RELATED CASES: Weaver, App., 627 N.E.2d 1311, *sum. aff'd*, 643 N.E.2d 342 (Testimony that D had no moral values, saw nothing wrong with drinking & driving, did not think finishing school was important, that he & victim were brought up with different morals & values, & that he did not think school was first priority, were not improperly admitted as "bad character evidence" because evidence was relevant & admissible to demonstrate conflicts between D & victim, & to show motive to kill victim. In light of D's own testimony & fact he brutally beat victim, evidence was not unduly prejudicial & could not constitute reversible error).

O. EVIDENCE

O.4. Relevancy

O.4.d. Other crimes/acts (IRE 404(b))

TITLE: Abdul-Musawwir v. State
INDEX NO.: O.4.d.
CITE: (3rd Dist., 12-13-96), Ind. App., 674 N.E.2d 972
SUBJECT: Admission of 404(b) evidence absent notice - waiver of error
HOLDING: Right to receive notice of State's intent to utilize Ind. Evidence Rule 404(b) evidence is only required if D properly requests such evidence. United States v. Barnes, 49 F.3d 1144 (6th Cir. 1995). If D does not request notice or if request is defective, then evidence of prior misconduct is admissible absent notice. United States v. Tuesta-Toro, 29 F.3d 771 (1st Cir. 1994). D can waive any error in admission of 404(b) evidence absent notice if he fails to object to admission of evidence at trial. Because D did not object at trial to introduction of evidence of prior argument & physical altercation with his girlfriend, he preserved no error for appeal. Held, conviction affirmed.

TITLE: Buchanan v. State
INDEX NO.: O.4.d.
CITE: (5-10-02), Ind., 767 N.E.2d 967
SUBJECT: Erroneous admission of irrelevant evidence - harmless error
HOLDING: In Buchanan v. State, 742 N.E.2d 1018 (Ind. Ct. App 2001), Ct. App. reversed D's child molesting conviction because Tr. Ct. erroneously admitted pornographic pictures & drawings found in D's possession. Drawings & photographs depicted naked & semi-clothed little girls & were improperly used to prove D's character. On transfer, S. Ct. concluded that admission of evidence, though erroneous, did not require reversal in light of substantial other evidence supporting jury's verdict. Other evidence available to jury for consideration included victim's testimony, statements of five adults that victim told them essentially same story, & D's statements to FBI agents that were consistent with victim's testimony. Held, transfer granted, Ct. App.' opinion vacated, conviction & fifty-year sentence affirmed.

RELATED CASES: Pierce, 29 N.E.3d 1258 (Ind. Ct. App. 2015) (no error in admitting evidence of pornography and pornographic domain names found on D's computer, which was not offered to prove D's character but to support young victims' testimony that D exposed them to pornography).

TITLE: Burks v. State
INDEX NO.: O.4.d.
CITE: (3rd Dist., 12-06-05), Ind. App., 838 N.E.2d 510
SUBJECT: Prior misconduct evidence - juror questions; harmless error
HOLDING: In attempted murder prosecution, Tr. Ct. did not abuse its discretion by failing to grant a mistrial based upon testimony that D had shot someone in an incident unrelated to offenses for which he was charged. Specifically, D argued that Tr. Ct. erroneously allowed a jury question directed to matters he had successfully sought to have excluded through a motion in limine. Ct. held that questions propounded by jurors pursuant to Jury Rule 20 are entitled to no less scrutiny under Indiana Rules of Evidence than those propounded by parties. Here, after one of victims testified, two jurors asked whether victim knew "the reason that [D & Co-D] would want to shoot you." D's objection to jury question, the parties' resulting discussion, & Tr. Ct.'s ruling all indicated that potentially prejudicial evidence to be balanced for relevance & harmful effect was expected to revolve around issue of illicit drug activity. Victim did testify as to D's involvement in illicit drug trade. Unexpectedly, however, victim also testified regarding D's uncharged act of shooting another person. Tr. Ct.'s balancing analysis of Jury Rule 20 & Evidence Rules 403 & 404(b) was not faulty based upon wrong supposition regarding potentially damaging evidence. As to D's motion for mistrial, Ct. concluded that when brief reference to other shooting is viewed in light of overwhelming evidence of D's guilt in this case, its admission into evidence can safely be relegated to status of harmless error. Held, judgment affirmed.

RELATED CASES: Owens, 937 N.E. 2d 880 (Ind. Ct. App. 2010) (although isolated testimony of victim of child molesting that D abused her and her mother violated the in limine order, the statement was isolated, vague and brief and was not used to show that D acted in conformity therewith).

TITLE: Commonwealth v. Morgan
INDEX NO.: O.4.d.
CITE: 559 Pa. 248, 739 A.2d 1033 (Pa. 1999)
SUBJECT: Character Witnesses May Not Be Asked About Unproved Crimes Alleged Against D
HOLDING: Pennsylvania Supreme Court holds that defense character witnesses may not be cross-examined about their knowledge of unproved allegations of specific instances of misconduct by the D. Here, prior to D's trial for molesting a young girl, state served notice that it had two witnesses prepared to testify in rebuttal that the D had sexually molested them twenty years ago. Over the D's objection, the Tr. Ct. ruled that if the D called witnesses to testify to his reputation for good moral character and chastity, they could be asked whether they were aware that "there are accusations in the community" that the D had previously committed acts similar to those charged. State pointed to line of cases holding that, while state cannot rebut evidence of D's good character with evidence of specific acts of misconduct, it can probe a witness' knowledge of such acts "to test the accuracy of his testimony and the standard by which he measures reputation." Majority here holds that there can be no meaningful distinction between these tactics in practice. "Asking character witnesses whether or not they have 'heard' allegations of a D's prior bad acts is akin to introducing extrinsic evidence of a D's specific acts of misconduct. It merely appears to be a way for the prosecutor to get in through the back door that which the law precludes him or her from getting in through the front." See also Wigmore on Evidence, Vol. III, Sec. 988, pp. 920-21.

TITLE: Cowan v. State
INDEX NO.: O.4.d.
CITE: (4th Dist., 3-5-03), Ind. App., 783 N.E.2d 1270
SUBJECT: Admission of uncharged misconduct - no error
HOLDING: In receiving stolen property prosecution, Tr. Ct. did not err in admitting evidence of D's drug usage and uncharged crimes. Evidence at trial showed that D suggested to two girls that they use stolen checks or credit cards to obtain various merchandise for him in exchange for drugs. Charged incident involved D and one of girls purchasing shoes using a forged check. Evidence of other acts as well as drug usage served as basis for everything that followed charged incident & was necessary to explain and understand incident. Drug usage and other uncharged misconduct were inextricably bound up with forgery spree that culminated in theft of shoes. Further, D's defense at trial was that the two girls had simply concocted his involvement in their forgery spree after they were apprehended in order to obtain favorable plea agreement. Therefore, it is apparent that D actually emphasized evidence and, as such, failed to show that evidence was unduly prejudicial. Held, judgment affirmed.

RELATED CASES: Kyle, 54 N.E.3d 439 (Ind. Ct. App. 2016) (trial court did not run afoul Evidence Rule 404(b) in admitting audiotape of phone conversations between D and mother, where D pressured mother to encourage her child to recant his allegation that D molested him, because the conversation was inseparable from D's crime; mother's testimony that she was convicted of assisting a criminal for pressuring her son to change his statement was admissible for the same reason); Swallow, 19 N.E.3d 396 (Ind. Ct. App. 2014) (D's recorded statement that he was a drug dealer was inextricably intertwined with his attempt to mislead police about the charged murder); Anderson, 15 N.E.3d 147 (evidence of D's monitoring device showing he was not at home on June 4 leading up to D's June 5 arrest was not error because it was part of one continuous crime of escape); Hape, App., 903 N.E.2d 977 (Tr. Ct. did not abuse its discretion in excluding videotape of police chasing and shooting at D while he fled for which he was charged with resisting law enforcement; videotape was irrelevant); Samaniego-Hernandez, App., 839 N.E.2d 798 (Tr. Ct. properly admitted evidence of D's involvement in controlled buy that occurred at his house one day prior to execution of resulting search warrant where D intentionally fostered impression that he knew nothing about cocaine found in his house); Holden, App., 815 N.E.2d 1049 (even if evidence of subsequent robbery was not intrinsic to charged robberies, admission of evidence was harmless).

TITLE: Crafton v. State
INDEX NO.: O.4.d.
CITE: (1st Dist., 2-4-05), Ind. App., 821 N.E.2d 907
SUBJECT: D "opened door" to 404(b) evidence -- juror question
HOLDING: D “opened the door” to other bad act evidence after not objecting to a juror question & answering it. After D concluded his testimony in his trial on intimidation & battery involving a domestic dispute, a jury submitted a written question as to whether any other previous domestic disputes had occurred with this family. D did not object to the reading of the question & answered that an individual involved in the current altercation had “sugared” his gas tanks after they “had words” over a family member's treatment. The State then sought permission to enter evidence of a past incident where D allegedly tried to push the one he had words with out of a moving vehicle while driving drunk. D objected, arguing that it was a prior bad act & its prejudice outweighed its probative value. The Court agreed with the Tr. Ct. that D opened the door to the testimony. Although prior bad act evidence is generally not admissible under Ind. Evid. R. 404(b), otherwise inadmissible evidence may become admissible where a D “opens the door” to questioning on that evidence. As noted in Gilliam v. State, 383 N.E.2d 297 (Ind.1978), the evidence opening the door must leave the trier of fact with a false or misleading impression of the facts related. That was the case here as the jury would have been left with the false impression that the only other instance of a domestic dispute between him & his family was when he was the victim. D waived his argument that the Tr. Ct. erred by admitting new evidence because Indiana Jury Rule 20 does not provide an evidentiary procedure to follow after submission of a juror question as it was not previously addressed to the Tr. Ct. Held, judgment affirmed.

TITLE: Day v. State
INDEX NO.: O.4.d.
CITE: (5th Dist., 9-9-96), Ind. App., 670 N.E.2d 898
SUBJECT: Failure to give limiting instruction on prior misconduct evidence - no error
HOLDING: Because D failed to tender correct instruction on manner in which jury should consider his prior crimes & alleged prior misconduct, D waived issue for appellate review. Instruction suggested that jury could consider evidence of D's extrinsic alleged prior misconduct evidence for purpose of evaluating intent or motive of witnesses who testified concerning those offenses. Ct. noted that credibility instructions specifically directed to particular witnesses invade province of jury & are erroneous. Terrell v. State, App., 507 N.E.2d 633. Further, D may not complain about Tr. Ct.'s failure to instruct jury on particular subject unless D tenders appropriate instruction that was refused. Hinkle v. State, App., 569 N.E.2d 349. Thus, Tr. Ct. did not err in failing to give limiting instruction sua sponte on prior misconduct evidence. Held, no error.

TITLE: Dixon v. State
INDEX NO.: O.4.d.
CITE: (1st. Dist.; 7-14-99), Ind. App., 712 N.E.2d 1086
SUBJECT: Prior bad acts - notice of use by State
HOLDING: Despite State's vague notice of its intent to use 404(b) evidence, Tr. Ct. properly admitted evidence of D's prior drug transactions because D was not unfairly surprised by use of 404(b) evidence at trial. Before 404(b) evidence may be admitted, upon request by accused, prosecution shall provide reasonable notice in advance of trial, or during trial if Ct. excuses pre- trial notice on good cause shown, of general nature of any such evidence it intends to introduce at trial. Ind. R. Evid. 404(b). Purpose of notice provision is to reduce surprise & promote early resolution of questions of admissibility. Prosecution must characterize conduct to sufficient degree to apprise D of its general nature. Prosecution also has continuing obligation to disclose "other crimes" evidence that it discovers after it has initially either provided or denied its intent to use such information. U.S. v. Barnes, 49 F.3d 1144 (6th Cir. 1995). Circumstances of particular case should govern whether advance notice provided by State to defense counsel is reasonable.

Here, D requested State to provide him with any evidence which would fall under Rule 404(b), & State responded by indicating that it would utilize testimony of "[c]onfidential Informant 900 . . ." Later, in interview, informant told defense counsel that D had sold her cocaine on prior occasions. Although State had continuing duty to disclose its intent to use 404(b) evidence, it became evident at interview that confidential informant's testimony about prior drug transactions would be used at trial, & thus any notice under 404(b) would have been redundant. In addition, because D asserted defense of entrapment to dealing cocaine charge, D placed his character in issue &, thus, could not claim that he was unfairly surprised when evidence of prior cocaine deal was admitted. Therefore, D was not prejudiced by lack of specific notice of State's intent to use 404(b) evidence because D asserted entrapment & interviewed confidential informant. Held, judgment affirmed; Rucker, J., concurring on basis that majority should first resolve whether State gave sufficient notice of 404(b) evidence before deciding whether evidence was admissible under 404(b).

Note: In dicta, Ct. noted Sixth Circuit case which held that when D puts his or her character in issue by asserting defense such as entrapment, prosecution can get around notice requirement of 404(b) by introducing evidence of prior bad acts under 404(a)(1). However, this logic is flawed. Although Ind. R. Evid. 405(a) permits, on cross examination, inquiries into relevant specific instances of conduct to prove character of accused, 405(a) still requires prosecution, upon reasonable pre-trial request by accused, to provide accused with any relevant specific instances of conduct to be used in cross-examination. Thus, when requesting notice of State's intent to use 404(b) evidence, also request notice of state's intent to use evidence under 404(a) & 405(a). In addition, Judge Rucker's concurrence which is based on law that when prosecution fails to give proper notice, 404(b) evidence is inadmissible is directly contrary with majority's determination that 404(b) evidence was admissible because D was not prejudiced by lack of notice.

RELATED CASES: Burgett, App., 758 N.E.2d 571 (Evidence of prior bad acts is properly admissible despite State's late notice of intent to use such evidence where Defense counsel was well aware of evidence & its likelihood of being presented at trial).

TITLE: Douglas v. State
INDEX NO.: O.4.d.
CITE: (2nd Dist., 4-25-01), Ind. App., 746 N.E.2d 424
SUBJECT: D's statements about other cocaine dealings admissible
HOLDING: Tr. Ct. did not abuse its discretion by admitting police officer's testimony with respect to D's statements to him following arrest. After receiving his Miranda rights, D informed officer that he understood his rights & that he wished to talk to officer. Officer explained to D that he was being charged with dealing cocaine for drug deal that took place one month prior to his arrest. D then informed officer that he only sold small amounts of cocaine, enough to pay his bills & take care of his family. Ct. held that State did not introduce officer's testimony about D's statements about other cocaine dealings to show that D acted in conformity therewith, as prohibited by Indiana Evid. R. 404(b), but rather, it offered testimony to show D's intent & motive for dealing in cocaine on present occasion. This was not evidence of other crimes, but rather, D's response to officer's questioning with respect to present offense. Held, no error.

TITLE: Escobedo v. State
INDEX NO.: O.4.d.
CITE: (4/10/2013), 987 N.E.2d 103 (Ind. Ct. App. 2013), *summ. aff'd*, 989 N.E.2d 1257
SUBJECT: D opened door to evidence of prior injuries
HOLDING In Class A felony battery prosecution, Tr. Ct. did not abuse its discretion in admitting rebuttal testimony from orthopedist and DCS caseworker regarding injuries victim suffered in 2007. D's testimony during direct examination that he lied to the hospital staff about victim's injuries because DCS had wrongfully removed victim from his home left the jury with a false impression that DCS did not substantiate abuse. Thus, his testimony opened the door to State's introduction of evidence to rebut this false impression. Court also found that, despite D's lack of criminal history, his maximum 53-year sentence was not inappropriate in light of the nature of the offense. Held, judgment affirmed.

TITLE: Garland v. State
INDEX NO.: O.4.d.
CITE: (5-14-03), Ind., 788 N.E.2d 425
SUBJECT: Evidence Rule 404(b) applies to prior bad acts of non-parties
HOLDING: Admissibility of evidence about prior bad acts by persons other than Ds is subject to the requirements of Indiana Evidence Rule 404(b). Thus, when a D has little or no direct evidence that a third person committed the charged offense, the D may offer evidence about that person's prior bad acts as proof that the person acted in conformity with his demonstrated character by committing the instant crime only when the exceptions of Rule 404(b) apply. Text of Rule 404(b) is not limited to a D but applies to "a person." Rule 404(b) acts as appropriate restraint on admissibility of evidence about events or acts that are extraneous to those for which a D is on trial.

Here, in murder/conspiracy prosecution, Tr. Ct. did not err in excluding testimony of person whom D thought would rebut State's theories about accomplice liability & motive. Witness would have testified that Co-D offered to obtain illegal a driver's license for him in exchange for $1,200. After receiving payment, Co-D did not produce license & threatened to "put a bullet in [witness's] head" when witness asked for his money back. In instant case, D wanted to present evidence that Co-D told victim & D he could erase any record of son's conviction in exchange for $1,200. D claimed that when she & victim confronted Co-D about returning money, Co-D accused them of trying to set him up & shot victim in retaliation. D thus wanted to use Co-D's prior bad act to rebut State's accomplice liability theory that D acted in concert with Co-D.

Ct. held that prior incident was not admissible to prove identity because crimes were not even the same, & fact that there were two threats does not make killing in this case a "signature crime." As for motive, Ct. noted that evidence that witness in prior incident had asked Co-D for his money back would hardly give Co-D a motive to kill victim in this case. Held, judgment affirmed.

RELATED CASES: Ramirez, 174 N.E.3d 181 (Ind. 2021) (no error in excluding evidence of mother's prior bad acts involving her children — specifically, the murder victim's buckle fracture suffered a year before her death which the trial court deemed too remote; D did not show that it was evidence of a "strikingly similar" crime or was caused by mother specifically, as required by Garland); Newland, 126 N.E.3d 928 (Ind. Ct. App. 2019) (Tr. Ct. properly prevented D from further cross-examining witness on details of his prior theft conviction for the sole purpose of creating the "forbidden inference," i.e., prior wrongful conduct in similar circumstances suggesting present guilt); Britt, 937 N.E.2d 914 (Ind. Ct. App. 2010) (tr. ct. did not abuse its discretion by excluding witness's prior robbery conviction where D intended to use it to prove witness committed the crime, not D, rather than for impeachment purposes); Camm, 908 N.E.2d 215 (Ind. 2009) (third party's prior attacks of women to steal their shoes motivated by his foot or shoe fetish were not admissible to prove he committed murders; the murders were not strikingly similar to the prior crimes and there was no evidence connecting the murders to the third party's foot or shoe fetish beyond the wife's shoes being off and her feet being bruised); Wells, 904 N.E.2d 265 (Ind. Ct. App 20090 (witness's testimony that victim had forced a sexual encounter with him from which he could only escape by threatening victim with a deadly weapon did not fall under an exception to Rule 404(b), in part, because it was not strikingly similar to the encounter between D and victim who were having a consensual, even if deviant, relationship); Kien, App., 866 N.E.2d 377 (trial counsel was not ineffective for failing to investigate & present evidence of girlfriend's vindictive behavior and that CW's half-brother could have molested her); Bryant, App., 802 N.E.2d 486 (no error in excluding evidence of D's father's

battery of murder victim that occurred five years before murder); Swann, App., 789 N.E.2d 1020 (Tr. Ct. properly excluded evidence concerning false confession D gave to police in prior, unrelated murder investigation).

TITLE: Gillespie v. State
INDEX NO.: O.4.d.
CITE: (4th Dist., 08-19-05), Ind. App., 832 N.E.2d 1112
SUBJECT: Erroneous admission of prior misconduct evidence
HOLDING: Ct. reversed D's aggravated battery & criminal recklessness convictions based on erroneous admission of bad act evidence under Ind. Evid. Rule 404(b). Facts of case lent itself to a strong self-defense argument. Tr. Ct. allowed evidence of alcohol & marijuana use hours before altercation, testimony regarding the alleged victim's accusing D of breaking into his father's home, testimony regarding D's wanting to fight another individual, & testimony regarding a statement by D earlier in the evening that he would cut his girlfriend's step-father if he were around. Despite State's assertions to the contrary, Ct. found that issue was properly preserved at trial. State sought to admit evidence to show D's state of mind at the time of the fight, but Ct. determined the evidence was irrelevant to whether D acted in self-defense. The only statutory element of self-defense to which D's state of mind might be relevant is to whether he is being subjected to imminent unlawful force & has reasonable belief that force is necessary to prevent serious injury to himself. The evidence the State offered involving other people not involved in the altercation & allegations of drug use earlier in the evening could not be relevant to D's state of mind at the time of the altercation & "under the then existing circumstances." Ct. *cited* language from Thompson v. State, 690 N.E.2d 224 (Ind.1997) that the State may not "flood the Ct. room" with unnecessary & prejudicial details of prior criminal conduct merely because some of that evidence is relevant & admissible & found such flooding occurred in this case. Held, judgment reversed.

TITLE: Gleason v. State
INDEX NO.: O.4.d.
CITE: 57 P.3d 332 (Wyo. 2002)
SUBJECT: Prior Bad Acts -- Basis of Admissibility Finding
HOLDING: A trial judge's basis for admitting prior bad acts evidence pursuant to Ev. R. 404(b) must be explicit. Mere recitation of all possible theories which can justify admission under 404(b), together with unelaborated conclusion that probative value outweighs its potential for unfair prejudice will no longer be sufficient in Wyoming. To suffice, record must identify (1) the specific purpose for which the evidence is admitted, (2) the relevance and probative value of the evidence, and (3) the factors considered in balancing probative value against potential for unfair prejudice.

TITLE: Hardin v. State
INDEX NO.: O.4.d.
CITE: (03-29-93), Ind., 611 N.E.2d 123
SUBJECT: Other misconduct evidence - common scheme or plan, & identity
HOLDING: Evidence that one month after charged drug dealing, D was attempted middleman in another transaction, & that another person had bought cocaine from D number of times prior to charged offense date, was inadmissible uncharged misconduct evidence; granting transfer & reversing Ct. App. decision at 600 N.E.2d 947. At D's trial in absentia, officer testified that one month after date of charged offense, D had arranged cocaine sale between two others, but that deal never took place. Testimony was admitted to show D's identity & to prove common scheme or plan. Tr. Ct. also allowed another witness' testimony that she had bought cocaine from D number of times before date of charged offense. This evidence was admitted to prove D's identity because he did not appear for trial. D objected to admission of evidence, as well as to three instructions relating to evidence. One instruction told jury that they were to consider evidence solely on issue of D's motive to obtain money & predisposition to commit charged offense. Another instruction said evidence could be considered for purpose of showing intent, motive, purpose, identity, or common scheme or plan. Third instruction said evidence could be considered solely on issue of D's credibility.

Ct. first discussed other misconduct evidence in general, noting evidence is relevant if it tends to prove or disprove material fact, or sheds light on guilt or innocence of accused, but that even relevant evidence may be excluded if its possible prejudicial effect outweighs its probative value. Ct. noted Ind. has long held evidence of D's prior acts of uncharged misconduct are inadmissible to prove guilt of charged offense, because of precept that every D should be required to defend only against specific charges filed. In discussing this precept,Ct. stated that: "If a Ct. were to indiscriminately admit proof of criminal activity beyond that specifically charged, then the burden on the defense would be intolerably enlarged & the Ct. would effectively negate the due process presumption of innocence that our system of justice accords to every accused." Ct. also discussed exceptions to exclusionary rule to prove specific material issues, in light of its recent holding in Lannan, (1992), Ind., 600 N.E.2d 1334, adopting Fed.R.Evid. 404(b).

Ct. then adopted Fed. R. Evid. 403, which states that: "Although relevant, evidence may be excluded if its probative 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." Ct. also noted that considerations of Fed. R. Evid. 404(b) & Fed. R. Evid. 403 must be evaluated by Tr. Cts in balancing test.

Ct. concluded common scheme or plan exception to other crimes evidence had two branches, modus operandi & res gestae. To be admissible as modus operandi, similarities between uncharged & present crimes must be so strong & method so clearly unique, that it is highly probable perpetrator of both is same person. Mere repetition of similar crimes does not warrant admission; acts or methods employed must be so strikingly similar as to be "signature" of accused. Penley, 506 N.E.2d 806, Brown, 577 N.E.2d 221. Ct. concluded modus operandi exception was consistent with Fed. R. Evid. 404(b). Res gestae branch of exception, allowing for evidence of preconceived plan, requires that crimes be so related in character, time, & place of commission as to establish some plan embracing both prior & subsequent activity & charged crime, Malone, 441 N.E.2d 1339. Furthermore, evidence falls within exception where each crime was part of uninterrupted transaction, Lannan, *supra*.

Applying rules to present case, Ct. found evidence of D's uncharged misconduct was inadmissible under common scheme or plan exception, as it did not fit within either modus operandi or res gestae exceptions. Ct. also held evidence was not admissible on issue of identity, because such evidence must show who perpetrated charged crime. Evidence of uncharged misconduct before & after charged crime did not tend to prove D was person on trial for selling cocaine to undercover officer. Ct. also concluded that all of objected- to instructions were erroneous. Instruction which directed jury to consider evidence of other offenses on issue of D's predisposition, specifically directed them to consider evidence for forbidden purpose. Entrapment defense was not raised either implicitly or explicitly. Instruction directing jury to consider evidence on issue of common scheme or plan, etc., was also erroneous, because evidence should never have been presented to jury. Instruction directing jury to consider evidence on issue of D's credibility was likewise erroneous, because D did not even appear at trial, let alone testify, & therefore his credibility as witness was not in question.

Ct. concluded errors could have had substantial impact on jury. Evidence was admitted to prove identity & common scheme or plan, but was probative of neither, & harmful effect of errors was compounded by erroneous jury instructions. Officer was sole eyewitness to transaction, & he made as many as 75 such transactions in period. Other witness was not stable observer, & because D did not appear at trial, State had to rely on photograph of D. Ct. therefore concluded there was substantial likelihood that erroneous evidence & instructions contributed to guilty verdict, impinged on right to fair trial. Held, judgment of Ct. of App. vacated, remanded for retrial, Givan, J., dissenting.

TITLE: Harris v. State
INDEX NO.: O.4.d.
CITE: (5th Dist., 12-31-07), Ind. App., 878 N.E.2d 504
SUBJECT: Admission of D's prior convictions - reversible error
HOLDING: In prosecution for operating while driver's license suspended for life, Tr. Ct. committed reversible error in admitting evidence of prior acts in violation of Indiana Evidence Rule 404(b). During trial, D denied having operated a motor vehicle on day in question & State was permitted to introduce evidence of prior driving while suspended/DWI convictions because D "opened the door." Parties had stipulated that D had previously been suspended for life. State's allusion to prior driving while suspended convictions & a driving while intoxicated conviction could only reasonably be considered as those offenses related to D's propensity to commit the very crime for which he was being tried. There was no reason for State to throw its prejudicial evidentiary harpoon in placing before jury the matter of D's many prior criminal convictions for same type of offense. Permitted questions by State as to D's prior record were unmistakably prejudicial & far outweighed any probative value with respect to genuine issue in dispute. Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App 1999), supplemented on rehearing, 723 N.E.2d 460 (Ind. Ct. App 2000). Held, conviction reversed & remanded for further proceedings.

RELATED CASES: Sasser, 945 N.E. 2d 201(Ind. Ct. App. 2011) (D's clarification on cross that he did, in fact, register each time he was required to register in State's Exhibit 6 did not open the door to evidence regarding other instances in which D did not register as required; fundamental error).

TITLE: Hatcher v. State
INDEX NO.: O.4.d.
CITE: (10-5-00), Ind., 735 N.E.2d 1155
SUBJECT: Prior acts - notice of intent to offer; six days before trial was reasonable
HOLDING: State's notice of intent to submit certain 404(b) evidence, six days before trial, complied with reasonable notice provision in Ind. R. Evid. 404(b). Determining whether State's notice is reasonable requires examination of whether purpose of notice provision is achieved in light of circumstances of particular case. Purpose of reasonable notice requirement is to reduce surprise & to promote early resolution of questions of admissibility. Abdul-Musawwir, App., 674 N.E.2d 972. Here, although D filed notice of State's Intent to Proffer 404(b) Evidence on July 1, 1998, State did not respond with notice until eleven months later, which was six days before trial. However, D was not surprised by 404(b) evidence which State was going to proffer because State had disclosed information about prior acts in discovery. Moreover, six-day notice provided sufficient time to promote early resolution of questions of admissibility. Thus, Tr. Ct. did not err in allowing State to admit 404(b) evidence. Held, judgment affirmed.

TITLE: Jones v. State
INDEX NO.: O.4.d.
CITE: (3rd Dist., 3-30-99), Ind. App., 708 N.E.2d 37
SUBJECT: Admission of D's prior convictions - reversible error
HOLDING: In prosecution for operating motor vehicle while license suspended for life, Tr. Ct. committed reversible error in admitting evidence of laundry list of D's prior convictions. State argued that D "opened the door" by questioning whether his lifetime suspension was premised upon felony conviction as required by Ind. Code 9-30-10-16(b), rather than by misdemeanor conviction, as cause number on abstract of Ct. record indicated. Even if it were proper to admit evidence of prior offense because D went beyond merely denying that his driving privilege had earlier been suspended for life, such evidence would be necessarily restricted to whether D was convicted of earlier habitual traffic offender (HTO) charge as felony or as misdemeanor. Inclusion of litany of fourteen prior offenses read to jury, rather than merely HTO conviction, had no probative value & resulted in substantial prejudice to D. Admission of this evidence intolerably enlarged burden on defense & effectively negated due process presumption of innocence accorded to D, thus violating D's constitutional right to fair trial. Held, conviction reversed & remanded for new trial; Hoffman, Sr.J., dissenting.

Note: Ct. also distinguished Williams, 690 N.E.2d 162 & held that defense objection based on relevancy is enough to preserve Evid.R. 404(b) argument on appeal, where evidence offered by State is that of D's prior convictions.

RELATED CASES: Wilson, 931 N.E.2d 914 (Ind. Ct. App 2010) (although Tr. Ct. erred in admitting D's unredacted entire BMV record, D did not object and failed to prove that its admission subjected him to any greater prejudice than ordinary reversible error); Carpenter, App., 743 N.E.2d 326 (although not *citing* Jones, Ct. implicitly disagrees with Jones by holding that evidence of underlying convictions were relevant in HTV case); Dumes, App., 718 N.E.2d 1171 (reversible error to admit D's driving record showing prior convictions & license suspensions unrelated & irrelevant to crime with which he was charged).

TITLE: McEwen v. State
INDEX NO.: O.4.d.
CITE: (4-30-98), Ind., 695 N.E.2d 79
SUBJECT: "Previous battery" statute is nullity - conflict with rules of evidence
HOLDING: Ind. Code 35-37-4-14, which requires State to provide notice to D of intention to offer evidence of previous battery, is without effect because it cannot be severed from rest of statute, which conflicts with Ind. Rules of Evidence. By permitting admission of previous battery for listed purposes without consideration of possible prejudicial impact required by Ind. Evidence Rule 403, Ind. Code 35-37-4-14 would admit evidence not necessarily admissible under Ind. Rules of Evidence. Because statute's substantive requirements for admissibility conflict with Ind. Rules of Evidence, statute is nullity on that point. Humbert v. Smith, 664 N.E.2d 356. Although Ind. Evidence Rule 404(b) does not foreclose statutory requirement of notice to D irrespective of any request for notice, notice provision of Ind. Code 35-37-4-14 may not be severed from rest of statute because it is inseparably connected with invalid subsections. Thus, statute's notice provision was not controlling with respect to pretrial notice when State's rebuttal testimony was admitted. Under Rule 404(b), which is controlling, notice of intent to offer evidence of prior crimes, wrongs, or acts is not required unless D requests advance notice. Held, judgment affirmed.

RELATED CASES: Brim, App., 624 N.E.2d 27.

TITLE: Meadows v. State
INDEX NO.: O.4.d.
CITE: (2nd Dist., 3-31-03), Ind. App., 785 N.E.2d 1112
SUBJECT: Admission of principal's uncharged misconduct & firearm capability in accomplice's trial
HOLDING: In prosecution for possession of firearm by serious violent felon (aiding & abetting), Tr. Ct. erred in admitting evidence regarding acts committed by principal & evidence regarding general capabilities of firearms. D purchased SKS & AK-47 rifles, which he then loaned to Dumperth, a serious violent felon. Dumperth was subsequently involved in police chase & shooting using these rifles, in which officer & Dumperth were both killed. After learning of incident, D called 911 & stated that his guns had been stolen, which he later recanted telling officers that he had initially given Dumperth the rifles but had asked for them back. At trial, information concerning deaths of officer & Dumperth was excluded, but Tr. Ct. did allow evidence regarding Dumperth's acts surrounding the police chase & shooting. State elicited testimony from officers that they were responding to a chase & shooting, that rifles were found at the scene near Dumperth, & that one rifle had been modified to hold thirty rounds (instead of original ten-round magazine). Evidence was relevant because it tended to show whether D actually aided Dumperth in gaining possession of firearms & also helped to explain why D changed his story to police, further indicating that D had purchased firearms not only at Dumperth's urging, but for him. However, discussion of capabilities of firearms & the particularly lethal nature of the SKS & AK-47 rifles along with fact that they were modified & magazines were empty when found at the scene set into motion, in mind of jurors, scenario in which serious & gruesome crime was committed. This was exact situation Tr. Ct. was attempting to prevent by excluding any information about the deaths. Court held that improper admission of evidence was harmless error because substantial independent evidence of guilt made it unlikely that erroneously admitted evidence contributed to verdict. Held, conviction affirmed, remanded for resentencing.

RELATED CASES: Jacobs, 2 N.E.2d 116 (Ind. Ct. App. 2014) (any error in excluding testimony about both victim's and D's truthfulness was harmless as there was substantial independent evidence of guilt).

TITLE: Montgomery v. State
INDEX NO.: O.4.d.
CITE: (11/21/2014), 21 N.E.3d 846 (Ind. Ct. App 2014)
SUBJECT: Exclusion of D's evidence of pattern of abuse - no error
HOLDING: In murder and neglect of dependent prosecution, Tr. Ct. did not err in excluding evidence that another person committed the crime. State presented evidence at trial that victim's death was the result of a single blow to the head. D argued that evidence showing a pattern of abuse by victim's mother should have been admitted to show that maybe it was not the injury he caused that resulted in the boy's death. Distinguishing Rohr v. State, 866 N.E.2d 242 (Ind. 2007), Court found that the evidence was properly excluded as not relevant because it was irrelevant to the charges against D. Tr. Ct. recognized that the sole issue at trial was who inflicted the blunt force trauma that killed victim and found that evidence of mother's pattern of abusing victim was not admissible to show that she committed the offenses unless D could show that victim's death was caused by a pattern of abuse. He failed to do so, and evidence was presented that he confessed to detectives that he threw victim to the ground in a manner consistent with the injury causing death. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Oldham v. State

INDEX NO.: O.4.d.

CITE: (4th Dist., 12-18-02), Ind. App., 779 N.E.2d 1162

SUBJECT: Erroneous admission of irrelevant character & unrelated weapons evidence - fundamental error

HOLDING: In murder prosecution, D was subjected to fundamental error when State introduced business cards, a novelty photograph, & photographs of two guns found in D's garage during search of D's home. During search, police found business or calling cards bearing name "Rob-Goddie" & "Goddie" & phrases "Tre Block" & "Dope City." Police also found novelty photograph of D & another youth with superimposed brightly-colored printed text bearing words "America's Most Wanted," "Wanted for: robbery, assault, arson, jaywalking," "Considered armed & dangerous," & "approach with extreme caution." Prosecutor did not present items as harmless novelty items, but tried to use business cards & novelty photograph to paint D as a dangerous criminal. Neither weapon found in garage was used to murder victim.

Defense counsel inexplicably stipulated to admission of this evidence, but these items constituted irrelevant, inadmissible character & prior misconduct evidence under Indiana Evidence Rule 404(a) & 404(b). Evidence of weapons possessed by D but not used in crime for which D is charged should generally not be introduced because evidence is irrelevant & highly prejudicial. Hubbell v. State, 754 N.E.2d 884 (Ind. 2001). Ct. concluded that error in admission of this evidence was fundamental because D made no effort to affirmatively rebut State's assertion that he had a bad & dangerous character, & evidence against D not overwhelming. Held, conviction reversed & remanded for new trial; Sullivan, J., concurring in part & dissenting in part on other grounds.

RELATED CASES: Saintignon, 118 N.E.3d 778 (Ind. Ct. App. 2019) (no error in admitting photograph showing D had bruise on his bicep two days after murder, where none of tattoos on arm clearly denoted Aryan Brotherhood and State did not present testimony identifying or explaining them); Pagan, App., 809 N.E.2d 915 (State's questions regarding "pimp" tattoo on D's hand were improper, but D was not prejudged by counsel's failure to object).

TITLE: Pavey v. State
INDEX NO.: O.4.d.
CITE: (1st Dist., 3-5-02), Ind. App., 764 N.E.2d 692
SUBJECT: 404(b) evidence admissible for impeachment
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion when it allowed State to introduce into evidence rebuttal testimony of witnesses who testified that D had previously talked about killing people. D opened the door to this testimony when, on cross-examination, he gave jury the impression that it was not his "nature" to talk about killing people. Although testimony was clearly prejudicial to D, Ct. concluded that there was no undue prejudice in rebuttal testimony, which was introduced to contradict D's own testimony on the subject. Held, judgment affirmed.

RELATED CASES: Reese, 939 N.E. 2d 695 (Ind. Ct. App. 2011) (Tr. Ct.court did not abuse discretion in admitting testimony from girlfriend that D knew he was a murder suspect because D opened the door to this testimony by misleading the jury that the police came to arrest him on an outstanding warrant for theft and that the police were chasing him because he was running around with a gun in his hand).

TITLE: Rogers v. State
INDEX NO.: O.4.d.
CITE: 897 N.E.2d 955 (Ind. Ct. App. 2008)
SUBJECT: Prior possession of steak knife - not 404(b) evidence
HOLDING: In murder prosecution, Tr. Ct. did not err in admitting testimony which indicated that D had previously been seen with a steak knife. "It is by no means clear that weapons possession, evidence of gun sales, and the like, are necessarily prior 'bad acts' for 404(b) purposes." Williams v. State, 690 N.E.2d 162, 175 (Ind. 1997); Pickens v. State, 764 N.E.2d 295 (Ind. Ct. App. 2002). If possession of firearms is not a "bad act" for purposes of Rule 404(b), we are unable to say that the possession of a common steak knife is the sort of evidence to which Rule 404(b) applies. This is not to say that, under proper circumstances, possession of a knife could not constitute a "bad act" under Rule 404(b). But there was no indication here that D behaved in any criminal or improper manner when he was previously seen in possession of a steak knife. Even assuming Rule 404(b) applies to D's prior possession of a steak knife, Court noted that evidence D had access to a steak knife was relevant to a matter other than "the forbidden inference." Held, judgment affirmed.

TITLE: Santonelli v. State

INDEX NO.: O.4.d.

CITE: (3rd Dist., 3-19-01), Ind. App., 743 N.E.2d 1281

SUBJECT: Defense counsel's offensive use of erroneously admitted 404(b) evidence - waiver of claim of error

HOLDING: In child molesting prosecution, where defense counsel went beyond merely meeting & responding to erroneously admitted fact that D had prior conviction, any error arising from admission of prior conviction was harmless. State first mentioned D's previous child molesting conviction during its opening statement, but Ct. concluded that D made offensive use of prior conviction by asking series of questions that suggested that victim had fabricated her allegation. Thus, although prosecutor first mentioned prior conviction, D was first party to introduce evidence & delve into subject. Party aggrieved by erroneous admission of evidence may respond to such improper evidence without waiving right to appellate review. Thomas v. Thomas, 577 N.E.2d 216 (Ind. 1991). However, where as here objecting party offers evidence on same subject matter which goes beyond merely meeting & responding to evidence which was admitted over objection, such action may render harmless Tr. Ct.'s error in overruling earlier objection. Id. Thus, because D's claim would not have been successful if it had been properly presented on appeal, D suffered no prejudice as result of appellate counsel's failure to include opening statements in appellate record. Held, denial of post-conviction relief affirmed; Vaidik, J., concurring in part & dissenting in part, argued that defense counsel's cross-examination of complaining witness merely rebutted State's reference to previous conviction, & to classify counsel's actions otherwise would have chilling effect on good trial advocacy.

TITLE: State v. Bryant
INDEX NO.: O.4.d.
CITE: 633 S.E.2d 152 (S.C. 2006)
SUBJECT: Admission of past firearm convictions improper -- self-defense theory prejudiced
HOLDING: South Carolina Supreme Court held that evidence of D's prior convictions for unlawful possession of a weapon by a convicted felon and pointing and presenting a firearm was inadmissible for impeachment purposes at his trial for murder and unlawful possession of a weapon by a convicted felon, where those priors had nothing to do with his credibility and were more prejudicial than probative. D, who was confined to a wheelchair, met the victim at a strip club. In the early morning, the two went to D's hotel room. Later, D asked another hotel resident to get help because he had been injured in a fight, and while the hotel clerk called the sheriff's department she heard gun shots. Police arrived to find the victim lying in the breezeway shot six times and bleeding. After a stand-off, a SWAT team rushed D's room to find him lying on the floor with a self-inflicted gunshot wound. The State sought to introduce evidence of: a 1984 voluntary manslaughter; 1992 shoplifting; 1994 bad check charge; 1997 possession of an unlawful weapon by a convicted felon; and 1998 pointing and presenting a firearm. D argued for exclusion of the manslaughter conviction because it was over 10 years old and that the two weapons convictions had nothing to do with truthfulness and, therefore, had little probative value, and their similarity to the current charges made them highly prejudicial. The State argued that the convictions served to impeach D and a pattern of getting in trouble every few years. The firearm convictions were allowed to be introduced and D stipulated to a conviction for a violent crime in 1984, although the manslaughter conviction was not specifically introduced. Court found that the prior firearms convictions did not involve dishonesty, and the trial judge failed to address the similarity of the prior convictions to the present charges in relation to unfair prejudice. Court found that error was not harmless because it significantly influenced D's defense of self-defense. As evidence existed both supporting and undermining self-defense, the credibility of D was essential to this defense and thus not harmless.

TITLE: State v. Collier
INDEX NO.: O.4.d.
CITE: 719 A.2d 1276 (N.J. Super. Ct., App. Div. 1998)
SUBJECT: Other Crimes Evidence -- Inherently Inflammatory; Tr. Ct. Must "Sanitize"
HOLDING: Where other crimes evidence is admissible under 404(b), and it is highly probative but inherently inflammatory, Tr. Ct. should "sanitize" it by limiting it only to what is necessary to prove proposition for which it is offered. Here, D was charged with shooting long-time friend. Tr. Ct. admitted evidence that victim had implicated D in gruesome killing of victim's cousin's dog, for purpose of proving motive for shooting. On appeal, Court found that Tr. Ct. properly admitted evidence, which fit 404(b) exception because it was probative of motive. Although it was highly prejudicial, it was only evidence of motive, and balance tipped in favor of admissibility. However, to reduce the prejudicial impact, the Tr. Ct. should have "sanitized" the evidence by limiting it solely to details that were relevant to prove motive, and leaving out gruesome details which would inherently inflame jury.

TITLE: State v. Alexander
INDEX NO.: O.4.d.
CITE: 214 Wis.2d 627; 571 N.W.2d 662 (Wis. 1997)
SUBJECT: Prior Convictions -- Repeat Offender Element
HOLDING: When evidence of a D's prior convictions for offenses similar to the charged offense is offered solely for purpose of proving prior convictions element, and D fully admits to existence of priors, Wisconsin Supreme Court holds that neither evidence of prior convictions nor prior convictions element should go before jury. D here was charged with violating statute that makes it illegal to drive with .08 BAC with two prior drunk driving convictions. While D admitted to priors, state was allowed to put on evidence of priors to prove prior conviction element. In Old Chief v. U.S., 117 S.Ct. 644, U.S. Supreme Court held that, when evidence of priors is offered solely to prove status of prior conviction, its probative value is outweighed by potential prejudice, and state can be foreclosed from putting evidence on if D stipulates to prior conviction(s). Here, Court goes step further, holding that prior conviction element itself should not be put before jury, pointing out that, unlike firearm possession at issue in Old Chief, drunk driving at issue here would have been illegal, and jury would not have been confused by absence of prior conviction element.

TITLE: State v. Hughes
INDEX NO.: O.4.d.
CITE: 189 Az. 62, 938 P.2d 457 (Az. 1997)
SUBJECT: Prior Bad Acts -- Prejudice
HOLDING: Introduction of "overwhelming" amount of "improper character evidence" requires reversal of D's murder conviction, for which he was sentenced to death. D allegedly caused victim to be killed by two juveniles because she refused to marry him, owed him money, and interfered with his drug business. Prosecution was allowed to present considerable evidence about D's drug dealing, verbal and physical threats, and miscellaneous acts of violence. Some evidence was not admissible for purpose for which it was offered; other evidence, while relevant, simply went too far. For example, evidence of drug dealing should have been limited to exclude irrelevant and inflammatory details. Held, conviction reversed.

TITLE: State v. Sawyer
INDEX NO.: O.4.d.
CITE: 279 Conn. 331, 904 A.2d 101 (Conn. 2006)
SUBJECT: Threatening phone call to another, not "signature" crime
HOLDING: The Connecticut Supreme Court held evidence of a threatening phone call D made to his ex-wife, who was the victim's sister, was not admissible to establish identity or common plan or scheme. D was on trial for charges related to an alleged burglary and sexual assault of his former sister-in-law. D allegedly had assaulted the woman with his hands and threatened her with a knife. D filed a motion in limine to preclude testimony by his ex wife as to the phone call. During the phone call, the ex wife testified that D stated he wanted to have sex with her one more time and had been harassing her, stating that if she did have sex with him he would make her life miserable. She also testified as to certain specific things D said he would do to make her life miserable and that his threats frightened her because he had threatened her in the past and she was afraid his threats "might come true." The State segued from testimony of D's threatening behavior into his collection of knives. The majority found few, if any, similarities between the charged crimes and the uncharged misconduct. The only similarities noted by the lower reviewing court of the D's use of threats to impose his will and failure to conceal his identity were far from distinctive or unique. The similarities between the victims (apparently as sisters or relations by marriage) was relevant but did not provide a basis for a "signature" or "criminal logo" to allow an inference that D committed both crimes. Court was neither persuaded by State's argument that the "pattern of victim selection" showed a common scheme or plan. The Court also disallowed testimonial evidence admitted concerning D's slashing a tire of his brother-in-law, finding the only similarity being that a knife was used but in an entirely different manner. Harmless error was not found and the Court remanded for a new trial. A dissent was issued in which the judge would have found harmless error.

TITLE: State v. Scheidell

INDEX NO.: O.4.d.

CITE: 584 N.W.2d 897, Reversed 595 N.W.2d 661 (Wis. 1999)

SUBJECT: Defense Use of Other Bad Acts by Third Party

HOLDING: D seeking to introduce, on issue of identity, evidence of an unknown third party's commission of similar crime, need not satisfy as stringent a test of similarity, under Wisconsin's equivalent to R. Ev. 404(b), as state must satisfy to admit prior bad acts against D. When D seeks to admit such evidence, danger of prejudice is not as great as when state seeks to use such evidence against D. D need not show "signature" likeness of acts, but evidence must do more than raise conjecture or speculation. The greater the similarity, the greater the case for admission.

TITLE: United States v. Simpson
INDEX NO.: O.4.d.
CITE: (3/13/2007), 479 F.3d 492 (7th Cir. 2007)
SUBJECT: D's statement showed propensity under 404(b), not confession
HOLDING: Seventh Circuit Court of Appeals held that the federal rule that requires the exclusion of propensity evidence in criminal cases, FRE 404(b), should have prevented the admission of evidence that a drug-trafficking D told police officers that -- although he did not specifically remember the particular crack deal with which he was charged -- he was indeed selling crack in the area at the time.

D did not object to an officer's testimony concerning the statement, but he did object to the prosecutor's reliance on the statement to make a propensity argument. Court found that the admission of the evidence of the statement constituted plain error. Rejecting the idea that the statement constituted a confession to the charged offense, Court concluded that the evidence that D had sold crack in the past could show only his propensity to sell crack, not that he was the person responsible for the particular crack sale with which he was charged.

Government contended, among other things, that the evidence of D's statement was admissible pursuant to the identity exception to Rule 404(b). Court, however, said the characteristics of the drug transaction were not sufficiently unique to constitute modus operandi evidence. "The unfortunate reality is that [D] was far from the only person selling crack cocaine during March of 2003 in the greater Joliet, Illinois area, and [his] acknowledgement that he was one of those persons does not help clear up the identity of the person responsible for the charged crime." A dissent was entered to decision.

TITLE: Thompson v. State
INDEX NO.: O.4.d.
CITE: (12-23-97), Ind., 690 N.E.2d 224
SUBJECT: Admission of prior misconduct evidence - reversible error
HOLDING: Extensive evidence of D's prior murder conviction was inadmissible under Indiana Evidence Rules 402, 403, & 404(b), & denied D fair trial. To prove that D was perpetrator, State presented evidence that he stole murder weapon in course of committing different murder month earlier. Although D's access to murder weapon was relevant & important piece of circumstantial proof that he was killer, fact of D's murder conviction & detailed evidence surrounding that murder was wholly irrelevant to establishing his access to weapon.

State argued that all evidence related to prior murder was properly admitted because D attacked credibility of State's key witness. Although corroboration of collateral facts is sometimes permissible to show credibility, corroborative proof of collateral facts is limited by: 1) whether challenged witness actually testified to what is sought to be corroborated; 2) whether corroboration helps prove material fact (relevance); & 3) whether corroborative evidence, assuming it is relevant, is nonetheless so prejudicial that it must be excluded under Evidence Rule 403. U. S. v. Burke, 948 F.2d 23 (1st Cir. 1991). Here, corroborative evidence was irrelevant. Fact that prior murder victim died & fact that D was convicted did not bear on any aspect of witness's credibility because witness did not testify to either subject. D's questioning witness's credibility did not open door through which all evidence related to prior murder could automatically pass. Proffered conviction here did not approach probative value required to outweigh prejudice under Rule 403. Even where D's involvement in prior murder is relevant in part, circumstances of killing should not be presented unless they too are relevant. Evidentiary errors were not harmless & denied D's right to fair trial. Held, convictions & death sentence reversed, remanded for new trial; Shepard, C.J., concurring.

RELATED CASES: Rhodes, App., 771 N.E.2d 1246 (Tr. Ct. committed reversible error by admitting flood of irrelevant & prejudicial evidence regarding D's & witness's character, rendering fair trial impossible); Barker, 695 N.E.2d 925 (although evidence of two assaults on State's witness was arguably probative of D's motive for kidnaping, highly prejudicial details of these assaults were of little or no probative value, & failed balancing test required by Rule 403).

TITLE: United States v. Bell
INDEX NO.: O.4.d.
CITE: 516 F.3d 432 (6th Cir. 2008)
SUBJECT: Past drug convictions improperly allowed to prove absence of mistake
HOLDING: Sixth Circuit Court of Appeals held that evidence that a D charged with possession of drugs with intent to distribute had several prior convictions for similar crimes should not have been admitted at his trial to prove intent or absence of mistake or accident. Fed R. Evid. 404(b) allows evidence of other crimes to come in at trial for purposes other than to prove D's criminal character, such as intent or absence of mistake or accident. In present case, Court found that the case did not present an issue of mistake or accident, noting D's "argument was not that he was mistaken about the narcotic nature of the substances seized by the police, but rather that he never possessed the marijuana and crack cocaine. In other words, [D] was claiming that it was a mistake for the police to think that the drugs were his, not that he was mistaken about the fact that the substances found were drugs." Nor were D's priors admissible on the issue of intent. "Unless the past and present crime are related by being part of the same scheme of drug distribution or by having the same *modus operandi*, the fact that a D has intended to possess and distribute drugs." Court noted the prior convictions were for crimes that took place years earlier and that were not alleged to have been part of the same drug trafficking scheme or to have involved a similar modus operandi. A dissent was entered on intent and knowledge grounds.

TITLE: U.S. v. Monteleone
INDEX NO.: O.4.d.
CITE: 77 F.3d 1086 (8th Cir. 1996)
SUBJECT: Evidence of Honest Character Cannot Be Rebutted with Uncharged Grand Jury Perjury
HOLDING: Possibility that D may have committed perjury before grand jury was not appropriate subject for "specific bad acts" cross-examination of D's reputation witness pursuant to Rule Ev. 405(a). Purpose of such cross-examination is to test knowledge and credibility of witness, and since grand jury testimony could not possibly be known in community (D had not been indicted for perjury), cross-examination regarding possible grand jury perjury could not serve this purpose. Instead, it served only to put before jury evidence of prior bad act – perjury –, and as such was forbidden by Rule Ev. 404.

TITLE: Wright v. State
INDEX NO.: O.4.d.
CITE: (1st Dist., 10-28-05), Ind. App., 836 N.E.2d 283
SUBJECT: D opened door to prior misconduct during cross examination
HOLDING: Typically, evidence elicited on cross-examination should not be relied on to open the door to otherwise inadmissible evidence. Kien v. State, App., 782 N.E.2d 398. However, in this case, D's attempt to "pin" cocaine he was charged with dealing on his brother through his brother's reliance on Fifth Amendment right against self-incrimination did open the door to questions about D's prior involvement with drugs. Even if testimony regarding prior drug transactions was otherwise inadmissible, its admission was harmless error. Held, judgment affirmed in part, remanded in part on other grounds.

O. EVIDENCE
O.4. Relevancy
O.4.d.1. In general

TITLE: Badelle v. State
INDEX NO.: O.4.d.1.
CITE: (6/13/83), Ind., 449 N.E.2d 1055
SUBJECT: Other acts - prior possession of weapon
HOLDING: Tr. Ct. did not err in allowing witness to testify D possessed handgun (described as similar to one D was seen carrying at murder scene) and had discharged it at witness' place of business. Here, 2 witnesses at scene observed D carrying long-barreled, silver-colored pistol. Ct. holds it is always proper to show instruments used in crime were owned or possessed by D. Corroborative evidence of how and where D obtained instruments is proper. Byrd 204 N.E.2d 651. See also Maldonado 355 N.E.2d 843. Evidence admissible for one purpose is not rendered inadmissible simply because it coincidentally discloses/suggests other criminal activity. Armstrong 412 N.E.2d 1207; Samuels 372 N.E.2d 1186. Held, no error.

RELATED CASES: Baumholser, 62 N.E.3d 411 (Ind. Ct. App 2016) (no error in CM victim testifying that D "drank a lot and had weapons in the house"; testimony was not offered to show D's character but to explain why victim waited 4 years to report D's crime).

TITLE: Benton v. State
INDEX NO.: O.4.d.1.
CITE: (4th Dist., 2-5-98), Ind. App., 691 N.E.2d 459
SUBJECT: 404(b) evidence admissible for several purposes
HOLDING: Tr. Ct. did not err in admitting victim's testimony concerning D being at victim's residence few months prior to burglary. If evidence about prior bad acts is offered only to produce forbidden inference -- that D acted badly in past, & that D's present, charged actions conform with those past bad acts -- then evidence is inadmissible. Ind. R. Evid. 404(b). However, evidence admissible under Ind. R. Evid. 404(b) may be excluded if its probative value is substantially outweighed by danger of unfair prejudice. Ind. R. Evid. 403. Here, State offered victim's testimony together with that of another witness indicating that D had discussed breaking into victim's home & robbing him in order to show D's identity, knowledge of victim & premises, & D's preparation & plan for crime. However, D only argued why such evidence could not be used to prove D's identity & that probative value of testimony was outweighed by its prejudicial effect. Because there were other permissible purposes for introducing victim's testimony other than to prove identity & D did not support with argument his bald assertion that probative value of testimony was outweighed by its prejudicial effect, Tr. Ct. properly admitted victim's testimony as to prior incident. Held, conviction affirmed.

RELATED CASES: Reynolds, App., 797 N.E.2d 864 (previous fight involving D, a former girlfriend & her current boyfriend that occurred 7 days earlier was relevant to prove identity & motive & its probative value outweighed any unfair prejudice).

TITLE: Bolin v. State
INDEX NO.: O.4.d.1.
CITE: (1st Dist., 05-23-94), Ind. App., 634 N.E.2d 546
SUBJECT: Other misconduct inadmissible
HOLDING: Evidence of subsequent uncharged arson for hire by D was erroneously admitted in trial for arson by hire, because other misconduct was not sufficiently similar to constitute "signature" to prove identity, nor state of mind, nor res gestae of crime charged. Evidence did not qualify under res gestae because there was no evidence uncharged arson was part of preconceived plan related to instant offense, & it did not complete story of present offense. It did not qualify to show state of mind because that was not seriously at issue. Two offenses, although similar, were also not sufficiently unique to qualify as signature. Similarities were: D approached same person for each fire; same person was hired to commit arson for both; D told person each time that if he burned structure he would be paid agreed-upon amount; same person agreed to commit each offense; same amount was paid for each; D told how to enter each house; each house was entered at night; person set each fire by setting fire to clothes in closet with inflamant & then leaving; & D paid person after each fire. Ct. found these methods were not unique & were common to many arsons for hire. Therefore, evidence related only to D's character or propensity to act in conformity therewith & was inadmissible. Ct. also found error required reversal, primarily because similarity between two offenses was great; evidence of uncharged crime was greater than charged; & State relied on uncharged crime, in part, in final argument.

RELATED CASES: Carson, App., 659 N.E.2d 216 (admission of evidence of drive-by shooting was harmless error); Reynolds, App., 651 N.E.2d 313 (error in admission of uncharged misconduct evidence harmless, because evidence of uncharged crime was not greater than crime charged, & state did not rely on uncharged crime in final argument).

TITLE: Brown v. State
INDEX NO.: O.4.d.1.
CITE: (2nd Dist., 8-20-97), Ind. App., 684 N.E.2d 529
SUBJECT: Uncharged misconduct evidence - no error
HOLDING: Tr. Ct. properly admitted into evidence other acts which could have constituted ghost employment by D. For evidence of prior bad acts to be admissible, they must be offered to prove something other than D's propensity to commit charged crime. Ind.Evidence R. 404(b); Poindexter v. State, 664 N.E.2d 398 (Ind. Ct. App 1996). Under Ind.Evidence R. 403, risk of unfair prejudice must substantially outweigh probative value of uncharged acts. Here, State offered evidence of other acts which could have constituted ghost employment to rebut theory that D's conduct was result of innocent mistake, & that D lacked intent to misuse state employees. State was entitled to introduce evidence to show D engaged in deliberate, intentional, on-going scheme to misuse state resources, rather than making few honest mistakes. In addition, risk of unfair prejudice created by admission of prior acts did not substantially outweigh their probative value. Held, conviction affirmed.

RELATED CASES: Freed, 954 N.E. 2d 526 (Ind. Ct. App. 2011) (Evidence of unrelated, uncharged burglary, forgery, and solicitation for murder in letter was permissibly admitted for a purpose other than showing D's propensity to commit class B felony robbery).

TITLE: Camm v. State
INDEX NO.: O.4.d.1.
CITE: (6-26-09), Ind., 908 N.E.2d 215 (Ind. 2009)
SUBJECT: Prior acts - no evidence connecting D to act
HOLDING: Tr. Ct. abused its discretion by admitting evidence from which the State speculated D molested his daughter as a motive for murder.

When conflicting evidence persists about a person's involvement in Rule 404(b) specific acts, the question is one of conditional relevance, which is governed by Rule 104(b). Under Rule 104(b), "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." There must be sufficient proof from which a reasonable jury could find the uncharged conduct proven by a preponderance of the evidence. Here, D was charged with the murders of his wife, daughter and son. The State admitted evidence that D's daughter had blunt force trauma to her groin area which could be consistent with different causes, such as molestation or a straddle fall. The State also put on two pediatricians who testified that the injuries were most likely the result of molestation. The State argued in closing that D murdered his family because he molested his daughter, who told her mother, who was leaving D. Although D's expert disagreed that the injuries were caused by molest, the State's expert testimony adequately supported an inference that the daughter was molested. However, missing from the record is any competent evidence of the premise that D molested his daughter, a hole in proof the State admits. With no evidence connecting D to the injuries, the inquiry lacked purpose. Further, the risk of unfair prejudice substantially outweighed any modest probative value of the molest evidence, which was of a highly inflammatory nature.

TITLE: Ceaser v. State
INDEX NO.: O.4.d.1.
CITE: (03-26-12), 964 N.E.2d 911 (Ind. Ct. App 2012)
SUBJECT: 404(b) - prior battery admissible to rebut parental discipline defense
HOLDING: In Class D felony battery prosecution, D's prior conviction for battering the same child in a manner similar to underlying incident was admissible under the intent and lack of accident or mistake exceptions to Indiana Evidence Rule 404(b). Victims of child abuse are often unable or unwilling to testify against a parent who has abused them. For this reason, a parent's other disciplinary acts may be the most probative evidence of whether the corporal punishment at issue was imposed "maliciously, with an intent to injure, or with a sincere desire to use appropriate corrective measures." State v. Wright, 593 N.W.2d 792 (S.D. 1999). Because the State must prove that a parent was mistaken about what force was necessary in disciplining a child, where a parent asserting parental privilege has a prior conviction for battering the same child in a similar manner, that evidence goes to reasonableness of force used and reasonableness of the parent's belief about the force used. Thus, the evidence was admissible under the lack of accident or mistake exception to Rule 404(b). The evidence was also admissible under the intent exception, because by arguing that she exercised her parental privilege in disciplining her child, D necessarily represents that her intent was to correct child's behavior through corporal punishment rather than to simply batter her daughter. Tr. Ct. did not err in finding that the probative value of prior conviction was not outweighed by the danger of unfair prejudice given its direct relation to the claim of parental privilege, the similarity and proximity of the incidents, and in light of the limitations imposed on the use of the evidence. Held, judgment affirmed.

NOTE: Agreeing with the dissent in State v. Fettig, 884 N.E.2d 341 (Ind. Ct. App 2008), Court also affirmed the denial of D's motion to dismiss. Whether an individual has a statutory defense to charges in an information goes beyond the issues that may be decided by a motion to dismiss and instead is a matter to be decided at trial.

TITLE: Christopher v. State
INDEX NO.: O.4.d.1.
CITE: (12/14/88), Ind., 531 N.E.2d 480
SUBJECT: Other acts – admissible where relevant to fact in issue
HOLDING: Tr. Ct. did not err in admitting evidence of prior criminal activity, which was relevant to fact in issue. D was charged with conspiracy, Class A felony. Evidence showed that he told undercover officer he was looking for contract to kill & needed money. After negotiations, D agreed to kill prosecutor for $25,000, & accepted $1000 from officer. As D walked away from this meeting he was arrested. At trial, 1 witness testified that she had picked D up while he was hitchhiking 8 years earlier. He told her he was a "hit man", pointed gun at her, & took her car. Former prosecutor testified that D had made statements that he was member of "La Cosa Nostra" & involved in contract killing. D argues on appeal that this evidence was irrelevant & should not have been admitted. Generally, evidence of criminal activity other than that charged is inadmissible. It is an exception, however, that evidence of unrelated criminal activity which is relevant to fact in issue is not inadmissible merely because it tends to show guilt of another crime. McManus, 433 N.E.2d 775. Here, D attempted to explain involvement in conspiracy by saying that he was attempting to set up undercover officer & planned to go to FBI after leaving meeting. Thus, D's former representations that he was "contract killer" were relevant to rebut this defense. Held, evidence properly admitted. DeBruler & Shepard, JJ., DISSENT.

RELATED CASES: Wrencher, App., 635 N.E.2d 1095 (Evidence linking D to others involved in drug dealing was not inadmissible prior misconduct evidence, because it was admitted to show victim knew D & to establish motive for shooting victim).

TITLE: Commonwealth v. Thompson
INDEX NO.: O.4.d.1.
CITE: 2001 Pa. Super. 198, 779 A.2d 1195 (Pa.Super.Ct. 2001)
SUBJECT: Prior Bad Acts of Third Party
HOLDING: Where D seeks to shift blame to third party who is neither witness nor co- D, 404(b) does not apply to keep out prior bad acts of third party.

TITLE: Conklin v. State
INDEX NO.: O.4.d.1.
CITE: (3d Dist. 03/10/92), Ind. App., 587 N.E.2d 725
SUBJECT: Prior dealing in cocaine inadmissible
HOLDING: Where D was charged with dealing in cocaine & confidential informant (CI) was allowed to testify that D had sold him cocaine in distant past, it was error to admit such evidence because it did not fit within excep- tions to prohibition against prior crimes evidence. After his arrest, CI agreed to complete arranged drug sale with D. CI was wired, & officers hid in his bedroom. When D arrived, CI sold him 2 grams of cocaine, & D imme- diately consumed about one-third of it. He was then arrested & charged with dealing in cocaine. Ct. found informant's testimony was classic type prohibited by prior crimes rule, in that it invited inference that "once a cocaine dealer, always a cocaine dealer." No connection was shown between past conduct & present cocaine possession, & former was too remote in time, place & circumstance to constitute common scheme or plan. Ct. found there was some evidence to support intent to deliver, but it was not so overwhelming as to allow conclu- sion that inadmissible evidence did not contribute to verdict. Held, reversed & remanded with instructions to enter conviction for lesser-included offense of possession as Class D felony, Hoffman, J., dissenting.

NOTE: On transfer, Conklin, 596 N.E.2d 1369, S.Ct. summarily affirmed Ct Appeal's decision on admissibility of prior evidence, but held that because D had successfully alleged trial error, he was entitled to new trial, & State was entitled to attempt to prove crime of dealing in cocaine again.

TITLE: Dalton v. State
INDEX NO.: O.4.d.1.
CITE: (3/2/87), Ind., 504 N.E.2d 568
SUBJECT: Linking weapon to other crimes – evidentiary harpoon
HOLDING: Tr. Ct. did not err in overruling D's mistrial motion following introduction of evidence linking gun used in murder to earlier burglary. Here, motion was overruled following argument outside jury's presence. State indicated it would not object to striking portion of comment or to jury receiving admonishment. Tr. Judge indicated she did not wish to draw attention to statement & did not feel state had made connection between burglary & D. D did not request admonishment be given to jury. Declaration of mistrial is extreme action warranted only when no other action can be expected to remedy situation. Gambill, 436 N.E.2d 301. Ct. finds impingement on D's substantial rights from jury's knowledge of gun's stolen character insufficient to warrant mistrial. Harpoon falls within category in which harm is curable by admonishment, in light of disparate differences between implied & charged crime. Page, 410 N.E.2d 1304; Ballard 318 N.E.2d 798. D made no request for admonishment. Held, conviction affirmed.

TITLE: Dowling v. United States
INDEX NO.: O.4.d.1.
CITE: 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)
SUBJECT: Double jeopardy – admission of testimony re: prior criminal act for which D acquitted
HOLDING: Double jeopardy clause not violated by admission of testimony re criminal act for which D acquitted. Here, at D's federal bank robbery trial testimony was elicited from witness that 2 weeks after bank robbery D & another man entered her home wearing mask & carrying gun similar to that used in bank robbery. D was acquitted of offenses arising from residential burglary. D argues here that admission of residential burglary testimony violated due process. Collateral estoppel doctrine of double jeopardy clause provides that "when an issue of ultimate fact has once been determined by a valid & final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson (1970), 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469. However, prior acquittal did not determine ultimate issue in present case. Acquittal in criminal case does not preclude government from re-litigating issue in subsequent action with lower standard of proof. Furthermore, evidence was admissible because D did not demonstrate that he was not one of men who entered witness' home. Burden is on D to show issue whose re-litigation he seeks to foreclose was actually decided in first case. There is nothing in record that persuasively indicates identity was at issue in first case & decided in D's favor. Held, conviction affirmed. Brennan, joined by Marshall & Stevens, DISSENTING.

TITLE: Gaston v. State
INDEX NO.: O.4.d.1.
CITE: (4th Dist. 7/26/83), Ind. App., 451 N.E.2d 360
SUBJECT: Other crimes – prior drug use inadmissible in dealing case
HOLDING: Tr. Ct. erred in allowing state to introduce impeachment testimony regarding D's use of cocaine during his trial for cocaine dealing. Impeachment of D witness by matters collateral to case is prohibited. Brown 417 N.E.2d 333. A matter is collateral if party seeking to introduce it for purposes of contradiction would not be entitled to prove it as part of case-in-chief. Brown; Bryant 301 N.E.2d 179. Here, state could not have introduced evidence of D's use of cocaine as proof D sold cocaine to informant. Evidence of criminal activity not reduced to conviction is inadmissible if irrelevant/produced merely to show D's unsavory character. Kerlin 265 N.E.2d 22; Meeks 234 N.E.2d 629; Coker, App., 399 N.E.2d 857. When entrapment is not an issue, evidence tending to prove D's propensity to commit crime charged is inadmissible. Evidence of prior criminal activity may be an issue if it: (1) shows common scheme/plan, Manuel 370 N.E.2d 906; (2) establishes D's guilty knowledge/motive, Coker; (3) shows witness was under influence of drugs at time of offense, Lusher, App., 390 N.E.2d 702; or (4) addresses unrelated incident after other party opens door, Gilliam 383 N.E.2d 297. Ct. finds above exceptions inapplicable. Manuel (evidence of unrelated drug use/transaction admissible to show common scheme/plan) cannot be read as creating unqualified exception for narcotics cases. Held, conviction reversed.

RELATED CASES: Mullins 504 N.E.2d 570 (Crim L 641.13(6); D opened door to questioning); Riley 489 N.E.2d 58 (see card at D.15.b.1); Parker, App., 501 N.E.2d 1131 (Crim L 369.3; evidence of D's use of marijuana was inadmissible at trial for murder of cocaine supplier, but error was harmless).

TITLE: Green v. State
INDEX NO.: O.4.d.1.
CITE: (4/2/84), Ind., 461 N.E.2d 108
SUBJECT: Other crimes - prior police contact
HOLDING: Tr. Ct. did not err in denying D's request to make objection out of jury's presence to testimony of officer that another officer knew D personally; such testimony was admissible. Here, D contends revelation implied officer's acquaintance involved prior crimes committed by D. In fact, officer knew D because he had arrested him for drug offenses. Ct. finds implication is not conclusive, as officers may be acquainted with persons through other than criminal activities. See Williams, 373 N.E.2d 142. Held, no error.

TITLE: Hackney v. State
INDEX NO.: O.4.d.1.
CITE: (3rd Dist., 4-27-95), Ind. App., 649 N.E.2d 690
SUBJECT: Evidence of prior domestic violence admissible
HOLDING: In child molesting prosecution, Complaining Witness's (CW's) testimony regarding alleged domestic abuse she observed was admissible for limited purpose of showing CW's state of mind. Evidence showed that CW did not come forward about D's abuse because she feared him. Defense counsel elicited testimony from several witnesses regarding timing & content of CW's claims. Testimony raised inference that CW might have fabricated events, thus putting her state of mind at issue. Tr. Ct. properly instructed jury regarding limited admissibility of CW's statements. Held, judgment affirmed, Sullivan, J., dissenting.

TITLE: Hare v. State
INDEX NO.: O.4.d.1.
CITE: (8/22/84), Ind., 467 N.E.2d 7
SUBJECT: Other crimes - admissible despite acquittal
HOLDING: Tr. Ct. did not err in allowing witness to testify that D committed similar crime in similar manner, despite D's acquittal for such crime. Here, pharmacist testified D took drugs & cash from store (Vigo County) at gunpoint, then forced him to lie down on floor, handcuffed his hands & taped his feet together. D was on trial for similar armed robbery in Shelby County. Ct. finds evidence similar enough to be admissible. Acquittal of crime does not make such evidence inadmissible. McCartney (1852), 3 Ind. 353. Ct. modifies McCartney to allow evidence of D's acquittal. Acquittal goes to weight not admissibility of crime. Ct. finds sufficient probative evidence to show D actually engaged in other crime, *citing* Howell, 413 N.E.2d 225. Held, harmless error.

TITLE: Hicks v. State
INDEX NO.: O.4.d.1.
CITE: (12-23-97), Ind., 690 N.E.2d 215
SUBJECT: Standard for assessing Rule 404(b) claims
HOLDING: Standard for assessing admissibility of prior bad acts evidence in Indiana is: (1) Tr. Ct. must determine that evidence of other crimes, wrongs, or acts is relevant to matter at issue other than D's propensity to commit charged act; & (2) Tr. Ct. must balance probative value of evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403. When inquiring into relevance, Tr. Ct. may consider any factor it would ordinarily consider under Rule 402. These may include similarity & proximity in time of prior bad act to charged conduct, & will typically include tying act to D. These factors are not in & of themselves separate requirements for admission under Rule 404(b), but are simply illustrative of many aspects that may, depending on context, be required to show relevance. Ct. found "no persuasive reason" to adopt Seventh Circuit's four-pronged test for admission of prior bad acts evidence set forth in United States v. Hudson, 884 F.2d 1016 (7th Cir. 1989). Hudson test unnecessarily restricts Tr. Ct.'s discretion to determine whether 404(b) evidence is relevant. Held, convictions affirmed, remanded for new sentencing.

TITLE: Hill v. State

INDEX NO.: O.4.d.1.

CITE: (10/3/86), Ind., 497 N.E.2d 1061

SUBJECT: Other crimes - reversal not required where offense mentioned is minor/does not prejudice D (harmless error)

HOLDING: Tr. Ct. did not err by permitting testimony that D (charged with murder) carried gun without license. Here, prosecutor on cross-exam asked D if she was illegally carrying a pistol. D responded affirmatively. She said she had no permit. During re-cross, prosecutor again asked whether D was illegally carrying gun. Defense objected & moved for mistrial based upon prejudicial allusion to separate/distinct crime. Ct. refused to admonish jury, but did give limiting instruction. Admission of testimony of another offense is error; however, when offense is minor/unlikely to weigh appreciably against D, resulting prejudice does not arise to grave peril requiring reversal. Mulligan, 487 N.E.2d 1309. Ct. is satisfied evidence that D carried pistol without permit when she killed her husband "counted for virtually nothing in jury's verdict." Held, no error.

RELATED CASES: Greenlee, 655 N.E.2d 488 (references to prior misconduct did not warrant mistrial; see card at D.17); Mulligan, 487 N.E.2d 1309 (notation re changed license plate on back of picture of car raised implication of minor offense, but was not so prejudicial as to require reversal); Parker, App., 501 N.E.2d 1131 (evidence re D's prior marijuana use & DWI conviction was inadmissible in trial for murder of cocaine supplier; however, Ct. finds error was harmless; case contains good analysis of case law); Dayton, App., 501 N.E.2d 482 (overwhelming evidence of guilt renders harmless any error in admission of prior bad acts).

TITLE: Howard v. State
INDEX NO.: O.4.d.1.
CITE: (1-14-02), Ind. App., 761 N.E.2d 449
SUBJECT: Ind. Evidence Rule 404(b) does not apply to charged crimes
HOLDING: Ind. Evidence Rule 404(b) does not apply to charged crimes. Paradigm of inadmissible 404(b) evidence is crime committed on another day in another place, evidence whose only apparent purpose is to prove D is person who commits crimes Swanson v. State, 666 N.E.2d 397 (Ind. 1996). Here, D was charged with conspiracy to deal cocaine. Evidence of $5,000 with narcotics odor was relevant to that charge because it made D's delivery of cocaine to others more probable. D argued that evidence was uncharged misconduct because evidence was seized in 1996 while charging information only charged him with conspiracy to commit dealing for acts committed in 1994-5. However, narcotics odor on money tended to show that conspiracy to obtain & deliver cocaine had taken place during 1995. Thus, evidence had requisite probative value for admission into evidence without danger of unfair prejudice. Because State successfully proved relevancy, probative value, & lack of unfair prejudice, there was no abuse of discretion in admitting evidence. Monegan v. State, 721 N.E.2d 243 (Ind. 1999). Held, judgment affirmed.

TITLE: James v. State
INDEX NO.: O.4.d.1.
CITE: (4th Dist., 10-28-93), Ind. App., 622 N.E.2d 1303
SUBJECT: Erroneous admission of other bad acts evidence
HOLDING: In D's trial for possession of marijuana found in sister's car, Tr. Ct. erred in allowing reference to D's prior imprisonment on drug conviction & status as probationer. Evidence was inadmissible for any proper purpose under Ind. case law & F.R.E. 404(b). Evidence of other crimes or wrongs is generally inadmissible to prove commission of present crime, because inferences of bad general character cannot be allowed to show tendency to commit crimes, Street, App., 567 N.E.2d 1180, *trans.* denied; Hardin, 611 N.E.2d 123.

Ct. found evidence of D's prior conviction drug use, & probation status was inadmissible to show his knowledge of drugs & intent to possess them. Ct. relied on State v. Coca (1983), 216 Neb. 76, 341 N.W.2d 606, which held that D's intention to possess marijuana on previous occasion could not support inference of intent to possess at later time, & noted central question was whether D knew marijuana was in his car, not whether he knew what marijuana was. See also Haynes, App., 578 N.E.2d 369, reaching similar conclusion.

Ct. found both Haynes & Coca applied to D's case, & that evidence was relevant only to present crime under impermissible presumption. Ct. rejected State's argument based on Haynes, App., 411 N.E.2d 659, because here D did not "open door" by trying to mislead jury & prior acts were not part of res gestae of crime. Ct. also rejected argument that any error was harmless, because evidence of prior uncharged crimes may have major impact on juries, Lannan, 600 N.E.2d 1334. Allusions to D's prior acts & status were numerous & prosecutor deliberately elicited testimony on multiple occasions, & in closing argument made thinly veiled attempt to draw jury's attention to improper use of testimony.

TITLE: Johnson v. State
INDEX NO.: O.4.d.1.
CITE: (9-25-95), Ind., 655 N.E.2d 502
SUBJECT: Uncharged misconduct inadmissible
HOLDING: In murder prosecution, Tr. Ct. committed reversible error by admitting evidence of uncharged misconduct. Victim was at apartment complex collecting money from customers of his children's newspaper route. When victim came to door of D's apartment, D opened door & shot victim. Over D's motion in limine & objections at trial, State was permitted to offer evidence of incident that occurred approximately 2 months before shooting. In that incident, 2 people from management of D's apartment complex knocked on D's door to inspect fire extinguisher. No one answered door, & after management representative attempted to use passkey to open door, D shouted, "Don't come in I will shoot, don't come in I will shoot." After holding pistol six inches from management representative's chest, seeing workers' identification & after ten-minute conversation, D allowed inspection of his fire extinguisher. Ct. noted that case implicates principle enunciated in Penley, Ind., 506 N.E.2d 806, that uncharged misconduct evidence "will naturally give rise to the inference that the D is of bad character," which poses danger that jury will convict D "solely on this inference." Here, theory of prosecution's case was that when D shot victim, he acted in conformity with his alleged violent character, born of his days in Chicago. D never claimed he did not intentionally arm himself before meeting victim at door. Fire extinguisher incident did not make it more likely either that D knew that he was killing victim or that shooting was not accidental. Moreover, because Tr. Ct. found insufficient evidence to instruct jury on self-defense, self-defense was not issue in case, thus evidence of prior incident could not have been relevant to rebut "what was not there to be rebutted." Record clearly showed Tr. Ct.'s abuse of discretion & that prior incident was offered for forbidden purpose of proving D's character. Held, transfer granted, Ct. App. decision at 645 N.E.2d 643 vacated, conviction reversed; Shepard, CJ., concurring.

RELATED CASES: Heavrin, 675 N.E.2d 1075 (probative value of handgun admitted to show that D knew how to get into victim's home undetected was lower than prejudicial effect, as issue was not relevant at trial; error was harmless).

TITLE: Johnson v. State
INDEX NO.: O.4.d.1.
CITE: (2nd Dist., 10-25-96), Ind. App., 671 N.E.2d 1203
SUBJECT: Erroneous admission of prior misconduct evidence - harmless error
HOLDING: Tr. Ct. erroneously admitted evidence of D's juvenile record of fighting. Evidence was admitted based on prosecutor's incorrect assertion that State had right to submit evidence of D's aggressive behavior because D was allowed to submit evidence of victim's aggressive behavior. Ind. Rules of Evidence 404 & 405 recognize distinction between D & State. State could not submit evidence of D's prior fights to rebut evidence that D had submitted regarding victim's aggressive behavior. Had D introduced evidence of his own character trait for peacefulness, then State would have been permitted to offer rebuttal evidence as to D's peacefulness or to inquire as to relevant specific acts by D on cross-examination. Ind.Evid.R. 404(a)(1); Ind.Evid.R. 405(a). Admission of evidence was harmless error, because: 1) there was substantial independent evidence supporting D's conviction & disproving his claim of self- defense; & 2) prejudicial effect of evidence was minimal, considering types of acts involved & their remoteness in time. Held, conviction affirmed.

RELATED CASES: Smith, 116 N.E.3d 1107 (Ind. Ct. App 2018) (incarrying a handgun without a license prosecution, harmless error to admit evidence that D had 15 days prior been in possession of a differently-colored handgun and had threatened to shoot someone).

TITLE: Johnson v. State
INDEX NO.: O.4.d.1.
CITE: (9-25-95), Ind., 655 N.E.2d 502
SUBJECT: Uncharged misconduct inadmissible
HOLDING: In murder prosecution, Tr. Ct. committed reversible error by admitting evidence of uncharged misconduct. Victim was at apartment complex collecting money from customers of his children's newspaper route. When victim came to door of D's apartment, D opened door & shot victim. Over D's motion in limine & objections at trial, State was permitted to offer evidence of incident that occurred approximately 2 months before shooting. In that incident, 2 people from management of D's apartment complex knocked on D's door to inspect fire extinguisher. No one answered door, & after management representative attempted to use passkey to open door, D shouted, "Don't come in I will shoot, don't come in I will shoot." After holding pistol six inches from management representative's chest, seeing workers' identification & after ten-minute conversation, D allowed inspection of his fire extinguisher. Ct. noted that case implicates principle enunciated in Penley, Ind., 506 N.E.2d 806, that uncharged misconduct evidence "will naturally give rise to the inference that the D is of bad character," which poses danger that jury will convict D "solely on this inference." Here, theory of prosecution's case was that when D shot victim, he acted in conformity with his alleged violent character, born of his days in Chicago. D never claimed he did not intentionally arm himself before meeting victim at door. Fire extinguisher incident did not make it more likely either that D knew that he was killing victim or that shooting was not accidental. Moreover, because Tr. Ct. found insufficient evidence to instruct jury on self-defense, self-defense was not issue in case, thus evidence of prior incident could not have been relevant to rebut "what was not there to be rebutted." Record clearly showed Tr. Ct.'s abuse of discretion & that prior incident was offered for forbidden purpose of proving D's character. Held, transfer granted, Ct. App. decision at 645 N.E.2d 643 vacated, conviction reversed; Shepard, CJ., concurring.

TITLE: Kuchel v. State
INDEX NO.: O.4.d.1.
CITE: (04/30/91), Ind., 570 N.E.2d 910
SUBJECT: Admissibility of prior crimes for which D was acquitted
HOLDING: Admission of testimony of victim from previous trial, where D had been acquitted of acts against that victim, was barred by collateral estoppel, but in light of other properly admitted testimony, such error was not reversible. After reversal of initial conviction in Kuchel, 501 N.E.2d 1045, D was retried on 20 total counts of Criminal Deviate Conduct, Battery, Criminal Recklessness, Intimidation, & various misdemeanors, involving several different victims. At first trial D was acquitted on 12 of 16 counts against one victim, who subsequently died. At second trial, the entire transcript of that victim's testimony from first trial was read into evidence. Under analysis of Little, 501 N.E.2d 412, Ct. found that admission of testimony as to 12 acquitted acts was error, apparently finding, but not discussing, fact that State was attempting to re-litigate facts already established against it. In light of evidence on other counts & involving other victims, however, Ct. found that error did not require reversal. Held, Convictions affirmed, JJ Debruler & Dickson concurring & dissenting on another issue.

TITLE: Lawrence v. State
INDEX NO.: O.4.d.1.
CITE: (6/29/84), Ind., 464 N.E.2d 923
SUBJECT: Prior crimes - relevancy; staleness
HOLDING: Tr. Ct. did not err in admitting evidence of rape conviction that occurred 22 years before present child molesting offense. Here, D objected on relevancy grounds. Referring to depraved sexual instinct exception (Austin, 319 N.E.2d 130; Miller, 268 N.E.2d 299) to rule that separate, independent & distinct crimes are inadmissible in establishing guilt, Ct. notes "[t]hroughout this span of years [age 22-44], a man normally maintains an active sexual interest in & at least some degree of sexual aggression toward women." Both child molesting & rape involve violent sexual aggression toward another. Passage of time alone does not overcome relevance. Held, no error.

RELATED CASES: Robinson 446 N.E.2d 1287 (card at O.6.f.5); Dockery, App., 504 N.E.2d 291 (same holding as Lawrence).

TITLE: Little v. State
INDEX NO.: O.4.d.1.
CITE: (12/16/86), Ind., 501 N.E.2d 412
SUBJECT: Collateral estoppel - evidence of other crime where acquitted
HOLDING: Ind. S.Ct. adopts collateral estoppel as analytical basis for determining admissibility of evidence of former offenses for which D has been acquitted. Here, during D's trial for rape of S.D., E.S. testified that D had raped her under similar circumstances. In earlier trial, D was acquitted of raping E.S. Ct. distinguishes Hare, 467 N.E.2d 7. There, D did not raise issue of collateral estoppel. In Hare, IN joined majority of states which follow rule that otherwise relevant evidence of prior crime generally is not rendered inadmissible by acquittal. Generic form of this "relevancy rule" takes form of 2-prong test. [Citation omitted.] (1) Tr. judge must determine whether evidence of commission of prior crime is sufficiently convincing to warrant its admission. (2) Tr. judge must then weigh probative value against prejudicial impact. Acquittal is merely one element in balancing test in most jurisdictions, although in IN, acquittal goes to weight of testimony about prior crime rather than to its admissibility. Collateral estoppel bars only reintroduction or relitigation of facts already established against state. Ct. finds admission of E.S.'s testimony, if erroneous, could hardly be considered harmless error because of difficulty of gauging its impact on jury's verdict. Although identity appears to be only issue which could have been litigated in either of D's rape trials, Ct. remands to Tr. Ct. for evidentiary hearing under collateral estoppel analysis. If Tr. Ct. decides issue of fact determined against state in D's trial for rape of E.S. was relitigated during his subsequent trial for rape of S.D., then Tr. Ct. must vacate conviction & conduct new trial excluding E.S.'s testimony. Held, remanded. **Note:** See separate card for appeal after remand.

TITLE: Little v. State
INDEX NO.: O.4.d.1.
CITE: (11/07/91), Ind., 580 N.E.2d 675
SUBJECT: Collateral estoppel - evidence of former crime for which D acquitted
HOLDING: Where D was on trial for rape & issue was identity, it was still error for Tr. Ct. to allow testimony from former alleged victim of previous rape for which D was acquitted based on consent. Prior alleged victim, who was different from alleged victim in instant case, was allowed to testify in detail during instant trial, that prior intercourse with D had been non-consensual. This was very issue that was decided against state in D's prior acquittal, & prosecutor used prior alleged victim's testimony to argue to jury that D had in fact raped prior alleged victim. Question of consent decided against state was presented & argued in present case as though it had been resolved in state's favor. Allowing testimony, even though issue in instant case was identity & not consent, was error because state was collaterally estopped from presenting this issue. Held, remanded for new trial.

RELATED CASES: Sloan, App., 654 N.E.2d 797 (uncharged misconduct evidence inadmissible because it had been basis of prior criminal charge of which D was acquitted).

TITLE: Maffett v. State
INDEX NO.: O.4.d.1.
CITE: (10/23/2018), 113 N.E.3d 278 (Ind. Ct. App 2018)
SUBJECT: Any error in admission of video and ammunition evidence was harmless
HOLDING: In prosecution for unlawful possession of firearm by serious violent felon (SVF), Tr. Ct. did not abuse its discretion in admitting three minutes of videotaped police interview of D and police testimony about the presence of handgun ammunition found in apartment. D argued that admission of the video recording impugned his character with an inference of prior bad acts, specifically police reference to D needing shotgun for protection "like if someone rolls up three deep because of what you do;" and D's statement, "I got a whole box of 9's because a MF'r come wanting a 3, I said cool give me the shells." Although D's vague statements in video may create an inference he was engaged in activities for which a gun was required for protection, a "mere inference" of bad acts does not implicate Evidence Rule 404(b). Dixson v. State, 865 N.E.2d 704, 712 (Ind. Ct. App 2007). Court did not address State's argument that D's possession of ammunition was relevant to the charged offense, because there was no substantial likelihood that ammunition and "nearly incomprehensible video interview" evidence contributed to his conviction. Thus any error was harmless. Held, judgment affirmed.

TITLE: McIntire v. State
INDEX NO.: O.4.d.1.
CITE: (10-1-99), Ind., 717 N.E.2d 114
SUBJECT: Rule 404(b) protections cannot be waived by volunteering prior bad acts before trial
HOLDING: Tr. Ct. erred in admitting D's statements to detective regarding his prior bad acts, which he volunteered before being arrested for charged offenses. While D may waive protections of Ind.Evidence Rule 404(b) by offering evidence of his own character at trial, Evid.R. 404(a)(1), he does not waive protections of Rule 404(b) by volunteering his previous bad acts at some point before trial. Ct. rejected argument that D's insanity defense opened door to all evidence relevant to his sanity, including criminal acts. Detective's testimony was irrelevant to issue of D's sanity at time it was offered because: 1) focus of trial was on proving D actually committed killings, not on his sanity; 2) detective's testimony was not admitted to rebut D's insanity defense inasmuch as D had not yet provided any evidence about his sanity when statement was admitted, & 3) nobody present at trial thought testimony was being offered on sanity issue; prosecutor argued statement was admissible because it was volunteered by D.

Applying harmless error analysis, Ct. concluded that although wrongfully admitted evidence was hardly insignificant, properly admitted evidence so solidly implicated D in murders that erroneously admitted testimony could not have substantially swayed jury's verdict. Held, convictions affirmed; Sullivan, J., concurring & dissenting on other grounds.

TITLE: Mote v. State

INDEX NO.: O.4.d.1.

CITE: (9-25-02), Ind. App., 775 N.E.2d 687

SUBJECT: Videotaped interview with officer - improperly admitted where references to criminal history in violation of Indiana Evidence Rule (IRE) 404(b)

HOLDING: Tr. Ct. abused its discretion when it denied D's motions for mistrial. In child molesting trial, State played redacted videotape recording of D & detective created prior to D's scheduled polygraph test. Videotape contained twelve references to D's prior criminal history in violation of IRE 404(b) & motion in limine. D's motions for mistrial were denied because Tr. Ct. found that there was only general reference to past criminal record, which "floated past rather quickly," & was "relatively innocuous." By allowing references to D's past arrests & convictions without admonishment, the possible & probable effects of those references in all likelihood caused the jury's determination of innocence or guilt to be prejudiced to point of placing D in position of grave peril to which he should not have been subjected. Held, conviction reversed.

RELATED CASES: Lehman, App., 777 N.E.2d 69 (Tr. Ct. erred in denying D's motion for mistrial after State's witness, the investigating officer, violated motion in limine by referring to his investigation of numerous other child molesting allegations against D).

TITLE: Newell v. State
INDEX NO.: O.4.d.1.
CITE: (4/24/2014), 7 N.E.3d 367 (Ind. Ct. App 2014)
SUBJECT: Prior misconduct evidence admissible under Rule 404(b)
HOLDING: In intimidation prosecution, Tr. Ct. did not err in admitting evidence suggesting D was previously engaged in an altercation involving a meat cleaver in the office at her apartment complex. At trial, D argued that she never intended to threaten apartment manager but was instead merely expressing frustration at being evicted. Evidence about the prior incident was admissible under Evidence Rule 404(b) as probative of whether D intended to intimidate and it was material to evaluating apartment manager's reaction to D's statements about doing violence to her. In addition, D opened the door to this evidence during her testimony. Held, judgment affirmed.

TITLE: Palmer v. State
INDEX NO.: O.4.d.1.
CITE: (4th Dist., 09-20-94), Ind. App., 640 N.E.2d 415
SUBJECT: Admission of other misconduct evidence not fundamental error
HOLDING: In child molest trial, evidence of other misconduct admitted on 3 different occasions did not constitute fundamental error. First instance of misconduct evidence was admitted when complaining witness (CW) testified to molestation of brother at same time as molest of CW. Evidence was properly admitted under res gestae exception because molestations were identical, occurred contemporaneously, in same manner, & in same location. Second instance involved D's wife's testimony regarding allegations of abuse made by CW's sister, D's physical & emotional abuse of wife, & D's extra-marital affairs. This evidence was admissible because D introduced it & put question in issue. Third instance involved cross-exam of three of D's witnesses, when State adduced testimony regarding D's affairs, specific acts of violence toward wife, & D's propensity to lie. State questioned witnesses as to whether they believed acts to constitute dishonest & deceptive behavior. On direct exam, witnesses were questioned as to their opinion as to truth, veracity, & honesty of D, & all responded they had high opinions of D on those issues. When D took stand in own behalf, his reputation for truthfulness became issue, & he opened door on subject during direct exam of witnesses. It was proper for Tr. Ct. to allow State to cross-exam witnesses regarding specific acts of bad character. Held, conviction affirmed.

RELATED CASES: Swanson, 666 N.E.2d 397 (no error in admitting evidence that prior to shooting victim, D had slapped his girlfriend & fired shots in ceiling by her).

TITLE: Reeves v. State
INDEX NO.: O.4.d.1.
CITE: (09-19-11), 953 N.E.2d 665 (Ind. Ct. App 2011)
SUBJECT: Evidence outside statute of limitations admissible
HOLDING: In prosecution for securities fraud, Tr. Ct. properly admitted evidence of transactions that fell outside of the statute of limitations period. State argued that D had concealed evidence of his offenses, thereby tolling the running of the statute of limitation pursuant to IND. CODE 35-41-4-2. However, State failed to allege concealment in its charging information, rendering this basis for admissibility of previous transactions improper. See Reeves v. State, 938 N.E.2d 10 (Ind. Ct. App 2010). Nonetheless, Court concluded that evidence was admissible on another ground, i.e., under common scheme or plan exception to Evidence Rule 404(b) and "to complete the story of a criminal transaction." Miller v. State, 593 N.E.2d 1247 (Ind. Ct. App 1992).

D testified at trial, specifically admitting that he either directed or was aware of all the transactions at issue while claiming that he believed them to be appropriate. Because D placed his intent at issue, the evidence involving transactions outside the statutory period was therefore rendered admissible to prove his criminal intent with regard to transactions within the statutory period. Moreover, evidence of earlier transactions is clearly related to the charged conduct in time, place, and circumstance as to have substantial probative value regarding D's intent. Given the number of transactions, and their interrelated nature, it is difficult to see how one could grasp the significance of later transactions without the context of the earlier ones. Held, judgment affirmed.

NOTE: Court also affirmed imposition of consecutive sentences, rejecting D's argument that because all of his crimes were all part of the same modified Ponzi scheme, they were all part of a single episode of criminal conduct, thus maximum sentence he could have received was ten years incarceration. Each of nine counts of securities fraud involved a different bond that was not issued with any of the other bonds, different sets of transactions, and different groups of victims. Notwithstanding some redeeming aspects of D's character, the very egregious nature of his crimes, reckless disregard for bondholders' money and negative aspects of his character justified his 54-year aggregate sentence.

TITLE: Robinson v. State
INDEX NO.: O.4.d.1.
CITE: (3rd Dist., 6-19-97), Ind. App., 682 N.E.2d 806
SUBJECT: Evidence of gang membership admissible to show bias
HOLDING: In murder prosecution, evidence of gang membership was admissible to show witness's bias, & probative value of this evidence was not substantially outweighed by any unfair prejudice. Indiana Evidence Rule 404(b) is not limited solely to evidence of prior crimes but includes any conduct of D which may bear adversely on jury's judgment of his character. Kimble, App., 659 N.E.2d 182. Here, witness identified D as shooter prior to trial but at trial recanted & testified that police fabricated earlier identification. Tr. Ct. allowed State to order witness to show jury tattoo of gang with which D & witness were affiliated. Rule 404(b) did not prohibit admission of this gang activity evidence, because it was offered to show bias of witness in favor of D, rather than to show that D acted in conformity with gang activities. Although evidence of gang activity is inherently prejudicial, prejudice did not substantially outweigh high probative value in this case. Evidence of bias of State's only identification witness was critical to State's claim that D recanted his prior identification to protect D. Held, no error.

RELATED CASES: Daniels, 683 N.E.2d 557 (calendar had only slight probative value in identifying D as assailant but had clear prejudicial effect because of its gang-related statements & drawings of guns; error held harmless in light of overwhelming evidence of guilt).

TITLE: Roche v. State
INDEX NO.: O.4.d.1.
CITE: (3rd Dist., 9-22-98), Ind. App., 699 N.E.2d 752
SUBJECT: Erroneous admission of prior misconduct evidence
HOLDING: In attempted murder prosecution, evidence of D's prior acts contained in prison conduct summary card & testimony concerning prison guard's prior altercation with D was not genuinely relevant to prove D's specific intent to kill at time of offense. Thus, evidence should have been excluded under Indiana Evid. R. 404(b) because it revealed only that, by shooting at prison guard, D was acting in conformity with his prior acts. At trial, D contended that although he fired shots at prison guard, he did not intend to kill him. In order for evidence of prior acts to be admissible, it must also be genuinely relevant to prove D's intent at time of charged offense. Wickizer, 626 N.E.2d 795. Because jury received no specific details about any of D's twenty-one prison violations, Ct. failed to see how jury might reasonably have used this evidence to determine whether it was more probable than not that D specifically intended to kill guard. Evidence was likewise inadmissible to refute D's claim that he was forced to escape from prison because he & other death-row inmates were maltreated by prison staff. D's reason for wanting to escape had no relationship regarding his intent to kill. Admission of prior acts was not harmless error, as evidence was likely to have had prejudicial impact on jury such that it contributed to verdict. Held, conviction reversed & remanded for new trial.

TITLE: Sayre v. State
INDEX NO.: O.4.d.1.
CITE: (3d Dist. 12/5/84), Ind. App., 471 N.E.2d 708
SUBJECT: Other acts - drug paraphernalia not admissible to prove common nuisance
HOLDING: Tr. Ct. erred in admitting items of drug paraphernalia under count charging D with maintaining a common nuisance (Ind. Code 35-48-4-13(b)); however, reversal is not required because D fails to show prejudice. Possession of paraphernalia associated solely with use of controlled substances is not probative on issue of whether D kept controlled substances in building (maintained common nuisance). Here, Ct. finds evidence that drugs were kept in house was properly admitted & violation of statute was properly shown. Ct. distinguishes Cox, App., 422 N.E.2d 357 (witness testified to receiving threats not to testify against D). Where D's conviction is not dependent on credibility of witnesses, admission of object has no prejudicial impact on jury. Held, no error.

TITLE: Sessoms v. State

INDEX NO.: O.4.d.1.

CITE: 357 Md. 274, 744 A.2d 9 (Md. 2000)

SUBJECT: Other Crimes Evidence -- Crimes of Third Person

HOLDING: Maryland Supreme Court holds that where other crimes evidence concerns person other than D, stringent tests of Evidence Rules 404(b) & 403 do not apply. Purposes of those rules is to ensure that D gets fair trial free from undue prejudice arising from past criminal history. Here, D was charged with rape. He denied sexually assaulting complainant, and testified that on day after alleged rape, complainant's brother and a friend had severely beaten and robbed him in a city park. Defense argued that rape allegation was fabricated in order to cover up for complainant's brother, and in support of this, he attempted to present evidence that another man was beaten and robbed in same park on same afternoon. Tr. Ct. improperly excluded this evidence pursuant to R. Ev. 404(b) & 403.

TITLE: Smith v. State
INDEX NO.: O.4.d.1.
CITE: (4th Dist. 12/12/84), Ind. App., 471 N.E.2d 733
SUBJECT: Other crimes - evidentiary harpoon
HOLDING: Tr. Ct. erred in denying D's motion for mistrial where: (1) prosecutor intentionally elicited evidence of unrelated burglaries (after Tr. Ct.'s ruling that he should not do so); (2) Tr. judge did not question jurors to determine whether they would obey her admonition to disregard officer's testimony; & (3) evidence re D's guilt was in conflict. White, 272 N.E.2d 312. "In assessing an evidentiary harpoon's impact on jury's verdict, we must consider whether there was serious conflict in evidence, whether witness implicated D in other crimes directly or only indirectly, & extent [of admonishment]. See Davis, 418 N.E.2d 203." Here, officer testified D told him he broke into another garage earlier that morning. Ct. finds jury may have been influenced by improper testimony. Ct. rejects state's contention that evidence is admissible to prove felonious intent or to complete story of crime charged. Ct. finds evidence was not admissible to impeach D because his whereabouts earlier that morning was "wholly collateral" to crime charged. Impeachment on collateral matters is improper. Gaston, App., 451 N.E.2d 360. Held, reversed.

TITLE: Soo Koo v. State
INDEX NO.: O.4.d.1.
CITE: (5th Dist., 09-22-94), Ind. App., 640 N.E.2d 95
SUBJECT: Admission of prior bad acts to rebut defense factual claim
HOLDING: Where D alleged complaining witness (CW) in rape prosecution was hallucinating about his acts, it was not error to admit evidence of prior similar acts with others. CW testified that when she went to D-doctor, he gave her valium, placed her on examination table, & raped her. D then admitted evidence to suggest CW hallucinated sexual encounter because she was heavy user of cocaine & valium. Testimony of two former patients of D was admitted over objection. Tr. Ct. erroneously admitted evidence based on federal "corpus delicti" exception, which at time of trial was not articulated exception to rule prohibiting bad acts evidence. However, error was harmless because evidence would be admissible on remand under new rules of evidence. Rules prohibit such evidence only where it is used for sole purpose of suggesting that D possesses certain character traits & acted in conformity therewith. Prior misconduct is also admissible to rebut specific factual defense claim, U.S. v. McAnderson, (7th Cir., 1990), 914 F.2d 934. Here, State was clearly entitled to rebut D's evidence that CW hallucinated D's acts against her. In addressing need to balance probative value of evidence against prejudice to D, Hardin, 611 N.E.2d 123, Ct. found evidence highly probative. There were no witnesses, rape test was inconclusive, & because other incidents were similar to charged act, evidence lent credence to CW's story. Same factors made evidence prejudicial to D, but limiting instructions minimized potential prejudice. Ct. could not say danger of prejudice to D outweighed probative value of evidence. Held, conviction affirmed. **NOTE**: Holding questionable based on ex post facto prohibitions on evidence rules discussed in Crouch, 638 N.E.2d 861.

RELATED CASES: Thornton, App., 653 N.E.2d 493 (where D presented substantial evidence suggesting his degenerative physiological impotency made it impossible or highly unlikely for him to have engaged in child molesting, Tr. Ct. did not err in admitting rebuttal evidence of D's prior sexual misconduct).

TITLE: State v. Montgomery
INDEX NO.: O.4.d.1.
CITE: 740 A.2d 625 (N.H. 1999)
SUBJECT: 404(b) Evidence -- Cannot Be Used to Explain Witness' Lack of Detailed Recall
HOLDING: The purposes for which uncharged criminal conduct may be admitted pursuant to Rule of Evidence 404(b) do not include explaining why a complaining witness cannot recall much detail about the particular instances of child molesting which the state has chosen to charge. D's daughters told police that he had committed a variety of sexual acts with them over a period of several years. The state formally charged D with one act of each type per girl per year. D filed a pretrial motion to exclude evidence of uncharged sexual assaults, which was denied on the theory that this evidence was admissible to explain why the girls could not recall much detail about specific charged assaults. The Tr. Ct. reasoned that if this evidence were not admitted, the jury would hear only about "isolated acts," and the girls would be "unable to explain to the jury why they cannot distinguish one incident from another and why they cannot testify in detail as to the circumstances surrounding each incident. The New Hampshire Supreme Court reverses, holding that while the evidence "may well" have been admissible to rehabilitate the girls' credibility if the defense had attempted to discredit them by bringing up their lack of detailed recall, the state cannot simply introduce evidence of prior bad acts during its case in chief for the purpose of enhancing its witness' credibility. The Court went on to conclude that admission of the evidence was not harmless and required reversal of the D's convictions.

TITLE: State v. Ruiz
INDEX NO.: O.4.d.1.
CITE: 131 N.M. 241, 34 P.3d 630 (N.M. Ct. App. 2001)
SUBJECT: Other Crimes - Absence of Mistake Exception
HOLDING: Absence of mistake exception to exclusion of prior crimes evidence (R.E. 404(b)) does not allow admission of D's prior bad acts to refute alleged mistake of fact on part of witness. D was charged with molesting several different adolescent girls, and state was allowed to join offenses for trial on ground that testimony of each victim would be admissible in each trial to refute D's allegation that events described by victims did not happen and victims were mistaken in their accounts. Court finds that using prior bad acts evidence in this fashion is no different from using it to show propensity. State's argument boiled down to claim that because D did bad things to one victim, it was more likely that he did them to other victims. "Absence of mistake" exception applies when D claims to have made mistake, such as when he admits touching victim but says it was accidental or by mistake, not any time D alleges that victim or other state's witness is mistaken.

TITLE: Stephens v. State
INDEX NO.: O.4.d.1.
CITE: (5th Dist., 10-17-07), Ind. App., 874 N.E.2d 1027
SUBJECT: Collateral estoppel prevented D from attacking judgment in child support proceedings
HOLDING: In nonsupport prosecution, Tr. Ct. did not abuse its discretion in collaterally estopping D from attacking the validity & findings of former child support proceedings in which he was a party. Collateral estoppel bars subsequent relitigation of an issue or fact where that issue or fact was adjudicated in a former proceeding, assuming the party against whom the prior judgment is asserted had a full & fair opportunity to litigate the issue. Reid v. State, 719 N.E.2d 451 (Ind. Ct. App 1999). Strict mutuality & identity of parties is not required where State invokes offensive collateral estoppel to prevent a D from attacking judgment of a prior proceeding. Here, D argued he did not have a full & fair opportunity to litigate the child support amount because he was not represented by counsel at prior hearing & increased support amount did not take into account his self-employment expenses. Tr. Ct. properly ruled that D either needed to appeal the specific issues he contended were problematic, file a petition to modify child support, or file a motion to correct error to modify the child support order. D may not now reincarnate the exact issues that were adjudicated in child support proceedings. Hunter v. State, 802 N.E.2d 480 (Ind. Ct. App 2004). Held, judgment affirmed.

TITLE: Storey v. State
INDEX NO.: O.4.d.1.
CITE: (4/12/90), Ind., 552 N.E.2d 477
SUBJECT: Prior crimes evidence to rebut diminished capacity defense
HOLDING: Tr. Ct. did not err in allowing state to rebut D's diminished capacity defense by cross-examining (*Citing*) both D & psychologist/ witness about offenses which predated injury to D's brain. D was charged with murder, & evidence showed that he fought with & ultimately shot man who accused him of taking tool kit & boat engine. Although insanity defense was not raised, D presented testimony of psychologist that he suffered from chronic organic brain disorder caused in part by 1968 embolism, reducing his capacity to handle stressful situations, make judgments, & control his impulses, especially fear. Psychologist testified that acts for which D was charged were consistent with his disorder. In *Citing* both psychologist & D himself, & in its own rebuttal through testimony of former prosecutor, state presented evidence of assault conviction from 1959. D objected at trial, & on appeal argues that this evidence was inadmissible & improper as impeachment. However, evidence was not offered to impeach D or to prove his guilt of charged offense, but to refute psychologist's testimony. State was attempting to attack information upon which opinion was based, as well as its conclusion. Evidence of 1959 assault tended to refute conclusion that charged offense was result of 1968 brain embolism & resulting organic brain disorder & was particularly relevant because psychologist only reviewed D's medical history since 1968. Ct. notes that diminished capacity defense is not recognized in Ind., but reasons that since D introduced psychologists' testimony, he cannot complain that evidence rebutting it was irrelevant. Held, conviction affirmed.

TITLE: Sudberry v. State
INDEX NO.: O.4.d.1.
CITE: (2/18/2013), 982 N.E.2d 475 (Ind. Ct. App 2013)
SUBJECT: Evidence of previous threat admissible
HOLDING: In Class C felony battery prosecution, Tr. Ct. did not abuse its discretion by admitting evidence of D's earlier threat against his brother. During a physical altercation, D threw a pan of hot water on his brother, who sustained second degree burns. At trial, D raised self-defense and State was allowed to present evidence that D threatened to kill brother if he pushed him again. Threat occurred a little over a year before the battery, and D argued that the threat was too remote in time to be relevant and probative of his intent at the time of the battery, *citing* Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App 2004).

Court disagreed, holding that D's threat was not too remote in time to be admissible. Evidence reflected that there were no physical altercations between D and his brother between the date of the threat and the date of the charged battery, thus a reasonable jury could conclude that D did not have a reason to act on his threat until the date of the battery. Held, judgment affirmed.

TITLE: Sundling v. State
INDEX NO.: O.4.d.1.
CITE: (4th Dist., 5-15-97), Ind. App., 679 N.E.2d 988
SUBJECT: Uncharged misconduct evidence - reversible error
HOLDING: Tr. Ct. committed reversible error in admitting evidence of uncharged acts of molestations allegedly committed by D. During voir dire, defense counsel asked prospective jurors various general questions regarding whether they understood that testimony of small children could be manipulated by parents, police, & therapists. Tr. Ct. determined that D's uncharged molestations were admissible for sole purpose of showing that complaining witnesses were not fantasizing about incidents of molestations. Ct. held that evidence of uncharged molestations did not provide proof of any of enumerated exceptions under Indiana Evidence Rule 404(b). Exceptions in Evid.R. 404(b) are only available when D goes beyond merely denying charged crimes & affirmatively presents claim contrary to charge. Here, D merely claimed that molestations never occurred; he did not contend that children were fantasizing about their molestations. Consequently, whether children fantasized their molestation could not serve as excuse for admission of D's extraneous bad acts or uncharged crimes. Sloan, App., 654 N.E.2d 797. Ct. reversed convictions because erroneous admission of evidence was likely to have had prejudicial impact on average juror such that it contributed to guilty verdict. Johnson, App., 671 N.E.2d 1203. Held, convictions reversed & remanded for new trial; Chezem, J., dissenting.

RELATED CASES: Marshall, App., 893 N.E.2d 1170 (D opened door to evidence of his criminal conduct in Tennessee when, during opening statement, defense counsel referred to fact that although CW reported to Tennessee authorities in 2001 that D had molested her years prior, she thereafter "recanted" her statement; State was permitted to explain why CW withdrew her prior allegations to police).

TITLE: Swain v. State
INDEX NO.: O.4.d.1.
CITE: (4th Dist., 2-28-95), Ind. App., 647 N.E.2d 23
SUBJECT: Evidence of prior convictions - erroneous admission
HOLDING: Tr. Ct. committed reversible error when it admitted evidence of D's prior drug dealing conviction at trial. D attempted to show that arresting officer was prejudiced against blacks, & that officer's presence at street corner on night of arrest was solely based on that prejudice. After cautioning defense counsel of risk of opening door to rebuttal, judge allowed officer to testify about prior convictions to explain officer's conduct & his presence in area. Ct. held that reason for police action had already been explained in direct examination & does not in any way prove that D committed a certain crime. Prior misconduct evidence admitted against D was not part of res gestae of charged offense & was not necessary to explain misleading testimony or evidence offered by defense counsel. Even if evidence was relevant, prejudicial impact outweighed probative value under Ind.Evid.R. 403. Held, conviction reversed, Chezem, J., dissenting.

RELATED CASES: Williams, App., 677 N.E.2d 1077.

TITLE: Swanson v. State
INDEX NO.: O.4.d.1.
CITE: (5-31-96), Ind., 666 N.E.2d 397
SUBJECT: Uncharged misconduct - Res Gestae exception abandoned
HOLDING: *Res gestae* exception to uncharged misconduct evidence has not survived adoption of Indiana Rules of Evidence. Uncharged misconduct evidence previously claimed admissible as part of *res gestae* will now be analyzed under Ind. Evidence Rule 401, considering relevancy of evidence & whether it tends to make more probable or less probable the existence of some fact pertinent to case.

Here, evidence that D slapped his girlfriend & fired shots in ceiling prior to shooting victim was admissible because it tended to connect D to murder weapon & it indicated D knew weapon was loaded. D's actions prompted victim to demand that people leave premises & provided possible motive D might have had for killing victim. Held, transfer granted, Tr. Ct. affirmed.

RELATED CASES: Mise, 142 N.E.3d 1079 (Ind. Ct. App. 2020) (no error in admitting multiple undisclosed/uncharged acts of child molest where defendant was charged with only one count; testimony also admissible to show preparation or plan); Hudson, App., 2009 Ind. App. LEXIS 363 (although occurring during the same charged time period, 2000-2006, evidence that D played a game with victim where she placed her hands on his penis was separate and unique from the charged sexual offenses and thus not "inextricably bound up"with the charged crimes; because the game did not fall under Rule 404(b) exception, it should not have been admitted into evidence; harmless error); Shepherd, App., 902 N.E.2d 360 (in felony murder/rape prosecution, evidence of D's prior flirtations with victim and evidence that D previously used victim's friend's car without permission "illustrates the challenges presented by the elimination of the doctrine of res gestae...the story of these crimes could not be properly told without this evidence"); Marshall, App., 893 N.E.2d 1170 (evidence of repeated molestations was instrinsic to time periods outlined in charging information and therefore outside of Evid. R. 404(b)); Wages, App., 863 N.E.2d 408 (testimony that D was driving erratically minutes or seconds before accident was intrinsically related to crime of reckless homicide & admissible); Seabrooks, App., 803 N.E.2d 1190 (evidence that D searched through murder victim's wallet was not excluded by Rule 404, as it was not evidence of a "crime committed on another day in another place.").

TITLE: Van Leer v. State

INDEX NO.: O.4.d.1.

CITE: (05/13/92), Ind., 591 N.E.2d 139

SUBJECT: Admission of statement including reference to other crime proper to complete picture of D's state of mind

HOLDING: On cross-examination, it was not error to admit un-redacted letter of D mentioning other situation which elicited testimony about "other crimes," because such evidence presented more complete picture of D's state of mind. After arrest for forgery & murder of roommate, D sent letter to other roommate indicating that he had killed victim accidentally, & that he first thought of summoning help, but because of past experience with parents he thought he would not be believed. Instead, he tried to pass himself off as decedent to save victim's friends & relatives pain of his death. At trial, D gave slightly different version of events than was in redacted letter. Full letter was admitted on cross-exam to show D's true state of mind at time of victim's death. During questioning about portion about his parents, it came out that D had pled guilty to attempted voluntary manslaughter for wounding his parents in their sleep. Ct. held that when D testified that shooting was accidental & he merely panicked in not summoning aid, it was proper to admit un-redacted letter to present more complete picture of situation.

RELATED CASES: Tingle, 632 N.E.2d 345 (Evidence juvenile was previously incarcerated in juvenile facility & participated in earlier theft of car & license plate on same evening as charged offenses was properly admitted to, show reasons for D being at crime scene. In footnote, Ct. indicated that evidence would now be admissible under IRE 404(b) as "preparation.")

TITLE: Weaver v. State

INDEX NO.: O.4.d.1.

CITE: (12/20/91), Ind., 583 N.E.2d 136

SUBJECT: Evidence of subsequent crime to show attempt to conceal evidence of charged crime inadmissible

HOLDING: In trial for D's murder of one person, it was error to admit evidence that he had shot his wife 2 years subsequently, as there was no evidence that he shot wife to conceal or suppress evidence of earlier killing, but such error was harmless in light of other evidence of guilt of murder. In finding evidence inadmissible to show attempt to conceal or suppress other evidence, Ct. noted that although wife knew of D's involvement in earlier murder, there was nothing to show his shooting of her was done to suppress this information. She had known about it for 2 years, & he had never done anything before. Additionally, she went to police only after he shot her, & jury could have viewed evidence as giving her reason to lie about previous murder. Held, conviction affirmed due to harmless error.

TITLE: Wells v. State
INDEX NO.: O.4.d.1.
CITE: (11/12/82), Ind., 441 N.E.2d 458
SUBJECT: Other crimes - proof of actual commission
HOLDING: Evidence is admissible if it tends to prove intent, motive, purpose, identity, common scheme or plan, or depraved sexual instinct, especially if the 2 crimes are related. Howell, 413 N.E.2d 225; Porter, 397 N.E.2d 269; Woodard, 366 N.E.2d 1160. Evidence of prior acts is not admissible unless evidence of probative value shows D actually engaged in those acts. Howell. Here, state introduced evidence of shooting incident at International Harvester (I.H.) plant in Louisville where D worked. Bullets found at I.H. plant matched bullet used to commit murder in Austin, IN. I.H. security guard testified that tip implicating D in I.H. shooting incident was deemed unreliable & D was never a suspect. Ct. finds no evidence of probative value linking D to I.H. shooting. Held, admission of evidence was error, but error was harmless because evidence did not prejudice D.

TITLE: Wertz v. State

INDEX NO.: O.4.d.1.

CITE: (7-17-02), Ind. App., 771 N.E.2d 677

SUBJECT: Prior bad acts - repetitive questions become improper when they begin to prove D's character

HOLDING: Tr. Ct. committed harmless error in admitting 404(b) evidence for purpose of showing motive, intent, identity, and/or mistake. D's motion in limine had been granted prohibiting admission of evidence of prior bad acts. However, trial judge allowed evidence to come in over defense counsel's continuing objection. Even where questions involve proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident instead of character, there is certainly a point where repetitive nature of such questions stops proving one of listed exceptions under 404(b) & begins to prove D's character. Therefore, while evidence of prior bad acts may have been relevant to matter at issue, cumulative nature of such questions had prejudicial effect that outweighed their collective probative value. Ct. nonetheless found error to be harmless due to substantial independent evidence of guilt. Held, judgment affirmed.

TITLE: Wilkes v. State
INDEX NO.: O.4.d.1.
CITE: (12-10-09), (Ind. 2009) 917 N.E.2d 675
SUBJECT: Corpus delicti rule does not apply to Rule 404(b) evidence
HOLDING: The corpus delicti rule does not apply to evidence of other crimes permitted by Evidence Rule 404(b). The purpose of the corpus delicti rule is to prevent conviction for a crime that did not occur. That purpose does not apply to evidence of crimes offered under Rule 404(b) to establish motive or intent because there is no danger of conviction for those crimes. Moreover, the corpus delicti rule does not apply to the admission of prior acts because admission under Evidence Rule 404(b) does not require proof sufficient for a conviction. Here, the State successfully sought to admit D's confessions to sexual activity with a thirteen-year-old as evidence of motive to murder. Because the corpus delicti rule does not apply to the admission of Rule 404(b) prior acts, the State did not have to admit other evidence of the sexual activity in order to admit D's confession. Thus, Tr. Ct. did not abuse its discretion by admitting D's confession as evidence of motive. Held, judgment affirmed.

O. EVIDENCE

O.4. Relevancy

O.4.d.2. Common scheme or plan

TITLE: Clark v. State
INDEX NO.: O.4.d.2.
CITE: (4/7/89), Ind., 536 N.E.2d 493
SUBJECT: Common scheme or plan - inadmissibly remote
HOLDING: Tr. Ct. erred in admitting offenses committed 10 yrs. or more before charged crime under common scheme or plan exception. Here, D was charged with possession of cocaine & heroin. State introduced evidence that D was convicted of possession of heroin & cocaine 13 yrs. earlier, & 7 yrs. earlier had been convicted of conspiracy to distribute cocaine & heroin. Both convictions arose from activities occurring at D's place of business, & state argues that they were admissible to prove common scheme or plan. Common scheme or plan exception to rule excluding prior crimes evidence has 2 branches: 1st permits proof of prior offense committed with identical modus operandi when identity of perpetrator is genuine issue; 2d permits proof of prior offense as evidence of preconceived plan that includes charged crimes. Penley 506 N.E.2d 806. State cites 2 cases for its position: Manuel 370 N.E.2d 904 (officers testified they had participated in several drug sales with D within 4 months of charged sale); & Downer 429 N.E.2d 953 (witness testified he had been buying drugs from D for 5 yrs.). Here, D's prior convictions are too remote & too dissimilar to be relevant as part of common scheme or plan. See Riley 489 N.E.2d 58. Unlike Manuel & Downer, they do not involve sales to same individual or during short period of time. They serve only to show propensity, which is precisely what rule excluding evidence of prior crimes is designed to prohibit. Held, reversed & remanded. Givan & Pivarnik, JJ., DISSENT, arguing that remoteness in time goes only to weight & not to admissibility. See previous holding in Downer, supra.

TITLE: Gaston v. State
INDEX NO.: O.4.d.2.
CITE: (4th Dist. 07/26/83), Ind. App., 451 N.E.2d 360
SUBJECT: Other crimes - dissimilar past drug dealings inadmissible
HOLDING: Tr. Ct. erred in allowing witnesses to testify concerning prior delivery of cocaine to them by D where allegations of past dealings lacked sufficiently distinctive similarities to crime charged to be admissible under common scheme/plan exception. Here, state introduced 3 witnesses who testified to prior deliveries of cocaine to them by D. Only similarities were cost, substance & place of transactions. Because nothing is unique about these similarities, they do not provide link between crime charged & prior dealings. Because testimony was irrelevant, it violated D's due process rights by allowing state to try him for crimes not charged. Held, conviction reversed on other grounds.

RELATED CASES: But see Hawn 565 N.E.2d 362 (prior uncharged drug dealings admissible because they were within one year of charged conduct & "circumstances" (without further discussion) tended to prove common scheme or plan); Mullins 504 N.E.2d 570 (Crim L 641.13(6); D opened door to questioning); Smith, App., 471 N.E.2d 733 (evidence of prior crime should have been excluded; only link between 2 alleged crimes was proximity in time; see card at O.4.d). Cf., Sweet 498 N.E.2d 924 (different drug transaction between D & same informant admissible, even though it occurred 9 months before one charged; Dixon DISSENTS without opinion); Moore 471 N.E.2d 684 (informant properly allowed to testify in D's cocaine dealing trial that he had not worn body mike to record first marijuana transaction because he was afraid of D, who had beaten up another informant); Gaines, App., 456 N.E.2d 1058 (evidence of prior involvement in drug sales admissible; Ct. distinguishes Gaston: issue is fact-sensitive resolved on case-by-case basis).

TITLE: Goodner v. State
INDEX NO.: O.4.d.2.
CITE: (9-24-97), Ind., 685 N.E.2d 1058
SUBJECT: Prior bad acts admissible to prove intent & plan
HOLDING: Tr. Ct. properly admitted D's statements regarding his two sales of cocaine earlier in week of arrest. Statements concerning transactions that week were part of plan that encompassed charged offense. Concerns that led Ct. in Wickizer, 626 N.E.2d 795, to adopt narrow construction of intent exception to Ind. Evidence Rule 404(b) do not appear applicable to evidence of acts that are part of "plan" for charged offense within meaning of plan exception under Rule 404(b). Held, no error.

TITLE: Greenboam v. State
INDEX NO.: O.4.d.2.
CITE: (4-30-02), Ind. App., 766 N.E.2d 1247
SUBJECT: Improper character evidence - prior molestations do not establish "plan"
HOLDING: Evidence of D's prior molestations of complaining witness (CW) was not admissible to establish a Aplan@ under Ind. Evidence Rule 404(b). In Lay v. State, 659 N.E.2d 1005 (Ind. 1995), Ct. held that Acommon scheme or plan@ did not survive adoption of Indiana Rules of Evidence. State argued that testimony of police officer & CW regarding D's prior molestations established common scheme or preconceived plan to repeatedly molest CW. However, State presented no evidence that D's prior molestations & current charges were part of plan. State established no similarity between acts except that they had occurred in family residence, which is too broad to be contemplated by Rule 404(b). Even under broader "common scheme or plan" analysis, evidence of D's prior molestations would be inadmissible. Because substantial likelihood existed that erroneously admitted evidence contributed to verdict & had impact on D's substantial rights, error was not harmless. Held, judgment reversed; Bailey, J., dissenting.

RELATED CASES: Southern, App., 878 N.E.2d 315 (subsequent sexual intercourse with victim was admissible to prove plan where in each instance D lured victim to secluded & remote place for sex).

TITLE: Guffey v. State
INDEX NO.: O.4.d.2.
CITE: (8/19/2015), 42 N.E.3d 152 (Ind. Ct. App 2015)
SUBJECT: Telephone calls admissible under plan exception to Evidence Rule 404(b)
HOLDING: In conspiracy and aiding, inducing or causing Class A felony attempted child molesting prosecution, Tr. Ct. did not abuse its discretion by admitting 15 recorded jail telephone calls between D and his co-conspirator. During these phone calls, D encouraged his girlfriend to have sex with her 12-year-old son so that she could make sure that he was not gay and told her to give her son alcohol prior to having sex so that he would be more comfortable.

On appeal, D argued that the conversations should have been excluded because their content did not "parallel" the charges and involved uncharged misconduct. Court held that the calls were relevant to show D's plan and preparation as they related to his conspiracy to commit child molesting charge. They also showed D's preparation and grooming of co-conspirator and her son to encourage their willingness, get them more comfortable, and prime them for a sexual act. See Piercefield v. State, 877 N.E.2d 1213 (Ind. Ct. App 2007). Additionally, the conversations completed the story of the crime and were relevant to a matter at issue other than D's propensity to commit the charged act. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Hobbs v. State
INDEX NO.: O.4.d.2.
CITE: (8/17/84), Ind., 466 N.E.2d 729
SUBJECT: Other crimes - common scheme or plan
HOLDING: Tr. Ct. committed reversible error in admitting testimony of participant (lookout) during murder trial that Ds were part of burglary ring in Lake/Porter Counties that had specific modus operandi. Common scheme or plan exception requires much more than mere repetition of similar crimes. Device must be so unusual/distinctive as to be like signature. Biggerstaff 361 N.E.2d 895; Riddle 348 N.E.2d 635. Here, witness (Keeler) testified in detail re burglary ring, but distinctive modus operandi was never proved in this case. Other witnesses also testified re burglary rings & Ds' involvement. Ct. finds evidence of prior unrelated crimes did not show common scheme or plan. Identity was not at issue (see Meeks 234 N.E.2d 629 - rape case). Prosecutor told judge testimony was admitted to support Keeler's credibility, in addition to common scheme/plan/identity. Ct. finds no support for prosecutor's contention that prior unrelated crimes are admissible solely to bolster witness' credibility. Held, reversed.

TITLE: Johnson v. State
INDEX NO.: O.4.d.2.
CITE: (4th Dist. 5/16/89), Ind. App., 544 N.E.2d 164
SUBJECT: Behavioral pattern - not common scheme or plan
HOLDING: Evidence of D's prior acts of violence toward girlfriend were not admissible under common scheme or plan exception in trial for battery. Evidence of prior threats or acts of violence toward decedent is permissible in murder trial as proof of malice. See, e.g., King 508 N.E.2d 1259. However, this exception does not apply to battery trials. Here, prior acts, which occurred over prolonged period of time, are not unusual, distinctive, or similar to each other or to present beating. At most, they indicate chronic behavioral pattern equivalent to "wife-beating." They do not indicate common scheme or plan, but at most show propensity to commit violent acts against victim, & are not admissible. See Clark 536 N.E.2d 493 (card at O.4.d.2). Held, reversed. Chezem, J., DISSENTS, arguing evidence is admissible to show intent.

TITLE: Laird v. State
INDEX NO.: O.4.d.2.
CITE: (6/15/2018), 103 N.E.3d 1171 (Ind. Ct. App 2018)
SUBJECT: No error in admission of D's internet search history
HOLDING: In child molesting prosecution, Tr. Ct. did not err in admitting evidence regarding search history from three days before the charged crime found on D's computer. Detective testified that he searched D's computer and found search history that included searches for the terms "young boy giving his first handjob," "young boy giving a handjob," and "boy's first handjob fast cum." Court first held that D failed to preserve the issue for appeal because he did not object when the evidence was admitted, but objected instead during State's opening argument when it mentioned the evidence collected from the search and then again prior to closing argument in anticipation of the State mentioning the evidence again. Waiver notwithstanding, the search history evidence was admissible under the "plan" exception in Evidence Rule 404(b)(2) because the searches were both close in time and very similar to the charged offenses against complaining witness. Evidence was also admissible under Rule 404(b)'s "intent" exception because D stated in his pretrial statements to police that, if he touched his nephew in an inappropriate manner, it was accidental. This is sufficient to place his intent at issue. And given the strength of evidence against D, any error in the admission of his search history was harmless. Held, judgment affirmed; May, J., concurring, believes that D adequately preserved the issue for appeal. "While the best practice would still be to object contemporaneously with the admission of any disputed evidence, Evidence Rule 103 was amended to allow parties to rely on the existence of a continuing objection after a Tr. Ct. has ruled definitively at trial."

TITLE: Lay v. State
INDEX NO.: O.4.d.2.
CITE: (11-30-95), Ind., 659 N.E.2d 1005
SUBJECT: Uncharged conduct evidence admissible - common scheme or plan abandoned
HOLDING: Confidential informant's testimony regarding uncharged incidents of drug dealing by D did not require mistrial because: 1) it was not covered by D's motion in limine, which covered only evidence of prior convictions; 2) Tr. Ct. admonished jury to disregard testimony about informant's previous dealings with D; & 3) given independent evidence of D's guilt, there was no substantial likelihood that this testimony contributed to jury's verdict. Tr. Ct. properly permitted another witness to testify about his previous dealings with D & gave jury appropriate limiting instruction regarding common scheme or plan that included charged activity. Evidence showed that witness had ongoing business relationship with D to deal drugs & that series of transactions were part of common scheme. Held, conviction affirmed; Selby, J., concurring in result; Shepard & Dickson, JJ., dissenting. DeBruler, J., concurring with opinion, noted that uncharged sales & charged sale were especially relevant & admissible under Ind. Evidence Rule 404(B) as probative of intent, knowledge, & special criminal plan.

Note: Although majority affirmed conviction, different majority declared that "common scheme of plan" has not survived adoption of Indiana Rules of Evidence.

RELATED CASES: Inman, 4 N.E.3d 190 (Ind. 2014) (in light of all evidence, error in allowing detective to testify that D was suspect for an unrelated crime did not affect D's substantial rights; limiting instruction that told jury to give no weight to officer's testimony that D was suspect in another crime made erroneous admission of testimony harmless); Ware, App., 816 N.E.2d 1167 (admission of evidence of extra-jurisdictional acts was harmless error because it was cumulative of other evidence & jury received limited instructions); Spires, App., 670 N.E.2d 1313 (evidence of prior uncharged marijuana sale was admissible under narrow "plan" exception of Ind.Evid.R. 404(b); charged & uncharged sale were tangibly connected in that they involved same parties, took place at same location, & were closely related in time).

TITLE: Moore v. State
INDEX NO.: O.4.d.2.
CITE: (2nd Dist., 7-18-95), Ind. App., 653 N.E.2d 1010
SUBJECT: Erroneous admission of other crime evidence - common scheme or plan
HOLDING: Tr. Ct. committed reversible error in admitting evidence concerning rape conviction which occurred eleven months after original offense. Common scheme or plan exception to Ind. Evid.R. 404(b) did not apply because there was neither issue of identity of D nor sufficient similarity to offense charged. D was apprehended at crime scene, & State agreed that his identity was not at issue. Likewise, other crime testimony cannot be construed to prove that D possessed preconceived plan which included assault upon victim in charged crime. Hardin v. State (1993), Ind., 611 N.E.2d 123. Preconceived plan exception has been limited by Lannan v. State (1992), Ind., 600 N.E.2d 1334, which requires that crimes constitute uninterrupted transaction. Hardin, supra. Evidence was not admissible for purpose of showing intent, because D denied that acts had ever occurred & did not present claim of particular contrary intent. Thus, other crime testimony constituted impermissible character evidence which was introduced for purpose of showing that D acted in conformity with particular trait. Ct. concluded that introduction of rape conviction required reversal because conviction "very probably had substantial impact upon jury's verdict." Held, reversed & remanded for retrial, Hoffman, J., dissenting.

RELATED CASES: Cutshall, 166 N.E.3d 373 (Ind. Ct. App. 2021) (harmless error to admit evidence that D accessed adult pornography on the night of incident); Buchanan, 767 N.E.2d 967 (pornographic drawings & photographs did not show that D had common plan to sexually molest little girls).

TITLE: Schumpert v. State
INDEX NO.: O.4.d.2.
CITE: (4th Dist., 11-30-92), Ind. App., 603 N.E.2d 1359
SUBJECT: Other crimes evidence admissible - common scheme or plan
HOLDING: Where in different robberies man robbed thrift stores by entering at closing time, bringing merchandise to counter, demanding money from cashier while exhibiting brown paper bag he said was covering gun, & then locking employees in back room, modus operandi was sufficiently distinct to create signature, & evidence of other robberies was admissible in D's trial for such robbery, because his identity was also sufficiently at issue. Although without evidence about gun in brown bag, robberies' methods were not sufficiently distinct; repetition of that distinctive factor, coupled with less distinctive factors common to all crimes, was sufficient to constitute common scheme or plan. Although two victims were able to identify D from line-up, third was not, & they were confronted only briefly by gun-wielding man they had never seen before. Ct. therefore found question of D's identity was significant issue, allowing for admission of common scheme or plan evidence on that issue, relying in part on Washington, 422 N.E.2d 1218.

RELATED CASES: Gardner v. State, Ind. App., 641 N.E.2d 641 (Tr. Ct. did not err in admitting testimony regarding uncharged burglaries committed on same morning in secluded rural areas, involving broken doors to gain access & taking of similar items).

TITLE: Sloan v. State
INDEX NO.: O.4.d.2.
CITE: (2nd Dist., 8-l0-95), Ind. App., 654 N.E.2d 797
SUBJECT: Erroneous admission of prior misconduct evidence
HOLDING: Tr. Ct. erred in admitting victim's testimony regarding prior & subsequent acts of uncharged sexual misconduct offered by State to prove D's common scheme or plan to exploit & sexually abuse victim. Res gestae branch of common scheme or plan exception to Fed.R.Evid. 404(b) did not apply, because there was no evidence to establish that alleged molestation of victim for 6 years was pursuant to any preconceived plan, nor could molestation constitute uninterrupted transaction. Because D's motive & intent were never at issue, prior misconduct evidence was not admissible to show relationship between parties. Pirnat v. State (1993), Ind. App., 612 N.E.2d 153. Ct. also held that evidence of D's prior bad acts was not admissible to prove that he had opportunity to molest victim. State failed to explain how D's opportunity to molest victim on date of charged crime was proved by molestations occurring as much as 6 years earlier. Moreover, probative value of prior misconduct evidence was substantially outweighed by danger of unfair prejudice. Although evidence of subsequent anal intercourse appeared to fall within res gestae branch of common scheme or plan exception, this evidence was inadmissible because it had been basis of prior criminal charge of which D was acquitted. Collateral estoppel barred State from reintroducing & relitigating this issue. Little v. State (1991), Ind., 501 N.E.2d 412. Error in admitting evidence of extraneous bad acts in this case was not harmless, as it was highly prejudicial & it likely swayed jury's verdict. D made no incriminating declarations, & record revealed no corroborating testimony by third parties to lessen impact of improperly admitted evidence on jury. Held, conviction reversed.

TITLE: Street v. State
INDEX NO.: O.4.d.2.
CITE: (5th Dist. 03/18/91), Ind. App., 567 N.E.2d 1180
SUBJECT: Prior uncharged misconduct - common scheme or plan or identity
HOLDING: In prosecution for receiving stolen property & dealing in marijuana to a minor, testimony that minor had received marijuana from D approximately 1 1/2 weeks before transaction at issue, was inadmissible as prior uncharged misconduct. It was not relevant to offense of receiving stolen property & did not fit within common scheme or plan, or identity exception to inadmissibility. Minor testified that D had traded marijuana for equipment minor had stolen earlier, & that approximately 1 1/2 weeks earlier he had also traded stereo equipment for marijuana with D. State argued that this prior uncharged misconduct was admissible to show common scheme or plan or identity, & that it was also necessary to explain amount of marijuana minor possessed. Ct. App. held evidence was inadmissible on charge of receiving stolen property because it did not concern a trade of marijuana for stolen property & therefore had no probative value. Evidence also did not fit within identity exception because identity was not an issue, & because State's evidence did not support its necessity to explain amount of marijuana possessed, it was not admissible on that ground. Ct. considered admissibility under common scheme or plan & noted evidence showed that D had committed charged offense of dealing marijuana to minor twice. Ct. found that in sense that 2 offenses were repetitive, close in time & place, & involved same 2 parties, they could possibly satisfy standard for admission under preconceived plan, but that mere repetition was insufficient. After considerable discussion, Ct. noted that D's case was similar to Sweet 498 N.E.2d 924, & held evidence inadmissible because there was no preconceived plan created by D. Only preconceived plan was that of minor who had scheme to trade home entertainment equipment, stolen or otherwise, for marijuana, & evidence revealed no plan on D's part. Ct. also noted that its restrictive view of preconceived plan posed no burden on prosecution, because it could have charged D with other crime. Admission of evidence was also found to be reversible error because effect of admission was to bolster witness' credibility & make conviction more likely. Held, reversed & remanded for retrial.

TITLE: Whitley v. State
INDEX NO.: O.4.d.2.
CITE: (1st Dist. 9/15/82), Ind. App., 439 N.E.2d 715
SUBJECT: Other acts - common scheme or plan
HOLDING: Evidence of separate, independent & distinct crimes is admissible to show identification (Jarvis 441 N.E.2d 1; Foresta 413 N.E.2d 889; Smith 21 N.E.2d 709; Alexander, App., 340 N.E.2d 366; Cobbs 338 N.E.2d 632) or common scheme or plan. Acts committed subsequent to crime charged are admissible to show common scheme or plan. Repeated commission of similar crimes is not enough. Acts/methods used must be so similar, unusual, & distinctive as to earmark them as D's acts. Willis 374 N.E.2d 520. Here, 2 women testified to "virtually identical" grabbing incidents at D's trial for attempted rape & confinement. Testimony of one witness related to incident subsequent to charged event. Held, no error in admission of testimony.

RELATED CASES: Clifford 474 N.E.2d 963 (prior sexual contacts with daughter admissible to show D's continuing plan to exploit/sexually abuse daughter, *citing* Lewis 451 N.E.2d 50).

TITLE: Witte v. State
INDEX NO.: O.4.d.2.
CITE: (2/12/90), Ind., 550 N.E.2d 68
SUBJECT: Common scheme or plan; killing of husband & mother-in-law, 3 years apart
HOLDING: At trial for murder & conspiracy to murder mother-in-law, evidence of murder of D's husband was admissible under common scheme or plan exception. Evidence showed that D & her 2 sons moved in with elderly mother-in-law, & shortly thereafter began discussing various ways in which they might kill her in order to obtain her money. On several occasions, D put poison in food & drink of victim, with no apparent effect. Finally, D awakened her youngest son & ordered him to kill victim, which he did by shooting her with crossbow. At trial, evidence was admitted regarding killing of D's husband 3 years earlier. Evidence showed that D conspired with sons to kill husband, who abused them. D had attempted to poison husband, & finally ordered older son to shoot father as he slept. On appeal, D argues that this evidence was inadmissible, while state counters that it is admissible under common scheme exception to general rule. D argues that 2 crimes were too separate in time & modus operandi. However, majority finds many more similarities than differences. In both instances, D conspired with sons to kill family member for what was perceived to be bettering of their situation. In both instances, D first attempted to poison victims before ordering son to shoot them. Fact that different son committed each killing, with different weapon, is insufficient to avoid admission under common scheme or plan exception. Held, conviction affirmed. DeBruler & Shepard, JJ, DISSENT, arguing that killings were too separate in time, manner, & space to be admissible under common scheme or plan, & that error was not harmless.

O. EVIDENCE
O.4. Relevancy
O.4.d.3. Entrapment/predisposition

TITLE: Dockery v. State
INDEX NO.: O.4.d.3.
CITE: (12-19-94), Ind., 644 N.E.2d 573
SUBJECT: Other crimes/acts - entrapment & predisposition
HOLDING: The Ind. S. Ct. granted transfer of Ct. App. decision at 622 N.E.2d 1346 & held that Tr. Ct. committed reversible error when it admitted evidence of prior bad acts offered by State to rebut D's defense of entrapment. Ct. reviewed facts & law of evidence applicable to D's case & concluded that possession of 1.1 ounces of marijuana & a pistol-grip shotgun was "simply irrelevant" to issue of predisposition to deal in cocaine. Erroneous admission of evidence had prejudicial impact on mind of average juror & thereby contributed to verdict. Held, transfer granted, conviction reversed, Givan, J., dissenting.

RELATED CASES: Dixon, App., 712 N.E.2d 1086 (D's prior sale of cocaine to CI was admissible when D asserted defense of entrapment in dealing cocaine trial); Stoker, App., 692 N.E.2d 1386 (evidence of prior drug sales made by D was admissible to prove predisposition where D charged with dealing).

O. EVIDENCE
O.4. Relevancy
O.4.d.4. Identity/modus operandi

TITLE: Attkisson v. State
INDEX NO.: O.4.d.4.
CITE: (6/27/2022), Ind. Ct. App., 190 N.E.3d 447
SUBJECT: Other crimes - rapes; common identity/plan
HOLDING: Defendant was convicted of armed robbery for donning a disguise and robbing a bank, giving the teller a note indicating he had a gun. Three weeks later at another bank a teller saw Defendant wearing large sunglasses and a hat and holding tightly to a bag while inside the vestibule of a bank where he looked inside and then left. The teller called the police who located Defendant, who was wearing makeup to cover up tattoos on his face and neck and had items in his bag for a disguise. At trial, Defendant objected to the introduction of evidence regarding his behavior at the second bank pursuant to Indiana Evidence Rule 404(b), arguing its probative value was outweighed by its prejudice. But the trial court overruled the objection, finding sufficient evidence in this case for the court to find by a preponderance of the evidence that Defendant engaged in the acts of wearing a disguise at the second bank and that those acts could be used by the State under 404(b)(2) for identification, motive, plan, modus operandi. The Court of Appeals affirmed the trial court's ruling on the admission of evidence finding that Defendant had a signature crime by wearing a disguise and the conduct at the second bank was relevant to the identity of Defendant as the person who robbed the first bank, and its probative value outweighed any unfair prejudice. The Court of Appeals likewise rejected Defendant's challenge to the sufficiency of the evidence against him, pointing specifically to the note that said, “I have a gun.” That statement and implication, the Court found, was evidence that he was in fact armed. The Court of Appeals rejected Defendant's argument that because he did not have a gun in his possession at the second bank, it is reasonable to assume that the same items were possessed during each event, and thus no deadly weapon was present in either robbery. The Court of Appeals disagreed stating that each event should be evaluated independently and on its own merits, and Defendant's arrest following his presence at the second bank, does not permit them to speculate that no gun was present during the robbery at the first bank despite Defendant's statement to the contrary. Sentence affirmed despite Defendant's argument that revision was necessary under Indiana Appellate Rule 7(B) reconsideration.

TITLE: Baker v. State
INDEX NO.: O.4.d.4.
CITE: (6/21/83), Ind., 449 N.E.2d 1085
SUBJECT: Other crimes - rapes; common identity/plan
HOLDING: Tr. Ct. did not err in admitting testimony of 2 witnesses who identified D as man who raped them on separate occasions where all 3 victims gave similar descriptions of assailant, rape of D.O. occurred one half hour before rape of L.C., D fled by vehicle in 2 cases, used knife in 2 instances after robbing victims, spoke similar endearments to 2 victims, gained entrance into 2 victim's homes by a similar manner (through unlocked door; by breaking glass in locked door), told D.M. he was Edward G. Smith & told L.C. he was Randall C. Smith & rapes occurred within 18 days. Brewer 417 N.E.2d 889; Lawrence 286 N.E.2d 830. Held, no error.

RELATED CASES: Allen, 720 N.E.2d 707 (evidence of another rape that had similar characteristics as rape for which D was charged was admissible to prove identity); Pharms 476 N.E.2d 120 (Crim L 372(14); held, evidence of identical crime (same victim, same words) properly admitted to establish identification of robber, *citing* Choctaw 387 N.E.2d 1305).

TITLE: Berry v. State
INDEX NO.: O.4.d.4.
CITE: (9-8-99), Ind., 715 N.E.2d 864
SUBJECT: Evidence of subsequent crimes inadmissible to show identity/modus operandi
HOLDING: In murder & robbery prosecution, where D was charged with shooting of acquaintance, Tr. Ct. erred in admitting evidence of robbery & shooting of stranger that occurred after charged offenses. Two incidents in question were not so unique as to qualify under identity or modus operandi exception of Indiana Evidence Rule 404(b). Similarities relied on by State -- that perpetrator of each crime was using shotgun & wearing blue jacket -- are not sufficiently distinctive to make evidence of second crime admissible under Rule 404(b). There was no evidence that same shotgun was used in both crimes, & navyblue jacket is simply too commonly found. Admission of subsequent crime was harmless error because it did not contribute significantly to conviction. Held, convictions affirmed.

RELATED CASES: Williams, 983 N.E.2d 661 (Ind. Ct. App2013) (trial counsel was ineffective for failing to object to admission of D's prior convictions and prior bad acts); Manuel, App., 793 N.E.2d 1215, (although complaining witness's testimony that D had molested her a number of times prior to the charged acts was not properly admissible to show identity, testimony had minimal impact on jury & did not constitute fundamental error or sufficient prejudice to support ineffective assistance of counsel in failing to object to testimony).

TITLE: Browning v. State
INDEX NO.: O.4.d.4.
CITE: (10-7-02), Ind. App., 775 N.E.2d 1222
SUBJECT: Prior bad acts improperly admitted under Indiana Rule of Evidence (IRE) 404(b)
HOLDING: Evidence of D's prior bad acts under IRE 404(b) for purpose of proving identity & establishing modus operandi were improperly admitted because prior bad acts were not similar to current charge. D was convicted of criminal deviate conduct & attempted rape based on assault of female student while running on school track. D had been involved in at least five other encounters of a sexual nature with female students on Anderson University campus. These prior bad acts consisted primarily of D approaching females in van, making sexual comments, exposing himself and/or masturbating. Although there are striking similarities among other incidents, same cannot be said when comparing those incidents with the attack in this case. Here, victim was approached on foot, approach was not accompanied by sexual comments, nor did D expose himself in any way. Further, incident in question was the only one involving a physical attack. Therefore, similarities are not sufficiently distinctive to make evidence of other crimes admissible under 404(b). Admission of evidence was not harmless error due to volume of the evidence & repetitive references to it. Held, convictions reversed & remanded for new trial.

RELATED CASES: Bassett, 795 N.E.2d 1050 (Evidence that the D had raped two other women & threatened to kill them to avoid probation revocation was not sufficiently similar to charged offense of murder to be "signature" crimes admissible on the issue of identity under IRE 404(b)

TITLE: Burch v. State
INDEX NO.: O.4.d.4.
CITE: (1st Dist. 12/30/85), Ind. App., 487 N.E.2d 176
SUBJECT: Other crimes - identity
HOLDING: Tr. Ct. did not err in admitting evidence of other crime where similarities were relevant to identity. Here, both attacks occurred (1) in same stairwell of parking garage; (2) on Thursdays; (3) during early evening hours; (4) to BSU co-eds; & (5) sexual overtones were present in each incident. Ct. finds case "clearly presents very close question," but finds 2 crimes sufficiently similar to justify admission of uncharged conduct. Because D interposed alibi defense, identity was primary issue; thus, evidence was "highly relevant." Held, convictions (attempted armed robbery & battery with a deadly weapon) upheld.

RELATED CASES: Taylor 506 N.E.2d 468 (Crim L 369.15; Ct. finds similarities of 2 robberies of 24 hour business establishments sufficiently unique to be relevant in establishing identity); Williams 489 N.E.2d 53 (Crim L 369.15; proximity in time & place, in conjunction with D's admission of guilt & nexus provided by evidence that D was bleeding when arrested & that his blood matched sample found in burglarized home, renders evidence of other burglary probative on issue of identification).

TITLE: Caldwell v. State
INDEX NO.: O.4.d.4.
CITE: (8/31/2015), 43 N.E.3d 258 (Ind. Ct. App 2015)
SUBJECT: Harmless error admitting evidence of "signature crime"
HOLDING: Tr. Ct. should not have admitted evidence of conduct similar to the charged offense under the identity exception to Evidence Rule 404(b) because the conduct was only similar, not strikingly similar.

L.C., a 56-year-old black woman, was asleep when D, a black male, broke in her home through the laundry room window. He ripped off her underwear and beat her so hard she briefly lost consciousness. When D touched L.C.'s genitalia, she cried out, "Jesus, Jesus!," which prompted D to abruptly stop the attack and flee. Police found D's DNA at the scene. D remained at large. About two months later, 60-year-old J.H., a black woman, reported that a black man was in her backyard looking in her window, who left when she turned on her lights. J.H. resided 12 to 13 houses from L.C.

Although the victims were similar and the crimes occurred in the same neighborhood, the differences between the two are striking. One involved a break in; the other did not. One involved a beating; the other did not. One involved an attempted rape; the other did not. Cf. Allen v. State, 720 N.E.2d 717 (Ind. 1999) (one crime was "virtual signature" of the other where crimes occurred in same neighborhood two months apart, both victims were black teenage girls, the perpetrator in both crimes used the nickname "Play," both incidents involved anal probing, and both victims were bound by duct tape, which was "relatively rare" in sexual assault cases). Thus, the Tr. Ct. should not have admitted evidence of the incident at J.H.'s home. However, the error was harmless since D's DNA was found at the scene. Held, judgment affirmed.

TITLE: Clark v. Commonwealth
INDEX NO.: O.4.d.4.
CITE: 223 S.W.3d 90 (Ky. 2007)
SUBJECT: Past sexual misconduct improperly admitted to establish modus operandi
HOLDING: Kentucky Supreme Court held evidence that a D charged with sexually abusing young boys had engaged in similar fondling incidents with boys of similar ages years earlier should not have been admitted under Ky. R. Evid. 404(b) to establish modus operandi. Rule 404(b), which is substantially similar to Fed. R. Evid. 404(b), provides that evidence of prior acts or wrongs may be admissible for certain reasons other than showing D's character or propensity to commit the charged crime. However, unlike the federal rule, the Kentucky rule has been construed by state courts as being "exclusionary in nature." In present child molesting case, State introduced a witness who testified that D was convicted for abusing him 20 years ago. Court noted the modus operandi exception "requires 'the facts surrounding the prior misconduct [to be] so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*.'" In addition to striking similarity, the acts must be "so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual." Despite similarities, Court also found as many dissimilarities, including the fact that D had been a priest and thus enjoyed a position of trust as to the witness that was "markedly different" from his relationship with the victims in the case. The lengthy period of time between the incidents of abuse also weighed strongly against the probative value of his testimony.

TITLE: Moore v. State
INDEX NO.: O.4.d.4.
CITE: (5th Dist. 04/10/91), Ind. App., 569 N.E.2d 695
SUBJECT: Other crimes evidence - admissibility to show identity
HOLDING: Although similarities between charged rape & evidence of another rape were not sufficient for admission to show identity under standard of Penley (1987), Ind., 506 N.E.2d 806, error in admitting such evidence was harmless because of substantial independent evidence to support verdict, even though victims initially selected picture of someone other than D from photo array. D was convicted of rape & criminal deviate conduct after raising defenses of mistaken identity & alibi. At trial witness testified that D had raped her 5 months prior to rapes charged, & State argued that such evidence was admissible to show identity. To show similarities & dissimilarities, both State & D submitted numerous facts set forth in opinion. Ct. noted that facts led to close question on similarity but fell somewhat short of required showing of Penley. Ct. nonetheless found admissibility of other rape harmless for 2 reasons: there was no contemporaneous objection to testimony, & there was substantial independent evidence to support verdict. Both victims of charged crimes unequivocally identified D at trial & coupled with quality & quantity of other inculpatory evidence, evidence was sufficient to satisfy Ct. that testimony about other rape did not contribute to jury's verdict. Both victims initially selected same picture, not D's, from photo array, but Ct. found that this did not amount to misidentification requiring reversal in Penley because both victims said, picture they selected resembled rapist, but was not him. Held, convictions affirmed.

RELATED CASES: Jenkins, 34 N.E.3d 258 (Ind. Ct. App 2015) (erroneous admission of photo of gun-brandishing accomplice was harmless because State presented substantial independent evidence of guilt); Remy, 17 N.E.3d 396 (Ind. Ct. App 2014) (error in admitting pornographic pictures at child molesting trial was harmless because there was substantial independent evidence of D's guilt; however, Court did caution on overuse of the "plan" and "grooming" rationales for admitting evidence normally inadmissible under Evidence Rule 404(b)).

TITLE: Penley v. State
INDEX NO.: O.4.d.4.
CITE: (4/15/87), Ind., 506 N.E.2d 806
SUBJECT: Other crimes - identity; modus operandi
HOLDING: Tr. Ct. erred in allowing testimony about attacks against 3 other rape victims; evidence of attacks on sister & mother of victim was properly admitted. Here, D was charged with entering victim's home in early morning hours & telling her it was okay, that her mother knew he was there. D ordered victim to disrobe & put his finger in her vagina. D pulled knitted hat over his face & forcibly had intercourse with victim. Before he left, D told her he would be back. Testimony of sister was admissible because D used same words & began sexual assaults similarly. Testimony of mother was admissible as probative of D's plan to attack repeatedly members of same household. As to 3 other rapes, first & second occurred 10 & 11 months after attack upon present victim. Similarities were not distinctive & both cases resulted in hung jury. Third victim was raped 3 years after charged crime; modus operandi was not the same. Mere repetition of similar crimes does not warrant admission of evidence of those crimes under modus operandi rule. Crimes must be so related in character, time, & place of commission as to establish some plan embracing both prior & subsequent criminal activity & charged crime. Malone, 441 N.E.2d 1339. State may prove identity by showing similarities between 2 crimes are so strong & method so clearly unique that it is highly probable perpetrator of both is same person. Ct. finds error in admission of testimony of latter 3 victims was not harmless in light of present victim's initial identification of someone other than D as her attacker. D did not receive fair trial. Held, conviction reversed & remanded for new trial. Givan, joined by Pivarnik, Dissents contending "majority places too stringent a restriction upon evidence of prior similar offenses."

RELATED CASES: Bishop, 40 N.E.3d 935 (Ind. Ct. App 2015) (evidence of prior shooting was admissible under 404(b) identity and motive exceptions; shootings occurred 10 hours apart; shell casings at both scenes were same brand and fired from same gun; shootings occurred in same area of Indianapolis and both arose from financial disputes).

TITLE: Southward v. State
INDEX NO.: O.4.d.4.
CITE: (11-09-11), 957 N.E.2d 975 (Ind. Ct. App 2011)
SUBJECT: Admission of 404(b) evidence did not constitute fundamental error
HOLDING: In prosecution for possessing material capable of causing bodily injury while incarcerated, Tr. Ct. erred in admitting evidence that D had previously been found in possession of a broken broomstick fragment. D was charged based on his possession of a plastic spoon with the edges ground down. At trial, D did not deny or otherwise contest that he possessed the altered spoon, but argued that the spoon was not a dangerous material. Intent required for a conviction under IND. CODE 35-44-3-9.5 is the intent to possess the device. Phillips v. State, 875 N.E.2d 480 (Ind. Ct. App 2007). By implication, the quality of the device--whether a weapon, dangerous, or capable of bodily injury-- is an element separate from that of intent. Thus, D did not place his intent at issue for purposes of Indiana Evid.R. 404(b). However, since trial counsel failed to object to the admission of the broomstick evidence, the issue was waived for appeal. Distinguishing Sasser v. State, 945 N.E.2d 201 (Ind. Ct. App 2011), Court found the error did not rise to the level of a fundamental error. Given the amount of evidence separate and apart from the prior incident, Court was confident that the jury was able to overlook any prejudicial aspects of the erroneously admitted Evid.R. 404(b) evidence and concentrate solely on the photos and testimony offered by corrections officers concerning the altered spoon. Held, judgment affirmed.

TITLE: State v. Vorhees
INDEX NO.: O.4.d.4.
CITE: 248 S.W.3d 585 (Mo. 208)
SUBJECT: Missouri no longer will allow 'signature modus operandi' evidence
HOLDING: Missouri Supreme Court held that it will no longer allow criminal Tr. Ct.s to admit "signature modus operandi" evidence solely to corroborate a victim's testimony. D in case was convicted of sexually assaulting his stepdaughter. At trial, State was allowed to corroborate her story by introducing the testimony of another girl who claimed D had sexaully assaulted her in the same peculiar manner. Court held Ds have a right under the Missouri Constitution to be tried only for crimes with which they are charged, which precludes the admission of evidence of uncharged crimes other than for purposes such as proving identity, motive, or intent. Court abandoned the "signature modus operandi/corroboration" exception to this general rule that it first adopted in a 1993 case, noting that its previous position on the admissibility of such evidence was misguided. "Signature evidence used for corroboration is, at base, propensity evidence masquerading under the well-recognized identity exception, a category of exception in which it does not belong. By admitting the prior act evidence, the court is reasoning that if the D committed a very similar crime once before, it is more likely that he committed the same crime on a subsequent occasion. This reasoning . . . undermines the general rule banning propensity evidence." The distinction between admitting prior bad acts to show that a D committed a crime, and admitting such evidence to show that the victim is being truthful in saying that the D committed the crime, "is too fine to support a constitutionally-dubious evidentiary exception."

TITLE: U.S. v. Murray
INDEX NO.: O.4.d.4.
CITE: 103 F.3d 310 (3d Cir. 1997)
SUBJECT: 404(b) -- Evidence of Prior Murder by “Drug Enforcer” Ruled Inadmissible
HOLDING: Evidence that D accused of intentional killing in futherance of continuing criminal enterprise (CCE) had killed another person in a territorial squabble unrelated to alleged CCE was inadmissible under Fed. R.Ev. 404(b). D was accused of participating in large drug ring in Harrisburg, PA, and of killing recalcitrant dealer in furtherance of interests of criminal enterprise. Tr. Ct. allowed detailed testimony regarding how D had previously traveled to New York to aid in killing of person who infringed on interests of cousin of friend of Harrisburg CCE’s boss. Tr. Ct. concluded that testimony was admissible to show that D was CCE’s "designated shooter." However, there was nothing in record to indicate that cousin, friend, or victim was involved in CCE or that dispute had anything to do with activities of CCE. Only relevance of testimony was to show that D had killed before, and that he was acting in conformity with bad character. As such, it was inadmissible under 404(b). Even if it had some relevance to anything other than bad character, the probative value would be too slight to outweigh prejudicial impact, pursuant to Fed. R. Ev. 403.

TITLE: Wilhelmus v. State
INDEX NO.: O.4.d.4.
CITE: (1st Dist., 03-23-05), Ind. App., 824 N.E.2d 405
SUBJECT: Prior misconduct evidence admissible to show identity - failure to give admonishment
HOLDING: In dealing in methamphetamine (meth) prosecution, Tr. Ct. did not abuse its discretion in admitting evidence of D's involvement in a meth lab for which he was arrested four years earlier. Tr. Ct. permitted admission of this evidence to prove D's identity as manufacturer, because at trial D focused on fact that he did not live on property where meth lab was found, did not attempt to leave premises, & thus had no knowledge of lab in loft of barn. To prove D's connection with meth lab circumstantially, State introduced evidence regarding many similarities between lab for which D had been arrested previously & the lab in instant case. Rationale of Indiana Evidence Rule 404(b) identity exception is that the crimes, or means used to commit them, were so similar & unique that it is highly probable that the same person committed all of them. Thompson v. State, 690 N.E.2d 224 (Ind. 1997). Given striking similarities between 2000 lab & one at issue in this case, Tr. Ct. could determine that whatever prejudice might arise was outweighed by probative value of the evidence.

However, in light of compulsory nature of Evidence Rule 105 & D's request, Tr. Ct. erred by not admonishing jury prior to admission of evidence regarding 2000 lab. Under unique circumstances of this case, Ct. held that final instruction cured error of failing to admonish jury when originally requested. Ct. reiterated that better practice for limiting use of evidence is for Tr. Ct. to immediately admonish jury as well as give a final instruction on the matter. Johnson v. State, 722 N.E.2d 382 (Ind. Ct. App 2000). Held, judgment affirmed.

O. EVIDENCE
O.4. Relevancy
O.4.d.5. Insanity

TITLE: Eubank v. State
INDEX NO.: O.4.d.5.
CITE: (12/16/83), Ind., 456 N.E.2d 1012
SUBJECT: Other crimes/acts - insanity defense
HOLDING: Tr. Ct. did not err in allowing state's rebuttal witness to testify re incident in which D escaped from him, which occurred a year after offenses for which D was on trial (escape, kidnapping, etc.) occurred. Here, D employed insanity defense. Ct. notes general rule is that evidence of other criminal activity is inadmissible. Beasley, 452 N.E.2d 982; Taylor 438 N.E.2d 294. Where D employs insanity defense, exception to general rule allows great latitude in admitting evidence of other conduct by D, limited only to extent that conduct be relevant to insanity. Smith, 432 N.E.2d 1363; Lock 403 N.E.2d 1360; Holt, 382 N.E.2d 1002. Challenged evidence disclosed conduct nearly identical to present charge, for which D claimed no responsibility because of his insanity. Although conduct occurred one year later, it was relevant because it evidenced conscious/intelligent choice/determination to escape. Held, no error.

RELATED CASES: Bond, 489 N.E.2d 504 (Witn 277(4); in order to substantiate insanity claim/lack of ability to form criminal intent, D testified as to his prior drug usage & practice of mixing various types of drugs; Ct. finds D opened door to introduction of conviction for sale of dangerous drug by testifying he was unaware of effect of combining drugs; such conviction connotes knowledge of use & effect); Coble, 476 N.E.2d 102 (Crim L 369.2(6); psychiatrist's mention of habitual offender charge did not prejudice D, who raised insanity defense; such defense distinguishes case from Lawrence, 286 N.E.2d 830).

O. EVIDENCE

O.4. Relevancy

O.4.d.6. Intent/knowledge/motive

TITLE: Baker v. State
INDEX NO.: O.4.d.6.
CITE: (10/25/2013), 997 N.E.2d 67 (Ind. Ct. App 2013)
SUBJECT: Admission of 404(b) evidence was harmless error
HOLDING: In theft prosecution, Tr. Ct. erred in admitting evidence of D's prior bad acts. D was charged with stealing 45 gallons of gasoline. At trial, State was allowed to elicit testimony from accomplice who stated that this was not the first time the two had stolen gasoline. D denied involvement in the crime and presented an alibi defense, claiming that he was with his fiancee the entire night in question.

Evidence of D's prior bad acts was not properly admitted under the knowledge, identity or intent exceptions of Evidence Rule 404(b). D did not place his intent or knowledge into issue and there was no evidence this was a "signature" crime. However, admission of challenged evidence was harmless because there is no substantial likelihood that the questioned evidence contributed to D's conviction in light of the testimony by his co-conspirators about their actions and the jury's apparent determination that their testimony was more credible than D's fiancée's testimony. Held, judgment affirmed.

RELATED CASES: Lewis, 34 N.E.3d 240 (Ind. Ct. App 2015) (testimony regarding D's prior conduct while consuming alcohol, i.e., being a mean drunk, was not evidence of habit under I.R.E. 406 and ran afoul of I.R.E. 404(b), but its admission was harmless error.

TITLE: Bowman v. State
INDEX NO.: O.4.d.6.
CITE: (4/28/2016), 51 N.E.3d 1174 (Ind. 2016)
SUBJECT: Letters admissible to show D's attempts to secure beneficial testimony
HOLDING: Threats against potential witnesses as attempts to conceal or suppress evidence are admissible as bearing upon knowledge of guilt. Bassett v. State, 895 N.E.2d 1201 (Ind. 2008). Here, during D's trial for Class A felony dealing in narcotic drug within 1000 feet of school property, State introduced seven redacted letters which D had written to two people from prison whom he believed were in the apartment at the time of one of his drug sales to informant. Tr. Ct. did not abuse its discretion in determining that letters constituted attempts by D to unduly influence witnesses into providing false testimony favorable to his defense, and were thus admissible under Evidence Rule 404(B)(2). Held, transfer granted, Court of Appeals' opinion at 39 N.E.3d 812 vacated, judgment affirmed.

TITLE: Butcher v. State
INDEX NO.: O.4.d.6.
CITE: 627 N.E.2d 855 (Ind. App. 1st Dist., 1-27-94)
SUBJECT: Prior misconduct evidence admissible on intent issue
HOLDING: In child molesting trial, although admission of depraved sexual instinct prior misconduct evidence (DSI) was error under Lannan, 600 N.E.2d 1334, evidence was properly admissible on issue of intent. D was convicted for acts against his daughter, & two of his nieces testified that he had kissed, fondled or made sexual advances toward them when they were children.

Ct. noted that in Wickizer, 627 N.E.2d 795, Ct. found narrow admissibility of prior misconduct evidence on issue of intent, but here D gave voluntary statement to police about week after incident, admitting "something happened," & that he touched daughter's breasts & vagina, but claimed she initiated encounter by asking him in & pulling him toward her. He explained that in light of her advances, he couldn't resist touching her. In opening argument, defense counsel told jury that D's story would be different from daughter's & when D testified, he reiterated claim daughter initiated action, & said she pulled him toward her nude body, grasped his hand, put it on her breast, & squeezed it. He said he never voluntarily reached up & touched her, that he did not intend to molest her, & that denial of wrongdoing was absence of specific intent.

Ct. found pretrial statement to police, opening remarks, & own trial testimony showed State was entitled to admit character evidence in case-in-chief to prove intent to molest daughter. Claim of contrary intent was made before State introduced evidence, because of pretrial statement & opening statement. Ct. also determined prejudicial effect of other evidence did not substantially outweigh its probative value because of defense put forth. Held, conviction affirmed.

RELATED CASES: Cannon, (4/11/2018), 99 N.E.3d 274 (Ind. Ct. App 2018) (no abuse of discretion in letting D's girlfriend testify about D's past drug dealing and activities a few hours before he was arrested; evidence was admissible under intent and knowledge exceptions; Judge Robb's 31-page dissent said majority failed to narrowly construe those exceptions); Johnson, 722 N.E.2d 382 (App.) (D put his intent at issue during cross-examination of complaining witness when he alleged that she had engaged in consensual sexual intercourse with him & stated that she had been raped to explain her sexual contact with man of different race to her parents); Ely, 655 N.E.2d 372 (App.) (where D placed intent into issue during opening statement, evidence of prior bad acts contained in signed written statement was admissible); Hornaday, 649 N.E.2d 669 (App.) (in harassment prosecution Tr. Ct. did not abuse its discretion in admitting evidence of prior uncharged telephone calls; D made declaration of contrary intent during her opening statement).

TITLE: Camm v. State
INDEX NO.: O.4.d.6.
CITE: (1st Dist., 8-10-04), Ind. App., 812 N.E.2d 1127
SUBJECT: Character evidence - D's adultery as evidence of motive to kill spouse; reversible error
HOLDING: In murder prosecution, Tr. Ct. committed reversible error by allowing State to present extensive evidence of extramarital sexual activity by D. D was convicted of murdering his wife & two children. In State's case-in-chief, it presented testimony of twelve women who had had various types of relationships with D from 1991 to 1997, ranging from prolonged sexual relationships to overt & implied sexual advances. Admission of this evidence was an attack on D's character, not admissible for any proper purpose under Indiana Evidence Rule 404(b), & unfairly prejudiced him.

Although motive is always relevant when proving a crime, this does not mean State can introduce questionable character evidence simply by labeling it evidence of "motive." If State's claim of relevance to motive is too strained & remote to be reasonable, then extrinsic act evidence is inadmissible. Bassett v. State, 795 N.E.2d 1050 (Ind. 2003). *Citing* Henson v. State, 530 N.E.2d 768 (Ind. Ct. App 1988) & cases from other jurisdictions, Ct. held that evidence of a D's marital infidelity is not automatically admissible as proof of motive in a trial for murder or attempted murder of the D's spouse. Instead, to be admissible as proof of motive, evidence of a D's extramarital affairs should be accompanied by evidence that such activities had precipitated violence or threats between the D & victim in the past, or that D was involved in an extramarital relationship at time of completed or contemplated homicide. Admissibility of such evidence may be further constrained by concerns of chronological remoteness, insufficient proof of extrinsic act, or general concern that unfair prejudicial effect of certain evidence might substantially outweigh its probative value in a particular case.

Here, although there was sufficient proof of D's philandering, & at least some of his activities took place relatively near in time to wife's murder, there was no evidence of a violent or hostile relationship between D & his wife, nor any evidence that he ever threatened her with harm. There was no evidence that D was involved with an extramarital relationship at time of wife's murder. State virtually conceded on appeal that this evidence was introduced to establish that D was a person of poor character who was more likely to commit murder because of that character, which is precisely what Evidence Rule 404(b) prohibits. State's rebuttal testimony from jail guard who testified she was propositioned by D was also improper, & D did not open door to this inadmissible evidence on cross examination. Tr. Ct.'s admonishments & limiting instruction in this case did not cure error in admission of evidence of D's adultery. Finally, error was not harmless, as State's portrayal of D as an immoral, self-centered individual of poor character because of his philandering was central to its case, & evidence was far from overwhelming. Held, convictions reversed & remanded.

RELATED CASES: Corbett, 179 N.E.3d 475 (Ind. Ct. App. 2021) (Tr. ct abused discretion under Rule 404(b)(2) in admitting evidence of other homes that were burglarized near time of murder); Smith, App., 891 N.E.2d 163 (evidence of the D's recent violence and controlling, manipulating and demeaning behavior towards his wife, the victim, went beyond evidence of just being a poor husband and into evidence of a hostile relationship, which is a motive for murder).

TITLE: Chanley v. State
INDEX NO.: O.4.d.6.
CITE: (12/20/91), Ind., 583 N.E.2d 126
SUBJECT: Admissibility of prior escape from prison to show motive
HOLDING: Although D did not contest that he committed acts alleged, only that he was legally in police custody when they were committed, evidence of his previous escape from Kentucky jail was admissible on issue of motive, which is always relevant in commission of crime. 27 days after D escaped from Kentucky prison, he was discovered intoxicated by side of road with 2 other persons. Police arrested all 3 & told D & other person that if everything checked out, they would be free to leave jail, as only driver would be held. Officer then put all 3 in police car but had to get out to assist driver. D then leapt into driver's seat of police car & sped away. Shortly thereafter, he got stuck in median & ran away. Later in day, D also stole another truck. Ct. found that logically, there would seem to be no reason for D to drive away in trooper's car & steal another, unless jury knew that search for outstanding warrants would reveal he was escapee. Evidence of this status was also relevant to intent to do whatever was necessary to remain free, & therefore was admissible. Held, conviction affirmed, DeBruler, J., dissenting on other issue.

RELATED CASES: Johnson, 959 N.E.2d 334 (Ind. Ct. App. 2011) (probative value of D's statement that he was afraid he would hurt his dependent outweighed its prejudicial effect; the statement demonstrated D's anger problems and how those problems might affect his dependent); Willingham, App., 794 N.E.2d 1110 (evidence of D's admission to selling cocaine the week prior to his arrest for dealing in cocaine was probative of D's motive to sell cocaine detectives found in his bedroom, & was inextricably bound up with charged crime); Pope, App., 740 N.E.2d 1247 (evidence of D's actions in response to internet correspondence with detective was highly probative of D's identity & his purposeful transmission of pornographic photographs); Sanders, App., 724 N.E.2d 1127 (evidence that earlier in evening of offense D had offered money for sex was highly probative of his motive to molest & was inextricably bound up with charged offense); Sanders, 704 N.E.2d 119 (evidence of battery which occurred minutes after charged crime was admissible to show D's intent by negating his claim of self-defense); Hicks, 690 N.E.2d 215 (some, but not all, evidence of D's violent relationship with victim was relevant under Ind. Evid. Rule 404(b) to show D's motive & hostility between parties); Ross, 676 N.E.2d 339 (D's prior threats to kill victim were admissible to show motive & intent); Carson, App., 659 N.E.2d 216 (Tr. Ct. erred in admitting evidence of D's alleged participation in drive-by shooting of murder victim's mother's house; motive was not element of offense & evidence had very little probative value to prove consciousness of guilt); Price, 619 N.E.2d 582 (In murder trial it was not error to admit evidence of prior violence of D toward victim. Evidence was admissible pursuant to Fed. R. Evid. 404(b) to show relationship between parties & D's motive & intent in commission of crime).

TITLE: Cook v. State
INDEX NO.: O.4.d.6.
CITE: (9-6-00), Ind., 734 N.E.2d 563
SUBJECT: Prior acts - previous violent acts against someone other than victim
HOLDING: It was harmless error to permit State to introduce testimony that D struck someone other than victim for no reason earlier in same night as murder. Evidence of other crimes, wrongs, or acts is not admissible to prove character of person in order to show action in conformity therewith. Ind. R. Evid. 404(b). Bad relationship between D & another person does not bear on D's motive to harm victim & will rarely be either relevant or admissible to show motive for charged conduct. Hicks, 690 N.E.2d 215, 222 n. 12. Here, State claimed it introduced testimony that D, without reason, struck another person in face earlier that night in order to show D's state of mind at time of shooting & his motive. However, it is apparent State sought to introduce evidence for purpose of demonstrating that because D had acted violently in recent past, he likely acted in conformity therewith & shot victim in this case. This is forbidden inference that 404(B) specifically prohibits. Nevertheless, error was harmless because State presented substantial evidence of D's guilt independent of testimony of earlier altercation. Held, conviction affirmed.

RELATED CASES: Pickens, App., 764 N.E.2d 295 (evidence that D robbed & shot another person two weeks before charged crime was admissible to show D's motive in murder prosecution, when State's theory was that D killed victim because he mistakenly believed victim was person he had robbed & shot).

TITLE: Craun v. State
INDEX NO.: O.4.d.6.
CITE: (2-6-02), Ind. App., 762 N.E.2d 230
SUBJECT: Improper use of 404(b) evidence - D did not present claim of contrary intent
HOLDING: Tr. Ct. erred in admitting evidence of D's prior bad acts under Indiana Evidence Rule 404(B). D was charged with molestation of three girls, but charges were severed. Complaining witness (CW) testified that D had touched her vagina while lying in bed. D testified that he had tickled her upper thigh. Tr. Ct. then permitted State to introduce evidence of other charges of molestation to refute what Tr. Ct. considered D's defense of accident. In evaluating admissibility of evidence under Ind. Evid. Rule 404(B), Tr. Ct. must: (1) decide if evidence of other crimes, wrongs, or acts is relevant to matter other than D's propensity; & (2) balance probative value of evidence against its prejudicial effect. Hicks v. State, 690 N.E.2d 215 (Ind. 1997).

Ct. agreed with D's contention that he did not affirmatively present claim of contrary intent by stating that he tickled CW's upper thigh, since he never stated that he touched her vagina either accidentally or intentionally. D's alleged inappropriate touching of other girls did not make it more or less probable that he touched CW with intent to arouse or satisfy. Further, even if evidence would have been relevant, its negligible probative value was substantially outweighed by danger of unfair prejudice under Ind.Evidence Rule 403. Finally, error was not harmless because there was not independent evidence of D's guilt & case boiled down to credibility contest between D & State's witnesses. Held, judgment reversed & remanded for new trial; Kirsch, J., dissenting.

TITLE: Davis v. State
INDEX NO.: O.4.d.6.
CITE: (5/2/2022), 186 N.E.3d 1203 (Ind. Ct. App 2022)
SUBJECT: Evidence of subsequent bad act allowed to show intent and motive
HOLDING: In burglary and domestic violence prosecution, trial court did not abuse discretion in admitting evidence of a subsequent altercation between Defendant and the complaining witness (CW). "[A]lthough Rule 404(b) cases typically involve the issue of whether prior bad acts of the defendant are admissible, the wording of Rule 404(b) does not suggest that it only applies to prior bad acts and not subsequent ones. .... Therefore, when determining the admissibility of evidence of subsequent crimes, wrongs, or other acts, it is appropriate to use the Evidence Rule 404(b) test." The Court of Appeals found that the evidence was properly admitted showing Defendant's intent (contrary to his claim of self-defense) and motive as it related to his hostile relationship with CW. The Court further found that the evidence was not unfairly prejudicial considering the court's limiting instruction to the jury and the fact the evidence was presented for a just short time during the three-day trial. Held, judgment affirmed.

TITLE: Embry v. State
INDEX NO.: O.4.d.6.
CITE: (4th Dist., 03-08-10), 923 N.E.2d 1 (Ind. Ct. App 2010)
SUBJECT: Improper use of uncharged misconduct for witness rehabilitation
HOLDING: Where the defense impeaches a State's witness by exposing her bias against the D, the State may not offer evidence of prior misconduct committed by the D against the witness solely to explain the witness's disposition. Here, in domestic battery prosecution, the defense questioned complaining witness (CW) on cross examination about several derogatory statements she had posted about D on her MySpace blog prior to the charged incident. Tr. Ct. found that D opened the door to prior acts of domestic violence against CW to explain CW's hateful statements and animosity. Court of appeals noted that offering a D's prior bad acts to explain a witness's animosity only reinforces--rather than disproves--the witness's disposition. Introduction of the D's uncharged misconduct thus violates the rule of logical refutation and has no rehabilitative value. Accordingly, the evidence is irrelevant and inadmissible if offered for purposes of rehabilitation.

However, D's uncharged misconduct was relevant to prove his motive to commit the charged offenses and to negate his self-defense claim. Where a relationship between parties is characterized by frequent conflict, evidence of the D's prior assaults and confrontations with the victim may be admitted, to show the relationship between the parties and motive for committing the crime. Iqbal v. State, 805 N.E.2d 401 (Ind. Ct. App 2004). Moreover, a D claiming self-defense goes beyond merely denying the charged culpability and advances a claim of particular contrary intent, and State may be able to use his prior misconduct to disprove that the victim was the first aggressor. Evans v. State, 727 N.E.2d 1072 (Ind. 2000). Here, D's prior acts of violence against CW evidenced his hostility toward her, which in turn made it more probable the conclusion he assaulted her and instigated the entire physical confrontation. Thus, prior misconduct was independently relevant and had purpose other than to show propensity to commit crimes charged. Held, judgment affirmed.

TITLE: Estelle v. McGuire
INDEX NO.: O.4.d.6.
CITE: 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)
SUBJECT: Battered child syndrome evidence - admissibility; instruction
HOLDING: Evidence of prior bodily injuries suffered by infant victim was relevant to show that her death was intentionally caused, & admission at her father's murder trial was proper despite lack of evidence connecting him to those prior injuries. Although 9th Cir. Ct. App. had granted habeas relief, based in part on ruling that admission of this evidence was improper under state law, federal habeas review is limited to deciding whether conviction violated federal constitution or laws. U.S. S.Ct. determines that admission of battered child syndrome evidence did not violate D's federal constitutional rights. Evidence of repeated, serious injuries serves to demonstrate that child did not receive those injuries accidentally. Intent was element of murder charge & D's plea of not guilty put each element in issue. Despite lack of evidence connecting prior injuries to D, evidence of those injuries was relevant to show intent of person who inflicted them, & admission did not violate due process. D also challenged jury instruction stating that evidence of prior injurious acts could be considered for purpose of determining whether it tended to show clear connection between those injuries & charged crime, "so that it may be logically concluded that if D committed other acts, he committed charged act as well." Because it contained word "if," it properly left to jury determination whether D committed prior acts, and thus whether evidence could be considered. D further argued that instruction allowed jury to base determination of guilt in part on prior bad acts/propensity evidence. Court found that restrictive language of instruction created situation parallel to use of prior bad acts to show intent, identity, motive, or plan. Majority concedes that instruction could have been clearer, but found no reason able likelihood that the jury had applied the instruction in violation of the constitution. O'Connor & Stevens, JJ., DISSENT on instruction issue.

TITLE: Evans v. State
INDEX NO.: O.4.d.6.
CITE: (5-4-00), Ind., 727 N.E.2d 1072
SUBJECT: Prior misconduct admissible - intent exception
HOLDING: Tr. Ct. did not err in admitting evidence that D had attacked his ex-girlfriend two days prior to victim's murder. D was convicted of attempted murder & murder after attacking his ex-girlfriend and killing her new boyfriend. During cross-examination of ex-girlfriend, defense counsel attempted to elicit her testimony that victim was dangerous person and initial aggressor in fatal encounter with D. Previous incident with ex-girlfriend was admissible because D went beyond merely denying charged culpability and affirmatively presented claim of particular contrary intent - self-defense - during his cross-examination of ex-girlfriend. Evidence of prior bad act against ex-girlfriend was particularly relevant and probative in aiding jury's decision regarding alleged murder of victim because: 1) it directly rebutted D's claim that victim was initial aggressor, and 2) evidence was close enough in time to be genuinely relevant in showing D's intent at time of murder. Evidence was also relevant and probative in that it directly involved and shed light on D's relationship with ex-girlfriend, whom jury considered as D's second alleged victim in deciding attempted murder charge. Ross, 676 N.E.2d 339. Probative value of this evidence substantially outweighed any danger of unfair prejudice. Held, no error.

RELATED CASES: Ward, 138 N.E.3d 268 (Ind. Ct. App. 2019) (song posted to defendant's social media account properly admitted at trial because it was highly probative of defendant's participation in the crimes given its proximity and accurate description of murder scene; evidence was not unfairly prejudicial because it was accompanied by a jury instruction that mitigated any risk that the jurors would consider the song based on racial prejudices); Miles, 51 N.E.3d 305 (Ind. Ct. App 2016) (text messages between D and murder victim showing they had been arguing and that D had threatened violence in weeks leading up to the shooting were relevant to show motive and absence of mistake); Shoultz, 995 N.E.2d 647 (Ind. Ct. App. 2013) (evidence of D's prior cruelty to small dogs was admissible because it was relevant to D's motive and intent for killing his father); McClendon, 910 N.E.2d 826 (Ind. Ct. App 2009) (evidence of confrontation that occurred eleven months before shooting was relevant to show that D harbored hostility toward victim's father; reference to marijuana provided context for ongoing conflict); Houser, 823 N.E.2d 693 (although Ct. did not believe there is a correlation between an individual's enjoyment of particular music and individual's behavior, admission into evidence of song lyrics from "heavy metal" rock band did not affect D's substantial rights); Pinkston, App., 821 N.E.2d 830 (admission of D's statement that he had "killed a motherf****r before and got away with it and I'll get off on this one too" was highly probative to contradict his self-defense claim and to show that he intended to murder victim without justification); Goldsberry, App., 821 N.E.2d 447 (admission of prior physical altercations between D and his girlfriend were admissible to rebut D's self-defense claim, but Tr. Ct. committed harmless error in also admitting phone messages containing threats seven months after crime occurred); Bryant, App., 802 N.E.2d 486 (admission of D's rap song lyrics were relevant on contested issue of D's intent, because exhibits tended to show that he had a hostile and violent attitude toward victim and to rebut D's defense that someone else murdered victim); Murray, 742 N.E.2d 932 (in attempted murder prosecution, evidence of fact that D was carrying and openly brandishing handgun unlawfully at time of shooting was relevant to his intent and was therefore admissible under Ind. Evid. Rule 404(b).

TITLE: Fairbanks v. State
INDEX NO.: O.4.d.6.
CITE: (3/27/19), Ind.,
SUBJECT: Other-bad-acts evidence to show lack of accident
HOLDING: Charged with murder and neglect of a dependent resulting in death, Defendant gave statements to police and a news outlet stating he had placed pillow over his baby's face on previous occasions to muffle her but took the pillow off right away. These statements gave the State the "reliable assurance" that accident would be raised as a defense at trial. Because a criminal defendant claiming an act was accidental is necessarily claiming a lack of the requisite criminal intent, the State may offer other-bad-acts evidence of lack of accident if: (1) the State had "reliable assurance" that an accident defense would be raised, or 2) the defendant placed accident at issue at trial. Here, the Defendant's statements to police and the news media were sufficient to give the State the "reliable assurance" that an accident defense would be raised. Because the State had "reliable assurance" of a forthcoming accident defense, the trial court did not abuse its discretion in finding that the pillow evidence was relevant to a matter at issue other than the Defendant's propensity to commit the charged acts and the prejudicial impact of the pillow evidence did not substantially outweigh its probative value.

TITLE: Fisher v. State
INDEX NO.: O.4.d.6.
CITE: (2nd Dist., 10-20-94), Ind. App., 641 N.E.2d 105
SUBJECT: Evidence of prior sex acts inadmissible
HOLDING: In child molesting prosecution, Tr. Ct. erred in admitting evidence of prior uncharged sexual misconduct offered by State to prove intent. After D claimed on direct examination that any improper touching he might have done was unintentional & accidental, State offered prior bad act evidence to prove intent, which is proper purpose under Fed. Rule 404(b) if D places intent at issue. On rebuttal, D's daughter was permitted to testify over objection that D molested her at least 23 years prior to charged offenses.

Although D placed intent "at issue," intent exception to Fed.R 404(b) should be narrowly construed & requires that prior misconduct evidence be genuinely relevant to prove D's intent at time of charged offense. Wickizer v. State, Ind., 626 N.E.2d 795. Applying relevant prong of four-part test adopted in Pirnat v. State, Ind. App., 612 N.E.2d 153, Ct. found that evidence of prior misconduct was neither similar enough nor close enough in time to be genuinely relevant to prove D's intent at time of charged offenses. Evidence of prior acts occurring 23 years before charged offenses was too remote to be genuinely relevant, & offenses were not sufficiently similar to make up for remoteness in time, despite fact that both victims were same age & were allegedly molested in family home & in D's truck. Ct. could reach no other conclusion but that erroneously admitted evidence swayed jury's verdict, affecting substantial rights of D, Thomas v. State, Ind. App., 612 N.E.2d 604. Held, convictions reversed & remanded for new trial.

RELATED CASES: Udarbe, App., 749 N.E.2d 562 (where D denied charged acts & did not present claim of particular contrary intent, his intent was not at issue so as to justify admission of prior uncharged acts under intent exception to IRE 404(b)); Sloan, App., 654 N.E.2d 797 (see card at O.4.d.2).

TITLE: Haggenjos v. State
INDEX NO.: O.4.d.6.
CITE: (11/4/82), Ind., 441 N.E.2d 430
SUBJECT: Other acts - motive
HOLDING: Prior acts are admissible to show motive to kill & intent re-quired to sustain conviction. Here, testimony regarding pendency of dissolution proceeding & pattern of D's harassment of victim was admitted. D contended this testimony should have been excluded because it concerned prior acts not reduced to conviction. Court rejects argument, *citing* Koerner v. State (1884), 98 Ind. 7 (evidence of quarrels, beatings, & threats between husband & wife admissible in prosecution of husband for murder of wife); Binns v. State (1877), 57 Ind. 46 (fact of pending divorce action may be competent to show state of feeling between parties in prosecution of husband for murder of wife); Kelley v. State (Ga. App. 1958), 105 S.E.2d 798 (evidence tending to show jealousy is admissible as a motive for homicide); State v. Noyes (Wash 1960), 418 P.2d 471 (evidence of D's quarrels with his wife over her relationships with other men is admissible). Held, no error.

RELATED CASES: Hatcher, 735 N.E.2d 1155 (emergency protective order that victim obtained against D was admissible to show relationship between murder victim and D, which in return showed D's motive); Forrest, App., 655 N.E.2d 584 (evidence of D's cocaine purchases & use on night of offense was admissible to show motive to steal money for cocaine purchase); Kinser 501 N.E.2d 1041 (evidence that D was involved in unrelated fires was properly admitted in his trial for arson, pursuant to law set out in Kahn (1914), 182 Ind. 1); Gibbs 483 N.E.2d 1365 (questions re D's & victim's prosti-tution-related activities were proper to show business relationship between them & D's motive for assaulting victim); Williams 481 N.E.2d 1319 (where D was found inside home, but had not taken or moved anything, TV set found some distance from home, which D admitted he had taken in earlier home burglary, was admissible to show motive/intent; held, conviction affirmed); Drummond 467 N.E.2d 742 (court finds officer's testimony that D expressed intent to kill victim & admitted participating in crimes with victim probative on issue of motive).

TITLE: Hazelwood v. State
INDEX NO.: O.4.d.6.
CITE: (1st Dist., 02-24-93), Ind. App., 609 N.E.2d 10
SUBJECT: Other crimes evidence admissible on intent issue
HOLDING: In prosecution for fraud & conspiracy to commit fraud, D's ex-wife's testimony concerning previous "staged" burglary made existence of D's fraudulent intent in instant case more probable, & therefore was admissible for limited purpose of proving culpable state of mind. D was accused of staging "fake" auto accident with another & attempting to collect on insurance. At trial, ex-wife was allowed to testify that 1) he told her they could make money by falsely reporting burglary & collecting insurance money; 2) he rummaged through their home after returning from honeymoon to make it look like burglary had taken place; & 3) she called police & reported "crime" because D asked her to. First communication did not fit within marital privilege because D & ex-wife were not yet married at time. Although second & third acts may have been communications falling within marital privilege, Ct. found any error in admission on this ground was harmless in light of other evidence. Communications were admissible as evidence of culpable intent regarding auto accident. Although evidence of extrinsic bad acts is inadmissible on question of guilt concerning charged offense, it may be admissible to prove intent, motive, purpose, identity, or common scheme or plan pursuant to Fed. R. Evid. 404(b), adopted in Lannan, 600 N.E.2d 1334, so long as it makes existence of element of charged crime more probable. At trial communications were admitted under common scheme or plan exception, but Ct. found evidence was not "so related in character, time, & place of commission" to charged acts to allow its admission under this theory. Evidence that D had pre-conceived plan encompassing both auto accident & burglary was practically non-existent, & mere fact that he tried to defraud insurance companies more than once did not amount to modus operandi. Error in admission under this theory was harmless, however, because it was admissible to prove intent. It made existence of D's fraudulent intent in instant case more probable than it would have been without testimony, & therefore was admissible for limited purpose of proving culpable state of mind. Ct. also looked to federal decisions interpreting Fed. R. Evid. 404(b) as to intent, U.S. v. Radseck (7th Cir. 1983), 718 F.2d 233, U.S. v. Weidman (7th Cir. 1978), 572 F.2d 1199 (both *cert. denied*), & Peters v. U.S. (5th Cir. 1967), 376 F.2d 839. Tr. Ct.'s erroneous admission of evidence under common scheme or plan did not bias jury because language of limiting instructions given regarding evidence applied also to intent. Held, judgment affirmed.

RELATED CASES: Prairie, App., 914 N.E.2d 294 (in prosecution for identity deception, Tr. Ct. did not abuse its discretion in admitting evidence about D's prior use of victim's identity).

TITLE: Highley v. State
INDEX NO.: O.4.d.6.
CITE: (4th Dist. 3/29/89), Ind. App., 535 N.E.2d 1241
SUBJECT: Other acts - intent
HOLDING: Tr. Ct. erred in allowing D's ex-wife to testify about acts of confinement allegedly committed by D against her. D was charged with confining his children & friend of girlfriend in girlfriend's apartment. On cross-examination (C-X), D was asked if he had confined his ex-wife 10 years earlier, which he denied. State called D's ex-wife as rebuttal witness to impeach D's denial of prior confinement. Collateral matters may not be basis for impeachment. Where party inquires into collateral matter on C-X, they are bound by answer received; they cannot offer extrinsic evidence to rebut answer unless it would be independently admissible. [Citations omitted.] State argues that evidence was independently admissible to show D's intent. According to state, D placed state of mind in issue by denying offense. However, fact that D denies element of offense does not mean he/she is raising new issue. D's denial of offense does not allow state to prove element of offense with evidence that is otherwise inadmissible. Intent exception to prohibition against prior acts evidence is much narrower than state's characterization of it. Intent to commit charged offense cannot be inferred from confinement of other individual 10 years earlier. Held, reversed & remanded.

TITLE: Hill v. State
INDEX NO.: O.4.d.6.
CITE: (1/17/2018), 91 N.E.3d 1078 (Ind. Ct. App 2018)
SUBJECT: D's subsequent bad acts admissible
HOLDING: In intimidation prosecution, Tr. Ct. did not err in admitting evidence of D's statements/threats he made to complaining witness (C.W.) after the date of charged crime. Defense was that although D threatened C.W., he did not intend to place her in fear of retaliation and that he was just blowing off steam. D placed his intent at issue during opening statements and his testimony, which made his subsequent actions/statements admissible under Evidence Rule 404(b) to establish his intent on the night in question. His actions and continued threats to kill C.W. over the next eight days imply otherwise and were relevant to determining the intent behind the threats he made on the day of the charged crime. Evidence of the subsequent threats was not unduly prejudicial or likely to mislead or confuse the jury. Held, judgment affirmed.

TITLE: Iqbal v. State
INDEX NO.: O.4.d.6.
CITE: (4th Dist., 3-22-04), Ind. App., 805 N.E.2d 401
SUBJECT: Prior bad acts admissible - mistake; volatile relationship & absence of mistake/accident
HOLDING: In murder prosecution, Tr. Ct. did not err in admitting evidence that D had put gun to victim's head four months prior to killing. This 404(b) evidence could not be produced in the State's case in chief because D did not assert a contrary intent, despite his pre-trial statement that gun "went off by itself" & defense counsel's opening statement. Record reflected that defense counsel only attempted to insert doubt as to State's burden of proof & not that D unintentionally shot victim, thus intent exception to Evid. R. 404(b) did not apply. Wickizer v. State, 626 N.E.2d 795 (Ind. 1993).

However, Ct. held that prior bad act evidence could be admitted as relevant to motive, the relationship between the D & victim, & absence of mistake or accident. Narrow construction of intent exception to Ind. Evidence Rule 404(b) set forth in Wickizer, requiring a D to allege a particular contrary intent, does not apply to all exceptions under 404(b). Hicks v. State, 690 N.E.2d 215, 224 (Ind. 1997). Numerous cases have held that evidence of prior assaults in a volatile relationship were relevant to show relationship between parties & motive for committing crime. Likewise, Ct. found that statement of gun just going "off by itself" did not go to intent as defense suggested but rather constituted an accident theory & this assertion is "indicative of the nature of the relationship between the parties, characterized by jealousy & denial, & ultimately culminating in hostility & murder." Probative value of evidence substantially outweighed any unfair prejudice under Evid.R. 403. Ct. also found no error in admitting expert testimony of domestic battery, which was used by State to explain why victim allowed D into home despite previous assault. Isaacs v. State, 659 N.E.2d 1036, 1041 (Ind. 1995). Held, judgment affirmed.

RELATED CASES: Laird, (6/15/2018), (Ind. Ct. App 2018) (D placed his intent at issue by stating in his pretrial interview with police that, if he touched his nephew in an inappropriate manner, it was accidental; see full review at O.4.d.6); Shoultz, 995 N.E.2d 647 (Ind. Ct. App. 2013) (girlfriend's testimony that she feared D after she defied his order to shoot his dog was admissible to rebut D's accusation on cross that she had no reason to fear D); Embry, 923 N.E.2d 1 (Ind. Ct. App 2010) (D's uncharged misconduct was relevant to prove his motive to commit the charged offenses and to negate his self-defense claim); Smith, 891 N.E.2d 163 (App.) (evidence of the D's recent violence and controlling, manipulating and demeaning behavior towards his wife, the victim, went beyond evidence of just being a poor husband and into evidence of a hostile relationship, which is a motive for murder); Book, 880 N.E.2d 1240 (App.) (prior act of throwing pillow and yelling obscenity at twenty-month-old victim was admissible to show relationship between victim and D).

TITLE: Jackson v. State
INDEX NO.: O.4.d.6.
CITE: (7/16/2018), 105 N.E.3d 1142 (Ind. Ct. App 2018)
SUBJECT: Evidence of D's prior threats admissible to prove motive
HOLDING: In attempted murder and criminal recklessness prosecution, trial court did not abuse its discretion when it admitted evidence of D's prior threats to his ex-wife and her boyfriend (Pollard), whom D repeatedly shot at two months later. Distinguishing Iqbal v. State, 805 N.E.2d 401 (Ind. Ct. App 2004), D argued that evidence did not show a history of frequent conflicts between Pollard and D, and there was only one other brief encounter between the two men prior to the shooting. But D's explicit threats to kill Pollard over something "as trivial as a child's haircut" was probative of his hostility towards Pollard and his motive in the shooting only two and a half months later. The probative value of the threats outweighed any prejudice to D. Even if the trial court erroneously admitted this evidence, the error was harmless in light of overwhelming evidence of D's guilt. Held, judgment affirmed.

TITLE: Kimble v. State
INDEX NO.: O.4.d.6.
CITE: (3rd Dist., 12-14-95), Ind. App., 659 N.E.2d 182
SUBJECT: Membership in racially biased group admissible to show motive
HOLDING: Tr. Ct. did not err in admitting testimony regarding D's membership in racially biased organization, the White Brotherhood. D & his cohorts planned to commit robbery to purchase drugs & alcohol, & specifically chose victim because she was black prostitute. After murder, D stated that he considered himself an "official" member of White Brotherhood, because he had committed crime against black race. Ct. held that this evidence was admissible under Indiana Evid.R. 404(B), as it went directly to D's motive in committing offense. Ct. noted overwhelming evidence of D's guilt & concluded that high probative value of evidence was not substantially outweighed by danger of unfair prejudice. Held, no error, Garrard, J., concurring in result.

RELATED CASES: Kirby, Ap., 774 N.E.2d 523 (evidence of D's prior drug dealing was highly relevant to issue of D's state of mind at time of fatal collision & was offered to prove State's theory that D was motivated to commit suicide for fear she was under investigation for drug dealing & would lose her children as consequence); Williams, 690 N.E.2d 162 (evidence of D's gang membership & drug-related activities was highly probative of motive for shooting, & probative value of this evidence was not substantially outweighed by prejudicial impact); Richmond, 685 N.E.2d 54 (evidence of D's street gang was relevant to D's ownership & possession of murder weapon); Daniels, 683 N.E.2d 557 (admission of gang-related evidence had only slight probative value & clear prejudicial effect; error held harmless); Cadiz, App., 683 N.E.2d 597 (evidence of D's association with gang member was relevant, very probative, & admissible under Rule 404(b) to prove motive for otherwise completely senseless act of violence); Tompkins, 669 N.E.2d 394 (evidence of D's racial prejudice was admissible under IRE 401 & 404(b) to support State's theory that murder was racially motivated).

TITLE: Lafayette v. State
INDEX NO: O.4.d.6.
CITE: (12-08-09), 917 N.E.2d 660 (Ind. 2009)
SUBJECT: Prior rape conviction inadmissible under intent exception to Ind. Evid.R. 404(b)
HOLDING: In rape prosecution, Tr. Ct. erred in admitting testimony about D's prior attempted rape conviction under the intent exception to Ind. Evidence Rule 404(b), because D did not present a claim of particular contrary intent by claiming intercourse was consensual and by challenging complaining witness's (CW's) credibility on the issue of consent.

Evidence of prior crimes may not be used to prove a D's character in order to show he acted in accord with that character, but such evidence may be admissible for other purposes, such as proving intent. Ind. Evid. R. 404(b). However, the intent exception is available only when a D goes beyond merely denying the charged culpability and alleges a particular contrary intent. Wickizer v. State, 626 N.E.2d 795 (Ind. 1993). Where State establishes that a D alleges a particular contrary intent, the evidence is still not admissible until Tr. Ct. determines that the probative value of the evidence substantially outweighs the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay or needless presentation of cumulative evidence. Id. The evidence has substantial probative value if it is specifically and significantly related to the charged crime in time, place, and circumstance as to be logically relevant to one of the particular excepted purposes. Malone v. State, 441 N.E.2d 1339 (Ind. 1982).

Here, after D cross examined CW, Tr. Ct. ruled that he opened the door to admission of his attempted rape conviction when he attacked the credibility of CW on the issue of whether the intercourse was consensual. In reversing the Tr. Ct., Court held that D's claim that the intercourse was consensual does not present a claim of particular contrary intent for purposes of the intent exception to Evidence Rule 404(b). Such a claim actually puts the alleged victim's intent in issue. Moreover, a D does not put his intent at issue by questioning the alleged victim's credibility. A contrary rule would prevent Ds from exercising the right to confront a witness's credibility. Held, transfer granted, Court of Appeals' opinion at 899 N.E.2d 376 vacated, conviction reversed and remanded for new trial.

RELATED CASES: Thompson, 15 N.E.3d 1097 (erroneous admission of evidence that D was a suspect in a similar sexual assault had a prejudicial impact on the jury and contributed to the verdict because D's guilt hinged solely on the credibility of C.W.); (Ind. Ct. App 2014) Duvall, 978 N.E.2d 417 (Ind. Ct. App 2012) (D's opening argument that D's husband killed himself by taking too many drugs did not open the door to prior boyfriend's testimony that he believed D previously tried to poison him; D's opening did not admit that she engaged in the conduct at issue and then assert a particular non-criminal intent; harmless error).

TITLE: Larry v. State

INDEX NO.: O.4.d.6.

CITE: 716 N.E.2d 79 (Ind. Ct. App. 1999)

SUBJECT: Collateral misconduct evidence admissible to show guilty knowledge/consciousness of guilt

HOLDING: Tr. Ct. did not abuse its discretion by admitting evidence that, after Co-D made statements to police implicating D in charged crime, D called Co-D a "snitch" & beat him up. Tr. Ct. has wide latitude in weighing probative value of evidence against possible prejudice of its admission & its ruling will be reviewed only for abuse of discretion. Poindexter, App., 664 N.E.2d 398. Manufacture, destruction, or suppression of evidence may properly be considered by jury as admission of D's guilt or his guilty knowledge. Scifres-Martin, App., 635 N.E.2d 218; Cox v. State, 422 N.E.2d 357 (Ind. Ct. App 1981). Moreover, evidence of D's attempts to cover up crime or suppress evidence against him is highly probative/prejudicial. Id. Here, collateral misconduct evidence was properly admissible to prove D's guilty knowledge or consciousness of guilt with respect to charged crime. Held, judgment affirmed.

RELATED CASES: Wilcoxson, 132 N.E.3d 27 (Ind. Ct. App. 2019) (in attempted murder and criminal recklessness prosecution, evidence that defendant fired a gun as a SWAT team arrested him was properly admitted under Rule 404(b) to show motive and consciousness of guilt; while that evidence prejudiced him, it met the balancing test under Evidence Rule 403); Dean, App., 901 N.E.2d 648 (evidence that D beat informant, held a gun to his head, and asked informant what the drug task force "had on him" was properly admissible to prove D's guilty knowledge or consciousness of guilt with respect to charged crimes).

TITLE: McCloud v. State
INDEX NO.: O.4.d.6.
CITE: (2nd Dist., 7-21-98), Ind. App., 697 N.E.2d 96
SUBJECT: Erroneous admission of prior misconduct evidence - mistake exception
HOLDING: In drug possession prosecution, Tr. Ct. improperly admitted evidence of D's subsequent arrest for possession of cocaine. Invoking "mistake" exception to Indiana Evidence Rule 404(b), Tr. Ct. allowed testimony about subsequent incident because of defense counsel's cross-examination of arresting officer regarding 1) officer's failure to ask D if baggies found near arrest scene were his; 2) D's falling with his hand in his pocket yet being uninjured; & 3) area where drugs were found being unkempt. D did not affirmatively plead defense of mistake; nor did he claim that there were baggies on his person of which he was reasonably unaware, or that he possessed baggies which he reasonably believed to contain some innocuous substance. Tr. Ct.'s finding that evidence of subsequent incident was admissible pursuant to mistake exception simply because D challenged officer's version of events was erroneous. Error in admitting evidence about subsequent arrest was not harmless, because it had substantial likelihood of contributing to jury's verdict. Held, reversed & remanded for new trial.

TITLE: McGuire v. State
INDEX NO.: O.4.d.6.
CITE: (2nd Dist., 05-24-93), Ind. App., 613 N.E.2d 861
SUBJECT: Other misconduct evidence admissible on intent issue
HOLDING: Where D admitted he possessed cocaine, but denied any intent to distribute it, evidence of prior sales of cocaine was admissible to show intent. At D's trial for selling cocaine to co-worker, co-worker was allowed to testify as to previous uncharged drug transactions with D. Ct. found evidence was properly admitted under Fed. R. Evid. 404(b), Hardin (1993), 611 N.E.2d 123. Ct. rejected argument that intent was not at issue & distinguished Haynes (1991), App., 578 N.E.2d 369. In Haynes, also involving prosecution for dealing in cocaine, Ct. found intent was not at issue because D denied any involvement in drug transactions. In instant case, D testified that he used cocaine, possessed it at time of arrest, & obtained it at work, but denied he intended to deliver it. Because only issue in dispute was intent, evidence of other dealings was properly admitted, & its probative value was not outweighed by unfair prejudice or jury confusion.

RELATED CASES: Schnitzmeyer, 168 N.E.3d 1041 (Ind. Ct. App. 2021) (text messages from D prior to date of arrest, which police testified were slang indicative of drug dealing, were properly admitted over objection because they were highly probative to establish D's intent to deal and his identity); Goodner, 685 N.E.2d 1058 (D's statements concerning his cocaine possession & drug activities prior to his arrest were properly admitted to counter D's testimony indicating his purported intent to aid police in a set up operation, & also to demonstrate his intent to deliver cocaine).

TITLE: Mitchell v. State
INDEX NO.: O.4.d.6.
CITE: (2nd Dist., 6-8-00), Ind. App., 730 N.E.2d 197
SUBJECT: Exclusion of evidence - no error
HOLDING: In rape & criminal deviate conduct prosecution, Tr. Ct. did not err in excluding evidence that complaining witness (CW) was party to CHINS proceeding. In his offer to prove, D argued that evidence was admissible under Evidence Rule 404(b) to show CW had motive to falsely accuse him of sexual assault. Cases interpreting Rule 404(b) involve application of rule with respect to D's motive to commit crime, rather than victim's motive to falsely accuse D of committing crime. Admissibility of evidence & permissible scope of cross-examination to test credibility of witness is within sound discretion of Tr. Ct. Even if exclusion of evidence was error, any such error was harmless in this case given other evidence indicative of D's guilt. Held, no error.

Note: CHINS evidence may have been offered for purposes identified in Ind. Evidence Rule 616, which provides that evidence of bias, prejudice, or interest of witness for or against any party to case is admissible for purposes of attacking credibility.

TITLE: Payne v. State
INDEX NO.: O.4.d.6.
CITE: (4th Dist., 08-31-06), Ind. App., 854 N.E.2d 7
SUBJECT: Erroneous admission of character evidence - D's letter to former boyfriend
HOLDING: In triple murder prosecution, Tr. Ct. erred in admitting into evidence a letter from D to her former boyfriend, in which she specifically describes how easy a robbery or burglary target her then employer would be. Record contained no evidence of any overt acts toward robbery or burglary, & there was no limiting jury instructions as to evidentiary value of the letter. State argued that letter provided evidence of a pertinent trait of D's character, as provided for in Ind. Evidence Rule 404(a). However, jurors were never exposed to any evidence regarding D's naivety & susceptibility. Mere remark in D's opening statement that "this young lady [is] gullible, easily misled, [&] very trusting of all individuals," without more, is insufficient for State to introduce character evidence to the contrary as there is no evidence yet "to rebut."

Letter was not admissible under intent exception of Ind. Evidence Rule 404(b) because D did not affirmatively present a particularized claim of contrary intent. Wickizer v. State, 626 N.E.2d 795 (Ind. 1993). D's opening statement was merely a summation of State's evidence in light of State's burden of proof. Moreover, letter was not admissible under mistake of fact or accident exception of 404(b). Defense revolved more around argument that D did not take four alleged accomplices seriously when she was providing them with information about victims' residence. Stressing the element that her role was minimal & that she should not be punished as if she was actually at scene of crime, D seemed to rely on argument that her involvement just was not enough to warrant a conviction for murder. Accordingly, letter was inadmissible under mistake of fact or accident exception of Evid. R. 404(b). Because of State's side-by-side comparison of letter's content with D's actions in this case, erroneously admitted letter had a substantial likelihood of contributing to the jury's verdict. Held, judgment reversed & remanded for new trial on other grounds.

TITLE: Reynolds v. State
INDEX NO.: O.4.d.6.
CITE: (4th Dist., 6-6-95), Ind. App., 651 N.E.2d 313
SUBJECT: Uncharged misconduct evidence - harmless error
HOLDING: Where D merely denied charged crimes & did not put his motive in dispute, admission of prior uncharged misconduct was error. During trial for burglary & theft, Tr. Ct. permitted State's witness to testify that she had returned stolen answering machine to K-Mart for D in exchange for cash. On appeal, State argued that evidence was introduced to show D's motive to obtain cash to support cocaine habit. Ct. found none of the exceptions of Ind. Evidence Rule 404(b) were in genuine dispute, & that D did not affirmatively present claim contrary to charged crimes. However, error was harmless because evidence of uncharged crime was not more abundant & more extensive than that for charged crime, & State did not rely on uncharged crime in its final argument. Ct. concluded that under these circumstances, erroneous admission of evidence was not likely to have had prejudicial impact upon mind of average juror, thereby contributing to verdict. Bolin, App., 634 N.E.2d 546. Held, convictions affirmed.

RELATED CASES: Hicks, 690 N.E.2d 215 (declining to hold that IRE 404(b) exceptions other than intent should be available only when D goes beyond merely denying charged crime & affirmatively presenting claim contrary to charge; relevance & admissiblity of motive is tied to facts of specific crime).

TITLE: Talley v. State
INDEX NO.: O.4.d.6.
CITE: (2/8/2016), 51 N.E.3d 300 (Ind. Ct. App 2016)
SUBJECT: Conviction admissible to show motive; No IAC by forgoing motion to bifurcate
HOLDING: Trial counsel was not ineffective in forgoing a motion to bifurcate D's charge for possession of a firearm by a serious violent felon from his charges for resisting law enforcement, even though this allowed the jury to hear about D's 2001 armed robbery conviction, because counsel's choice was a reasonable strategic decision.

Officer told D to stop because he matched the description of suspected burglar. D fled. Officer Campos caught and detained D, who possessed a .40 caliber semiautomatic handgun. In 2001, D was convicted in Illinois for armed robbery. At trial, counsel presented testimony that D did not possess the gun instead of moving for bifurcation. She chose this strategy because she believed the trial court would have denied the motion to bifurcate and admitted the prior conviction as a motive for D to flee the officer. See Ind. Evid. Rule 404(b)(2).

Trial counsel was correct that D's prior robbery conviction was relevant to prove motive for resisting law enforcement. See Fuentes v. State, 10 N.E.3d 68, 73 (Ind. Ct. App. 2014), trans. denied (presence of a rifle in D's car was admissible at trial because it was evidence of his motive to flee from the police in the car and on foot). Thus, her decision to not file the motion to bifurcate and instead present testimony that D did not possess a gun was a reasonable strategic decision entitled to the Court's deference. Held, judgment affirmed.

TITLE: Taylor v. State
INDEX NO.: O.4.d.6.
CITE: (4th Dist., 06-21-93), Ind. App., 615 N.E.2d 907
SUBJECT: Other crimes evidence admissible on issue of knowledge
HOLDING: Although evidence of prior drug transaction was erroneously offered & admitted as part of res gestae in trial for cocaine possession & maintaining common nuisance, error was harmless because evidence was properly admissible to show D's knowledge that drugs were in apartment. Officer was permitted to testify about cocaine purchase he had made at D's apartment earlier on day of search & arrest, & evidence was offered to complete story of charged offense by placing it in context. Res gestae evidence is not exception to general rule prohibiting other misconduct evidence to show propensity, but it can be admitted to prove & explain occurrence of specific, charged crime. Ct. found admission of prior transaction under res gestae was erroneous, however, because evidence of cocaine sale at apartment earlier in day was not so closely related to charged crimes as to be part of same transaction. Error in admission on this ground did not require reversal, however, because D's sole defense to charged crimes was that he didn't know drugs were in apartment. State had burden of proving D knowingly possessed cocaine & maintained place where drugs were kept & used. Because his knowledge of drugs was therefore at issue, evidence he was involved in drug sale earlier that day made it more probable that he knew drugs were present. Ct. concluded that probative value of evidence outweighed its prejudicial impact, & that Tr. Ct. did not err in incidentally showing evidence of prior crime. Held, conviction affirmed.

TITLE: Werne v. State
INDEX NO.: O.4.d.6.
CITE: (6-20-01), Ind. App., 750 N.E.2d 420
SUBJECT: Erroneous admission of 404(b) evidence under intent exception
HOLDING: Allegations of prior misconduct are not admissible under Ind. Evidence Rule 404(b) to prove intent unless there has been an affirmative presentation of contrary intent by D. Wickizer v. State, 626 N.E.2d 795 (Ind. 1993). Here, neither D's inadmissible pretrial statement nor his counsel's opening statement constituted affirmative presentation of contrary intent. D's pretrial statement only indicated that he had touched child, but there was no suggestion that touching occurred in genital area. Defense counsel's opening statement suggested to jury that any touching of child occurred over clothes, but there was no mention of accidental or inadvertent touching. Admitting evidence of prior molestation allegation was not harmless error, given substantial effect on D due to emotionally-charged type of case & interjecting another molestation allegation is almost certain to give much more credibility to charged allegation. Held, judgment reversed & remanded for new trial; Bailey, J., dissenting with separate opinion.

TITLE: Whatley v. State
INDEX NO.: O.4.d.6.
CITE: (2nd Dist., 06-17-09), 908 N.E.2d 276 (Ind. Ct. App. 2009)
SUBJECT: Evidence of drug use/dealing did not violate Rule 404(b) or 403
HOLDING: In murder prosecution, Tr. Ct. did not commit fundamental error in admitting testimony that D had been using crack cocaine for five days and visited motel to deliver drugs. Challenged evidence was not introduced to show D's propensity to engage in crime or that his behavior was in conformity with a character trait. With respect to D's drug use, his girlfriend's testimony explained why D was awake for five days and, consequently, why girlfriend needed to drive D's vehicle and why she was waiting in driver's seat when victim, the motel manager, ordered her to leave motel property. With respect to D's delivery of drugs to motel, the evidence explained that victim first confronted D's girlfriend and another witness as they waited for D to deliver drugs to one of the motel's rooms and that victim again confronted girlfriend when she attempted to retrieve D from motel. This evidence explained the context of victim's altercations with girlfriend, and any motive D may have had to attack victim. Because this evidence was necessary for jury to understand relationships between D, victim, and the other witnesses and context of arguments and events which culminated in victim's death, Court found that admission of girlfriend's testimony did not violate Rule 404(b). Similarly, Court could not say that probative value of evidence was substantially outweighed by danger of unfair prejudice. Held, judgment affirmed.

TITLE: Whitehair v. State
INDEX NO.: O.4.d.6.
CITE: (5th Dist., 7-31-95), Ind. App., 654 N.E.2d 296
SUBJECT: Other misconduct evidence admissible on knowledge issue
HOLDING: In prosecution for receiving stolen property, extrinsic acts of misconduct were admissible to show that D was not naive purchaser, but rather knew that property at issue had been subject of theft. Tr. Ct. allowed State to introduce evidence of stolen tires found in D's garage when stolen vehicle at issue was discovered. On appeal, D argued that evidence was inadmissible under knowledge exception of Indiana Evid. R. 404(b), because he did not affirmatively put his intent or knowledge in issue at trial. Although recognizing that result was "a close call," Ct. concluded that effect of D's statements to police & counsel's opening remarks was to place in issue D's knowledge that vehicle was stolen. When questioned by detective concerning stolen vehicle, D stated that he had purchased vehicle for cash & had receipt. In opening statement, defense counsel emphasized to jury that State had to prove that D had knowingly or intentionally possessed property that was subject of theft. D's concurrent possession of stolen tires was highly probative & relevant to his knowledge of stolen character of vehicle. Tr. Ct.'s admonishment to jury limited danger of unfair prejudice. Held, judgment affirmed.

RELATED CASES: Johnson, App., 785 N.E.2d 1134 (testimony of D's previous sex partners detailing their previous sexual relationships with D & their subsequent positive test results for HIV & testimony that D admitted he was HIV positive were properly admitted to establish that D was HIV positive & knew it); Fuller, App., 674 N.E.2d 576 (prior misconduct evidence was admissible to negate D’s assertion of accident and lack of knowledge).

TITLE: Whitham v. State
INDEX NO.: O.4.d.6.
CITE: (12/30/2015), 49 N.E.3d 162 (Ind. Ct. App 2015)
SUBJECT: Prior attacks on victim and expert's opinion regarding injuries admissible
HOLDING: In attempted murder prosecution, complaining witness's (C.W.'s) testimony regarding two prior attacks demonstrated D's pattern of hostility toward C.W. and his motive for the charged attack. Where, as here, D and the victim have a frequently hostile relationship, evidence of those prior hostilities are "usually admissible" under Indiana Evidence Rule 404(b). Hicks v. State, 690 N.E.2d 215, 222-23 (Ind. 1997). D did not challenge the admission of this evidence under Rule 403 on appeal.–Held, judgment affirmed in part, reversed in part on other grounds.

TITLE: Wickizer v. State
INDEX NO.: O.4.d.6.
CITE: (12-27-93), Ind, 626 N.E.2d 795
SUBJECT: Depraved Sexual Instinct (DSI) evidence inadmissible to show intent
HOLDING: At child molest trial, admission of DSI evidence in State's case in chief was error, even though D subsequently admitted touching but denied sexual intent, because at time evidence was admitted intent was not sufficiently at issue to warrant admissibility under F.R.E. 404(b) & I.R.E. 404. Evidence of prior sexual misconduct was discussed in State's opening statement & admitted during its case-in-chief for sole purpose of showing D's DSI. Jury was instructed to consider evidence solely on issue of DSI. After evidence was admitted & D began his case, he took stand & admitted touching but denied any sexual intent. Case was eligible for treatment under rule of Lannan, 600 N.E.2d 1334. Critical issue was whether prior conduct evidence was admissible under intent exception to general inadmissibility of other misconduct evidence, pursuant to F.R.E. 404(b) & I.R.E. 404(b). Ct. noted strong impact of such evidence & concluded that applying broad construction to intent exception could often lead to creation of "forbidden inference," & would also cause exception to overwhelm rule's primary objective of prohibiting conviction for "bad character." Other cts. have held that "`willfulness & intent [must] be more than merely formal issues' and that `a plea of not guilty cannot, by itself, be construed .... so as to justify admission of this type of evidence.'" (*citing* U.S. v. Fierson (7th Cir. 1969), 419 F.2d 1020, 1023). Ct. found narrow construction of intent exception that does not authorize general use of prior misconduct evidence as proof of general or specific intent in criminal offenses was best & stated that: The intent exception in Evid. R. 404(b) will be available when a D goes beyond merely denying the charged culpability & affirmatively presents a claim of particular contrary intent. When a D alleges in trial a particular contrary intent, whether in opening statement, by cross-examination of the State's witnesses, or by presentation of his own case-in-chief, the State may respond by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the D's intent at the time of the charged offense. The Tr. Ct. must then determine whether to admit or exclude such evidence depending upon whether `its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.' Evid.R. 403. Here, prior misconduct evidence was admitted before D presented proper claim. Only indication of contrary intent was testimony that in response to police as to whether he touched complaining witness' penis, he said he was not "'devious character.'" Because only other evidence of intent was testimony of victim & D, error in admission of evidence required reversal. Held, decision at 619 N.E.2d 947 vacated & conviction reversed & remanded for new trial, Givan & Sullivan, JJ., dissenting. See, also, Levi, App., 627 N.E.2d 1345 (finding error in allowing State to introduce evidence of D's prior burglary conviction to show intent, but finding error was harmless due to other evidence of guilt). But, see, Price, 619 N.E.2d 582; Thompson, 625 N.E.2d 1322 (uncharged prior sexual misconduct admissible to show intent & motive).

RELATED CASES: Vermillion, 978 N.E. 2d 459 (Ind. Ct. App 2012) (D did not put his intent in issue by denying that the charged acts occurred); Day, App., 643 N.E.2d 1 (evidence of prior molestations admissible where D unequivocally went beyond merely denying culpability & affirmatively presented claim of particular contrary intent).

O. EVIDENCE

O.4. Relevancy

O.4.d.7. Res gestae

TITLE: Anderson v. State
INDEX NO.: O.4.d.7.
CITE: (5/26/83), Ind., 448 N.E.2d 1180
SUBJECT: Other acts - res gestae
HOLDING: Tr. Ct. did not err in allowing witness to testify that D shouted an abusive comment from passing car & shot witness in the side. Incident occurred one hour prior to D's crime spree & in the same general vicinity. Happenings near in time & place which complete story of crime are admissible under theory of res gestae. Brown 417 N.E.2d 333. Ct. rejects D's contention that testimony had little probative value & only purpose was to prejudice him. D was convicted of only those crimes to which he confessed before jury & was acquitted of those to which he professed innocence. Held, no error.

RELATED CASES: Geans, App., 623 N.E.2d 435 (In prosecution for nonsupport of dependent, D's ex-wife's testimony accusing him of battery, residential entry, theft & harassment was admissible, Testimony concerning battery of ex-wife was used to explain reason she obtained divorce & testimony about alleged harassment & possible residential entry was part of story explaining D's reason for refusing to pay support. Evidence was properly admissible as part of res gestae of crime.); Weyls, App. 598 N.E.2d 610 (In prosecution for robbery, theft, & vehicle theft, evidence that on the same night as charged offenses, D participated in shoplifting, possession of stolen property, attempted burglary, & robbery, all in different city, was properly admitted as part of res gestae of crimes charged); Wilson 491 N.E.2d 537 (Crim L 365(1), 369.2(2); evidence of uncharged act of fellatio was admissible because committed contemporaneously with criminal deviate conduct, with which D was charged); Cary 469 N.E.2d 459 (although D was not charged with rape, alleged rape was one event occurring during crime spree & admissible as part of res gestae of crimes charged).

TITLE: Harris v. State
INDEX NO.: O.4.d.7.
CITE: (6/22/2017), 76 N.E.3d 137 (Ind 2017)
SUBJECT: Gun admissible under Rules of Evidence, not res gestae doctrine
HOLDING: In a companion case to Snow v. State, the Supreme Court affirmed the admission of a handgun Defendant was carrying in an incident where both she and Defendant committed battery and resisted law enforcement. Snow held that though the gun was not admissible under the *res gestae* doctrine, as the Court of Appeals had ruled, it was admissible under Evidence Rules 401 and 403. Here, Defendant is correct that the gun was not relevant to his crimes because he was already detained in a police car before Snow brought her gun to the enounter with the officer. However, Defendant waived this claim for two reasons. First, he raised this claim for the first time at oral argument. Second, in his joint trial with Snow, he made no effort "to distance himself from Snow's case or her handgun." He never moved for a separate trial and never requested a limiting instruction that the jury consider the gun for Snow's charges. Held, transfer granted, Court of Appeals opinion vacated, and judgment affirmed.

RELATED CASES: Swanson, Ind., 666 N.E.2d 397 (Swanson in companion case to Snow v. State, Court of Appeals erred in justifying admission of gun under what was essentially the res gestae doctrine; D is correct that unlike Snow's crimes, the gun was not relevant to his crimes, but he waived this claim.)

TITLE: Haun v. State
INDEX NO.: O.4.d.7.
CITE: (8/8/83), Ind., 451 N.E.2d 1072
SUBJECT: Evidence - res gestae; error
HOLDING: Tr. Ct. erred in admitting evidence of D's possession of marijuana & his arrest on that charge in D's rape trial over his objection; however, reversal is not required because jury is presumed to be able to set such knowledge aside in determining whether D was guilty of rape. Here, officers went to D's trailer without warrant, after victim identified D from picture. Officer knocked on door, identified themselves & were admitted. Officers smelled burning marijuana & saw 4 bags of marijuana. Officers arrested D on possession charge. Ct. rejects D's contention that officers came to home to make routine felony arrest in violation of Payton v. NY (1980), 455 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639. D contends introduction of marijuana was irrelevant & prejudicial. State argues evidence was admissible under theory of res gestae (happenings near in time & place which complete story of crime are admissible, Maldonaldo 355 N.E.2d 843). Ct. holds officer's observations of marijuana & D's arrest for possession did not occur near in time & place to alleged rape & did not serve to complete story of rape; however, D was not prejudiced. Held, conviction affirmed.

RELATED CASES: Hudson 496 N.E.2d 1286 (Crim L 363; Witn 269(2); prosecutor's continued questioning whether co-D was drug dealer exceeded scope of res gestae, but was permissible to establish motive for burglary; held, conviction affirmed); Mulligan 487 N.E.2d 1309 (notation re changed license plate on back of picture of car raised implication of minor offense, but was not so prejudicial as to require reversal).

TITLE: Luginbuhl v. State
INDEX NO.: O.4.d.7.
CITE: (1st Dist. 5/13/87), Ind. App., 507 N.E.2d 620
SUBJECT: Convictions of others admissible under res gestae to show knowledge of D
HOLDING: Tr. Ct. did not err by admitting evidence that woman whom D had procured for vice detective had in fact been convicted of prostitution for that incident. Evidence of crimes or misconduct by another is admissible if it directly relates to totality of circumstances surrounding D's crime. Hudak, App., 446 N.E.2d 615; Smith, App., 284 N.E.2d 522. Here, evidence of prostitute's criminal activity bears direct relationship to D's procurement of her for purposes of prostitution. Although it is not necessary that state show that an act of prostitution actually occurred, Mure, App., 468 N.E.2d 951, prostitute's act of deviate sexual conduct had a strong tendency to prove a knowing procurement had been accomplished. Fact that act actually occurred makes inference that D knowingly procured woman for purposes of prostitution more probable than it would be without that evidence. D has failed to show Tr. Ct. manifestly abused its discretion to weigh probative value of evidence against prejudice to her. Wallace 486 N.E.2d 445. Held, conviction affirmed.

TITLE: Snow v. State
INDEX NO.: O.4.d.7.
CITE: (6/22/2017), 77 N.E.3d 173 (Ind. 2017)
SUBJECT: Gun admissible under Rules of Evidence, not res gestae doctrine
HOLDING: The Tr. Ct. did not err in admitting a gun that Defendant carried when she battered the arresting officer, even though she was not charged with a gun-related offense. The gun was admissible but not because "it explained the circumstances and context of the . . . altercations between [Defendant] and Officer Peck," as the Court of Appeals had ruled. Though stated in different terms, the Court of Appeals essentially relied on the *res gestae* doctrine, which the Supreme Court disapproved in Swanson v. State, 666 N.E.2d 397, 398 (Ind. 1996). "We . . . reiterate today our holding from over twenty years ago: *res gestae*—the common-law doctrine that made evidence admissible when it was part of a crime's story—is no more." However, the gun was admissible because it was relevant under Evidence Rule 401 to show Defendant's aggressive state of mind, and its probative value exceeded its prejudicial impact, per Evidence Rule 403. Held, transfer granted, Court of Appeals opinion vacated, and judgment affirmed.

RELATED CASES: Swanson, Ind., 666 N.E.2d 397 (Court of Appeals erred in justifying admission of gun under what was essentially the res gestae doctrine, but the gun was admissible under Evidence Rules 401 and 403); Bennett, 5 N.E.3d 498 (Ind. Ct. App 2014) (no abuse of discretion in admitting pictures of text messages related to drug deals not at issue in D's trial for dealing and possessing cocaine because messages were "intrinsically" related, meaning they occurred at the same time and under the same circumstances as the charged crimes); Hudson, 2009 Ind. App. LEXIS 363 (although occurring during the same charged time period, 2000-2006, evidence that D played a game with victim where she placed her hands on his penis was separate and unique from the charged sexual offenses and thus not "inextricably bound up" with the charged crimes; because the game did not fall under Rule 404(b) exception, it should not have been admitted into evidence; harmless error); Marshall, App., 893 N.E.2d 1170 (evidence of repeated molestations was instrinsic to time periods outlined in charging information and therefore outside of Evid. R. 404(b)); Wages, App., 863 N.E.2d 408 (testimony that D was driving erratically minutes or seconds before accident was intrinsically related to crime of reckless homicide & admissible); Seabrooks, App., 803 N.E.2d 1190 (evidence that D searched through murder victim's wallet was not excluded by Rule 404, as it was not evidence of a "crime committed on another day in another place.")

TITLE: Swanson v. State
INDEX NO.: O.4.d.7.
CITE: (5-31-96), Ind., 666 N.E.2d 397
SUBJECT: Uncharged misconduct - *Res Gestae* exception abandoned
HOLDING: *Res gestae* exception to uncharged misconduct evidence has not survived adoption of Indiana Rules of Evidence. Uncharged misconduct evidence previously claimed admissible as part of *res gestae* will now be analyzed under Ind. Evidence Rule 401, considering relevancy of evidence & whether it tends to make more probable or less probable the existence of some fact pertinent to case.

Here, evidence that D slapped his girlfriend & fired shots in ceiling prior to shooting victim was admissible because it tended to connect D to murder weapon & it indicated D knew weapon was loaded. D's actions prompted victim to demand that people leave premises & provided possible motive D might have had for killing victim. Held, transfer granted, Tr. Ct. affirmed.

RELATED CASES: Harris, 76 N.E.3d 137 (Ind. 2017) (in companion case to Snow v. State, Court of Appeals erred in justifying admission of gun under what was essentially the res gestae doctrine; D is correct that unlike Snow's crimes, the gun was not relevant to his crimes, but he waived this claim), Swanson, 77 N.E.3d 173, (Court of Appeals erred in justifying admission of gun under what was essentially the res gestae doctrine, but the gun was admissible under Evidence Rules 401 and 403), Bennett, 5 N.E.3d 498 (Ind. Ct. App 2014) (no abuse of discretion in admitting pictures of text messages related to drug deals not at issue in D's trial for dealing and possessing cocaine because messages were "intrinsically" related, meaning they occurred at the same time and under the same circumstances as the charged crimes); Hudson, 2009 Ind. App. LEXIS 363 (although occurring during the same charged time period, 2000-2006, evidence that D played a game with victim where she placed her hands on his penis was separate and unique from the charged sexual offenses and thus not "inextricably bound up" with the charged crimes; because the game did not fall under Rule 404(b) exception, it should not have been admitted into evidence; harmless error); Marshall, App., 893 N.E.2d 1170 (evidence of repeated molestations was instrinsic to time periods outlined in charging information and therefore outside of Evid. R. 404(b)); Wages, App., 863 N.E.2d 408 (testimony that D was driving erratically minutes or seconds before accident was intrinsically related to crime of reckless homicide & admissible); Seabrooks, App., 803 N.E.2d 1190 (evidence that D searched through murder victim's wallet was not excluded by Rule 404, as it was not evidence of a "crime committed on another day in another place.").

TITLE: U.S. v. Heidebur

INDEX NO.: O.4.d.7.

CITE: 122 F.3d 577 (8th Cir. 1997)

SUBJECT: 404(b) evidence; Child Pornography Conviction Spoiled by Evidence of Molestation of Same Child

HOLDING: Evidence that D had sexually molested his 12-year-old step-daughter was improperly admitted at his federal trial for knowingly possessing sexually explicit photographs of the girl. D's wife surprised him in locked bedroom with stepdaughter, and several days later she found nude pictures that formed basis of federal charge. At trial, prosecutor elicited testimony from wife that her search for pictures was prompted by earlier discover of D molesting child. Government argues that molestation was "integral part of crime charged," and thus not excluded under R.Ev. 404(b). Court rejects this claim, reasoning that motive for wife's search had nothing to do with crime charged and was not necessary to paint coherent picture for jury. Only purpose of testimony was to show propensity. Testimony should have been excluded.

TITLE: Webb v. State
INDEX NO.: O.4.d.7.
CITE: (9/12/83), Ind., 453 N.E.2d 180
SUBJECT: Other acts - res gestae; motive
HOLDING: Tr. Ct. did not err in admitting evidence of D's use of illegal drugs in D's felony murder trial where those facts established a motive for commission of burglary & murder. These facts were admissible as evidence of acts within res gestae exception to rule that evidence of one crime is not admissible to prove another. Bond 403 N.E.2d 812; McCabe 396 N.E.2d 895; Thomas 328 N.E.2d 212. Here, D had a $60/day drug habit; his girlfriend also had a drug habit. Both were unemployed. D had no drugs or money when he left their apartment, when he returned, he had money he said he had found & immediately used it to buy drugs for himself & his girlfriend. Held, no error.

RELATED CASES: Newman 485 N.E.2d 58 (Crim L 365(2); Tr. Ct. did not err by permitting testimony re D's drug transactions several days before he allegedly murdered his supplier; although several days had passed between drug transaction & victim's death, drug transaction was focal point of contact between D & victim; Ct. finds evidence helps complete story of relationship of D & victim which ended in victim's murder); Beasley 452 N.E.2d 983.

O. EVIDENCE

O.4. Relevancy

O.4.d.8. Sex offenses/depraved sexual instinct

TITLE: Depraved sexual instinct exception - prior to Lannan
INDEX NO.: O.4.d.8.
CITE: UNKNOWN
SUBJECT: Cases on prior DSI exception
HOLDING: Cards relating to DSI evidence have been removed because the depraved sexual instinct exception was abolished in Lannan 600 N.E.2d 1334, but cases relating to the exception are listed here for informational purposes. Amburn 545 N.E.2d 1141 Lawrence 464 N.E.2d 923 Lehiy 509 N.E.2d 1116 Daniels 408 N.E.2d 1244 Austin 319 N.E.2d 130 McKim 476 N.E.2d 503 Knisley 474 N.E.2d 513 Jarrett 465 N.E.2d 1097 Hoehn 472 N.E.2d 926 Best 439 N.E.2d 1361 Crabtree 547 N.E.2d 286 Dockery 504 N.E.2d 291 Montgomery 412 N.E.2d 793 Cobbs 338 N.E.2d 632 Kuchel 501 N.E.2d 1032 Jenkins 474 N.E.2d 84 Johnson 472 N.E.2d 892 Neaveill 474 N.E.2d 1045 Oldham 467 N.E.2d 419 Stephens 546 N.E.2d 1260

TITLE: Brown v. State
INDEX NO.: O.4.d.8.
CITE: (2/10/84), Ind., 459 N.E.2d 376
SUBJECT: Other crimes - rape; proof of consent
HOLDING: Tr. Ct. erred in permitting 2 state witnesses to testify re prior instances of forced sexual intercourse with D (which occurred 3 months before instant crime under similar circumstances). In rape cases where intercourse has been proved or admitted, D has interposed consent defense & only issue is consent of prosecutrix, evidence of prior rapes is inadmissible. Miller 436 N.E.2d 1113; Austin 319 N.E.2d 132; Duvose 275 N.E.2d 536; Kerlin 265 N.E.2d 22; Meeks 234 N.E.2d 629. See Lovely v. US (CA4 1948), 169 F.2d 386 (fact one woman was raped has no tendency to prove another woman did not consent). Here, D admitted acts occurred & interposed consent defense, thus evidence of other alleged rapes was not relevant to any issue before jury. Witness' testimony had no other purpose than tarnishing D's image in a case that hinged entirely upon his credibility. Held, conviction reversed; remanded for new trial.

RELATED CASES: Kuchel 501 N.E.2d 1032 (Ct. rejects D's contention that since deviate conduct is only a crime if performed against non-consenting person, same rule should apply in both rape & sexual deviate conduct cases where consent is only issue); Jenkins 474 N.E.2d 84 (Crim L 369.8, 372(7); prosecution rebuttal evidence of subsequent similar rape/sodomy reversible error where only issue was consent; Ct. rejects state's argument that evidence was admissible under depraved sexual instinct exception); Malone 441 N.E.2d 1339 (alleged rapes were remote; held, admission of testimony re subsequent rape was reversible error).

TITLE: Clausen v. State
INDEX NO.: O.4.d.8.
CITE: (10-26-93), Ind., 622 N.E.2d 925
SUBJECT: Waiver of other misconduct error
HOLDING: S.Ct. granted transfer of decision at 612 N.E.2d 147, but essentially affirmed both of its holdings. Ct. App. holding follows: Admission of DSI evidence that was not objected to does not require reversal, nor is it ineffective assistance of counsel (IAC) to fail to object. D was convicted of two counts of child molesting. At trial, 36-year old adopted daughter (AD) said D fondled her from ages of 5 or 6 to 10 or 12, & complaining witness (CW) also testified to other uncharged acts of molestation against her by D. D admitted trying to place his penis between AD's legs on one occasion, but denied any sexual touching of CW. D did not object to AD's testimony at trial, but he had filed motion in limine to exclude evidence, & Ct. inserted objection to witness' testimony in record, upon motion of D at sentencing hearing (apparently in attempt to amend record, which was not discussed by Ct. App.). Failure to object to evidence at trial waives any error, & Ct. found even if objection had not been waived, it had no merit. D did not object to DSI evidence presented by CW, & therefore testimony of AD was merely cumulative. Ct. also found D's admission of sexual misconduct with AD rendered admission of her DSI evidence harmless. In footnote, Ct. also noted it was not IAC to fail to object to evidence, because Lannan, 600 N.E.2d 1334 had not been decided at time of trial, & attorneys are not required to anticipate changes in law & object accordingly, Fulmer, 523 N.E.2d 754. In St.Ct. decision Justice Dickson dissented concerning preservation of error because Tr. Ct. & State all agreed that injecting objection & ruling in record prior to sentencing preserved issue for review. He found requiring more was simply imposing arbitrary & technical formality that precluded ruling on merits. See, also, card at E.6.h on restitution issue.

TITLE: Lehiy v. State
INDEX NO.: O.4.d.8.
CITE: (6/30/87), Ind., 509 N.E.2d 1116
SUBJECT: Other crimes - depraved sexual instinct (DSI)
HOLDING: Pursuant to AR 11(B)(3), Ind. S. Ct. adopts 3d Dist.'s opinion at 501 N.E.2d 451, which held that evidence of prior criminal sexual conduct is not admissible to show DSI in case where only rape is being prosecuted. Such evidence is limited to prosecutions for sodomy or incest. Montgomery 412 N.E.2d 793; Daniels 408 N.E.2d 1244; Cobbs 338 N.E.2d 632; Austin 319 N.E.2d 130. Ct. rejects state's contention that error is harmless. Evidence is far from overwhelming & jury's determination depended in large part on credibility of witnesses. "Under such circumstances it is paramount that D be protected from evidence which has only effect of reflecting unfavorably on his character." Held, conviction reversed; remanded for new trial.

RELATED CASES: Barger 587 N.E.2d 1304 (evidence that D, school principal, rubbed inner thighs & faces of first grade girls, made comments about bodies of young female students, & engaged in excessive frontal hugging & touching of young girls, was all admissible in child molest trial, as it went to show D's DSI. Former student also testified that D twice hugged her so tight she could feel his penis & played with her bra strap. It was not necessary that uncharged acts be identical to crime charged, so long as they showed DSI. Additionally, fact that some of DSI evi- dence occurred after act charged, did not render it inadmissible. Acts were similar in time & proximity, within 2-3 year time frame); Kuchel 501 N.E.2d 1032 (Ct. rejects D's contention that since deviate conduct is only a crime if performed against non-consenting person, same rule should apply in both rape & sexual deviate conduct cases where consent is only issue); McKim 476 N.E.2d 503 (evidence of forced sexual intercourse against girlfriend is admissible to show DSI in incest/rape/child molesting trial); Jenkins 474 N.E.2d 84 (where only issue is consent, evidence of subsequent similar rape/sodomy was not admissible under DSI exception); Knisley 474 N.E.2d 513 (by denying molestation of E.L. (9-year-old step-grandchild), D opened door to CX/rebuttal re sexual relations with victim & to any phase of his sexual experiences relevant under crime charged; CX & rebuttal evidence re molestation/rape of T.L./F.H. proper to show DSI; act need not be identical to crime charged *citing* Jarrett (infra); Young DISSENTS); Johnson 472 N.E.2d 892 (prior acts of anal intercourse admissible to show DSI); Jarrett 465 N.E.2d 1097 (prior crime showing same sexual instinct - homosexuality & involvement with minors admissible); Neaveill, App., 474 N.E.2d 1045 (photos of family sex admissible to show DSI, *citing* Caccavallo 436 N.E.2d 775); Hoehn, App., 472 N.E.2d 926 (photo of nude 7-year-old boy & testimony of ex-wife that child slept with them on their wedding night admissible to show DSI; Young DISSENTS); Oldham, App., 467 N.E.2d 419 (D's tendered instruction that state must prove acts beyond a reasonable doubt was incorrect statement of law); Best, App., 439 N.E.2d 1361 (in child molesting trial, 20 photos of nude or scantily clad girls under 16 were properly admitted within DSI rule to show D's propensity for sexual involvement with girls under 16).

TITLE: Lannan v. State
INDEX NO.: O.4.d.8.
CITE: (10-16-92), Ind., 600 N.E.2d 1334
SUBJECT: Depraved Sexual Instinct (DSI) exception abolished
HOLDING: Evidence of prior sexual misconduct is no longer admissible in certain sex crime prosecutions to show conformity with character trait of "depraved sexual instinct," unless such evidence is admissible as other misconduct evidence under Fed. R. Evid. 404(b); granting transfer of Ct. of appeals memorandum decision. Although upholding D's conviction due to properly admitted evidence, Ct. abandoned DSI exception to general prohibition against use of other misconduct evidence as substantive evidence of guilt in child molest & deviate conduct cases.

Ct. rejected recidivism argument to justify DSI evidence, noting drug dealers have high recidivism rate, but evidence of similar misconduct isn't admissible in their prosecutions unless it fits within standard exceptions, such as common scheme or plan, res gestae, to show motive, identity, etc. Ct. also rejected argument that such evidence was necessary to allow complaining witness to be believed, because allegations of child molest are all too familiar to layperson in present day & age.

Ct. instead adopted Fed. R. Evid. 404(b), which allows for such evidence to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Rule 404(b) also requires reasonable notice to D of State's plan to use such evidence if D so requests. Ct. noted such evidence would still be admissible in number of instances & discussed such situations. Ct. applied rule to D & found some evidence against him was inadmissible under new rule but found sufficient admissible evidence to sustain conviction. Held, conviction affirmed, but DSI rule abolished, Givan, J., concurring in result, but dissenting as to abolition of DSI.

RELATED CASES: Santonelli, App., 743 N.E.2d 1281 (Lannan decision applied to D's case, where he was convicted almost 30 days before decision but he filed his praecipe for appeal 11 days after decision); Cossell, App., 675 N.E.2d 355 (Lannan does not apply retroactively to petitions for post- conviction relief); Posey, App., 624 N.E.2d 515 (Where D's trial was completed on October 1, 1992, 15 days before Lannan was issued & D was sentenced on November 25, 1992, & praecipe for appeal was filed December 4, 1992, Lannan rule was not applicable. Ct. interpreted Pirnat, 607 N.E.2d 973, to hold that any case not pending on appeal at time Lannan was decided was not eligible for its application, even if time for appeal had not yet run. Interpretation seems contrary to logic, as it would exclude any cases in the narrow window of time just shortly before Lannan, but allow older cases the benefit of the rule.); See, also, Moran, App., 604 N.E.2d 1258, & Vanover, App., 605 N.E.2d 218 (applying Lannan rule to cases pending on appeal); Pirnat, 600 N.E.2d 1342 (applying new rule to case pending on petition to transfer, & remanding to Ct. of appeals for reconsideration in light of Lannan); Pirnat, 607 N.E.2d 973, (On petition for rehearing, Ct. clarified retroactivity of new rule abandoning depraved sexual instinct (DSI) exception, & rejected State's argument that application of rule to cases pending on appeal would have "devastating effect on the administration of justice." Cases where issue was properly preserved & where direct appeal was pending at time Lannan was decided to receive benefit of review under new rule because they should not be penalized merely because Ct. happened to chose Lannan as vehicle for changing rule. Ct. noted its doubt as to whether rule would qualify for retroactive application to cases on collateral review, i.e., PCR, but reserved that question.)

TITLE: Pirnat v. State
INDEX NO.: O.4.d.8.
CITE: (1st Dist., 04-12-93), Ind. App., 612 N.E.2d 153
SUBJECT: Evidence of D's Depraved Sexual Instinct Inadmissible
HOLDING: After remand from S. Ct. (Pirnat 600 N.E.2d 1342), Ct. App. held that D's prior conviction for child molesting was inadmissible as other misconduct evidence in present trial for child molesting. Ct. looked to 7th Cir. in establishing test for admissibility of evidence under Fed. R. Evid. 404(b). Result was four-part test from U.S. v. Hudson (7th Cir. 1989), 884 F.2d 1016, cert. denied, (following Huddleston v. U.S. (1988), 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771). Test included following: 1) evidence must be directed toward establishing matter in issue other than D's propensity to commit charged act; 2) other crime must be similar enough & close enough in time to be relevant to matter in issue; 3) evidence must be sufficient to support finding by jury that D committed other crime; & 4) proponent of evidence must show probative value of other crime is not substantially outweighed by its prejudicial effect. Additionally, Tr. Cts. must always use F.R.E. 403 balancing test to evaluate prejudice to D to determine admissibility of evidence, Hardin, 611 N.E.2d 123, & U.S. v. Fairchild (7th Cir. 1975), 526 F.2d 185, cert. denied.

Ct. determined evidence of Pirnat's prior child molesting conviction was inadmissible for any legitimate purpose. Ct. noted incident leading to previous conviction occurred over 3 years prior to incident giving rise to present prosecution, & found it was not recent enough to meet part 2 of Hudson test. Ct. also found testimony concerning prior conviction & facts surrounding that incident were highly prejudicial to D & noted in footnote that this would be case whether there was testimony as to underlying facts, or merely introduction of a certified copy of conviction.

As to admissibility of evidence under common scheme or plan exception, Ct. first noted that although in both incidents victims were D's step-children & were fondled while lying in bed, those facts were insufficient to create unique modus operandi or "signature," because particular acts were typical & common in cases of child molestation. Ct. also rejected admission under res gestae prong of common scheme or plan exception, because they were too unrelated in time, character, & place of commission to establish plan which embraced them both.

Admissibility of evidence under intent exception was also rejected. Evidence of prior misconduct is admissible to prove intent if D places it in issue, or if intent is automatically in issue, U.S. v. Gruttadauro (7th Cir. 1987), 818 F.2d 1323. Additionally, intent is automatically at issue if charged crime involves specific intent, id., & child molesting is by statute, specific intent crime. In child molesting cases, however, specific intent may be inferred from circumstances. Ct. therefore found that to create automatic intent issue allowing for admission of 404(b) evidence in class of cases where intent is inferable from nature of the act charged, would create exception to 404(b) which would "virtually swallow the rule...." Ct. again also mentioned probative value/prejudicial impact weighing test, & lack of striking similarity of offenses. Ct. concluded that erroneous admission of prior conviction required reversal, because there was not other overwhelming evidence of D's guilt. Held, conviction reversed & remanded.

RELATED CASES: Hicks, 690 N.E.2d 215 (Ct. declined to adopt 4-part Hudson test; see card at O.4.d.1). Thomas, App, 612 N.E.2d 604 (While finding that D's prior Texas conviction for child molesting was erroneously admitted, admission did not require reversal because of other evidence to sustain verdict. Ct. discussed balancing test set forth in Hardin v. State, 611 N.E.2d 123, & rejected admissibility of document on issue of intent, as in Pirnat.)

TITLE: Ried v. State
INDEX NO.: O.4.d.8.
CITE: (06-18-93), Ind., 615 N.E.2d 893
SUBJECT: Admission of Depraved Sexual Instinct (DSI) evidence not fundamental error
HOLDING: Ind. S.Ct. granted transfer of decision at 610 N.E.2d 275, & summarily affirmed its ruling that admission of DSI evidence at trial held prior to abolition of that exception to other misconduct evidence in Lannan (1992), 600 N.E.2d 1334, did not constitute fundamental error & could not be argued on appeal without proper objection at trial. Ct. interpreted its decision in Pirnat, (1993), 607 N.E.2d 973, to have resolved issue. While D's case was pending on direct appeal at time of Lannan decision, D did not present objection to evidence at trial. Ct. therefore found that failure to preserve issue in this way was fatal to D's claim, as admission of such evidence does not qualify as fundamental error. See, also, Vela, App., 615 N.E.2d 913.

TITLE: Shanks v. State
INDEX NO.: O.4.d.8.
CITE: (2nd Dist., 09-28-94), Ind. App., 640 N.E.2d 734
SUBJECT: Depraved Sexual Instinct (DSI) evidence, error at bench trial
HOLDING: Erroneous admission of DSI evidence at bench trial was reversible error. D's child molest trial took place before decision in Lannan v. State, Ind., 600 N.E.2d 1334, found such evidence inadmissible, but was pending on appeal at time of Lannan decision & thus was entitled to its effect. Issue was whether admission of evidence required reversal of conviction, because trial was to bench, not jury. Where evidentiary error occurs, reversal isn't required if its apparent factfinder didn't rely on evidence. Ordinarily, where trial is to bench, reviewing Ct. can conclude improper evidence didn't have significant impact on judge & was not relied on, & can reach same conclusion if there is other overwhelming influence of guilt, regardless of factfinder. Here, however, application of "judicial-temperance" presumption where Lannan error occurred was improper because evidence was used for improper purpose, was admissible at time of trial, & was admitted over specific objection. Lannan decision meant DSI evidence could no longer be used to prove guilt of crime charged, & therefore because evidence was legally irrelevant, it was admitted for improper purpose to show guilt. It cannot be presumed judge did not consider it for that purpose. Where rules change after trial, it cannot be honestly assumed that judge applied correct, albeit non-existent, rule. Judicial-temperance presumption is inapplicable where evidence was admitted over specific objection, Fletcher v. State, Ind., 340 N.E.2d 771, because where judge overrules specific objection, it is clear he or she believes evidence is admissible & relevant. There was no other overwhelming evidence of guilt. Held, conviction reversed, Friedlander, J., dissenting.

RELATED CASES: Konopasek, 934 N.E.2d 762 (Ind. Ct. App 2010) (Ct. declined to extend Shanks beyond the unique situation before that panel, nor will it hold that inadmissible evidence will always be improperly relied on by a judge)

TITLE: Stout v. State
INDEX NO.: O.4.d.8.
CITE: (1st Dist., 04-26-93), Ind. App., 612 N.E.2d 1076
SUBJECT: Depraved Sexual Instinct (DSI) objection not specific enough to preserve error
HOLDING: Tr. Ct. did not commit reversible error in permitting the introduction of evidence D had previously raped a first cousin, because D's objection to evidence was not specifically related to abolishing DSI rule. Evidence, along with testimony that D molested her twice before she turned sixteen, & testimony from series of other family members alleging D had molested them, was admitted in D's trial for child molesting as DSI evidence. DSI evidence rule was abolished in Lannan, 600 N.E.2d 1334 & although D objected to admission of uncharged rape as DSI evidence, he did not object to evidence on ground that justifications for DSI exception were no longer valid or that rule should be abolished for other reasons. Ct. noted Lannan decision could be retroactively applied only to cases pending on appeal at time of the decision where issue has been properly preserved. Although D argued error was fundamental, Ct. found it was not. Held, conviction affirmed, Sullivan, J. dissenting. Note: Dissent found requirement that objection should have specified that justification for DSI no longer existed or that rule should be abolished, was tantamount to requiring counsel to anticipate precise holding of future cases. Discussion may provide language for argument on this issue.

RELATED CASES: Arndt, 642 N.E.2d 224 (D was not entitled to Lannan remedy because he did not claim any impingement from application of rule existing at time of trial which broadly sanctioned evidence of prior sexual misconduct); Reid, 614 N.E.2d 893 (error in admission of DSI evidence not fundamental; see separate card).

TITLE: Thompson v. State
INDEX NO.: O.4.d.8.
CITE: (4th Dist., 04-28-93), Ind. App., 612 N.E.2d 1094
SUBJECT: Depraved Sexual Instinct (DSI) evidence inadmissible
HOLDING: Where D objected to admission of DSI evidence at trial, & specifically argued on appeal that DSI exception should be abolished, his case came within provisions of new rule of Lannan, 600 N.E.2d 1334, & erroneously admitted evidence entitled him to reversal for retrial. State presented evidence of other sexual misconduct by D through complaining witness & 12 other witnesses. State relied on DSI exception to justify admission of evidence & jury was instructed to consider evidence for limited purpose of determining whether D possessed DSI & had instinct to commit charged crime. Such evidence became inadmissible to show DSI when Lannan decision adopted Fed. R. Evid. 404(b). After considering evidence submitted, & its prejudicial nature, Ct. concluded D was entitled to reversal for retrial.

RELATED CASES: Townsend, App., 612 N.E.2d 216 (D was entitled to reversal of conviction where evidence of other misconduct was admitted for sole purpose of establishing DSI even though evidence might have been admissible for proper purpose. D objected to evidence because it was irrelevant, remote in time, & unduly prejudicial, but evidence was admitted & jury was instructed that evidence was received "solely on the issue of the D's sexual propensities." Ct. found rule of Lannan, applied to case, & rejected State's argument that testimony could have been properly admissible under Fed. R. Evid. 404(b) for purposes other than to prove D had DSI. Record established it was offered & considered solely for determining sexual instinct & therefore, reversal was mandated even though evidence theoretically might have been admissible for proper purpose, Sink, App., 605 N.E.2d 270, Hoffman, J., dissenting.) See, also, Orr, App., 612 N.E.2d 213, reaching similar conclusion.

TITLE: Watkins v. State
INDEX NO.: O.4.d.8.
CITE: (3/19/84), Ind., 460 N.E.2d 514
SUBJECT: Other crimes - rapes; "similarities of conduct"
HOLDING: Tr. Ct. did not err in admitting in D's trial for attempted rape of S.H. testimony of C.G. that D had raped her. Here, Ct. finds "similarities:" both victims knew D, both lived within few blocks of D, both attacks occurred in early morning hours, entry into apartments was by rear windows, both attacks were carried out in sleeping areas & both victims were threatened with loss of life. "These similarities of conduct are sufficient to support inference that same person committed both offenses." Held, no error.

O. EVIDENCE

O.5. Witnesses

TITLE: Dodd v. State
INDEX NO.: O.5.
CITE: 993 P.2d 778 (Okla. Crim. App. 2000)
SUBJECT: Jailhouse Informers -- Special Discovery Requirements and Jury Instructions
HOLDING: On rehearing, Oklahoma Court of Criminal Appeals holds that when state plans to have jailhouse informer testify at trial, it must comply with special discovery scheme and jury must be given special instruction on reliability of jailhouse informers. At least 10 days before trial, state must disclose the following: 1)the complete criminal history of the informer; 2) any "deal, promise, inducement, or benefit that the offering party has made or may make in the future" to the informer; 3)specific statements the D is alleged to have made and the time, place, and manner of their making; 4)all other cases in which the informer testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informer received any deals, inducements, promises or benefits in exchange for or subsequent to that testimony or statement; 5)whether at any time the informer recanted that testimony or statement and, if so, a transcript or copy of such recantation; and 6)any other information relevant to the informer's credibility. If the informer testifies, the jury must be specially instructed on the credibility of informers, beginning with the following statement: "The testimony of an informer who provides evidence against a D must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the D is for you to determine." The instruction goes on to list five factors for the jurors to consider: 1)whether the witness has received anything in exchange for his/her testimony; 2)any other case in which the informer testified or offered statements, whether the statements were admitted, and whether the informer received any sort of benefit in exchange for the testimony or statements; 3)whether the informer has ever changed his or her testimony; 4)the informer's criminal history; and 5)any other evidence relevant to the informer's credibility.

TITLE: Brown v. State
INDEX NO.: O.4.d.8.
CITE: (2/10/84), Ind., 459 N.E.2d 376
SUBJECT: Other crimes - rape; proof of consent
HOLDING: Tr. Ct. erred in permitting 2 state witnesses to testify re prior instances of forced sexual intercourse with D (which occurred 3 months before instant crime under similar circumstances). In rape cases where intercourse has been proved or admitted, D has interposed consent defense & only issue is consent of prosecutrix, evidence of prior rapes is inadmissible. Miller 436 N.E.2d 1113; Austin 319 N.E.2d 132; Duvose 275 N.E.2d 536; Kerlin 265 N.E.2d 22; Meeks 234 N.E.2d 629. See Lovely v. US (CA4 1948), 169 F.2d 386 (fact one woman was raped has no tendency to prove another woman did not consent). Here, D admitted acts occurred & interposed consent defense, thus evidence of other alleged rapes was not relevant to any issue before jury. Witness' testimony had no other purpose than tarnishing D's image in a case that hinged entirely upon his credibility. Held, conviction reversed; remanded for new trial.

RELATED CASES: Kuchel 501 N.E.2d 1032 (Ct. rejects D's contention that since deviate conduct is only a crime if performed against non-consenting person, same rule should apply in both rape & sexual deviate conduct cases where consent is only issue); Jenkins 474 N.E.2d 84 (Crim L 369.8, 372(7); prosecution rebuttal evidence of subsequent similar rape/sodomy reversible error where only issue was consent; Ct. rejects state's argument that evidence was admissible under depraved sexual instinct exception); Malone 441 N.E.2d 1339 (alleged rapes were remote; held, admission of testimony re subsequent rape was reversible error).

TITLE: Clausen v. State
INDEX NO.: O.4.d.8.
CITE: (10-26-93), Ind., 622 N.E.2d 925
SUBJECT: Waiver of other misconduct error
HOLDING: S.Ct. granted transfer of decision at 612 N.E.2d 147, but essentially affirmed both of its holdings. Ct. App. holding follows: Admission of DSI evidence that was not objected to does not require reversal, nor is it ineffective assistance of counsel (IAC) to fail to object. D was convicted of two counts of child molesting. At trial, 36-year old adopted daughter (AD) said D fondled her from ages of 5 or 6 to 10 or 12, & complaining witness (CW) also testified to other uncharged acts of molestation against her by D. D admitted trying to place his penis between AD's legs on one occasion, but denied any sexual touching of CW. D did not object to AD's testimony at trial, but he had filed motion in limine to exclude evidence, & Ct. inserted objection to witness' testimony in record, upon motion of D at sentencing hearing (apparently in attempt to amend record, which was not discussed by Ct. App.). Failure to object to evidence at trial waives any error, & Ct. found even if objection had not been waived, it had no merit. D did not object to DSI evidence presented by CW, & therefore testimony of AD was merely cumulative. Ct. also found D's admission of sexual misconduct with AD rendered admission of her DSI evidence harmless. In footnote, Ct. also noted it was not IAC to fail to object to evidence, because Lannan, 600 N.E.2d 1334 had not been decided at time of trial, & attorneys are not required to anticipate changes in law & object accordingly, Fulmer, 523 N.E.2d 754. In St.Ct. decision Justice Dickson dissented concerning preservation of error because Tr. Ct. & State all agreed that injecting objection & ruling in record prior to sentencing preserved issue for review. He found requiring more was simply imposing arbitrary & technical formality that precluded ruling on merits. See, also, card at E.6.h on restitution issue.

TITLE: Lehiy v. State
INDEX NO.: O.4.d.8.
CITE: (6/30/87), Ind., 509 N.E.2d 1116
SUBJECT: Other crimes - depraved sexual instinct (DSI)
HOLDING: Pursuant to AR 11(B)(3), Ind. S. Ct. adopts 3d Dist.'s opinion at 501 N.E.2d 451, which held that evidence of prior criminal sexual conduct is not admissible to show DSI in case where only rape is being prosecuted. Such evidence is limited to prosecutions for sodomy or incest. Montgomery 412 N.E.2d 793; Daniels 408 N.E.2d 1244; Cobbs 338 N.E.2d 632; Austin 319 N.E.2d 130. Ct. rejects state's contention that error is harmless. Evidence is far from overwhelming & jury's determination depended in large part on credibility of witnesses. "Under such circumstances it is paramount that D be protected from evidence which has only effect of reflecting unfavorably on his character." Held, conviction reversed; remanded for new trial.

RELATED CASES: Barger 587 N.E.2d 1304 (evidence that D, school principal, rubbed inner thighs & faces of first grade girls, made comments about bodies of young female students, & engaged in excessive frontal hugging & touching of young girls, was all admissible in child molest trial, as it went to show D's DSI. Former student also testified that D twice hugged her so tight she could feel his penis & played with her bra strap. It was not necessary that uncharged acts be identical to crime charged, so long as they showed DSI. Additionally, fact that some of DSI evi- dence occurred after act charged, did not render it inadmissible. Acts were similar in time & proximity, within 2-3 year time frame); Kuchel 501 N.E.2d 1032 (Ct. rejects D's contention that since deviate conduct is only a crime if performed against non-consenting person, same rule should apply in both rape & sexual deviate conduct cases where consent is only issue); McKim 476 N.E.2d 503 (evidence of forced sexual intercourse against girlfriend is admissible to show DSI in incest/rape/child molesting trial); Jenkins 474 N.E.2d 84 (where only issue is consent, evidence of subsequent similar rape/sodomy was not admissible under DSI exception); Knisley 474 N.E.2d 513 (by denying molestation of E.L. (9-year-old step-grandchild), D opened door to CX/rebuttal re sexual relations with victim & to any phase of his sexual experiences relevant under crime charged; CX & rebuttal evidence re molestation/rape of T.L./F.H. proper to show DSI; act need not be identical to crime charged *citing* Jarrett (infra); Young DISSENTS); Johnson 472 N.E.2d 892 (prior acts of anal intercourse admissible to show DSI); Jarrett 465 N.E.2d 1097 (prior crime showing same sexual instinct - homosexuality & involvement with minors admissible); Neaveill, App., 474 N.E.2d 1045 (photos of family sex admissible to show DSI, *citing* Caccavallo 436 N.E.2d 775); Hoehn, App., 472 N.E.2d 926 (photo of nude 7-year-old boy & testimony of ex-wife that child slept with them on their wedding night admissible to show DSI; Young DISSENTS); Oldham, App., 467 N.E.2d 419 (D's tendered instruction that state must prove acts beyond a reasonable doubt was incorrect statement of law); Best, App., 439 N.E.2d 1361 (in child molesting trial, 20 photos of nude or scantily clad girls under 16 were properly admitted within DSI rule to show D's propensity for sexual involvement with girls under 16).

TITLE: Lannan v. State
INDEX NO.: O.4.d.8.
CITE: (10-16-92), Ind., 600 N.E.2d 1334
SUBJECT: Depraved Sexual Instinct (DSI) exception abolished
HOLDING: Evidence of prior sexual misconduct is no longer admissible in certain sex crime prosecutions to show conformity with character trait of "depraved sexual instinct," unless such evidence is admissible as other misconduct evidence under Fed. R. Evid. 404(b); granting transfer of Ct. of appeals memorandum decision. Although upholding D's conviction due to properly admitted evidence, Ct. abandoned DSI exception to general prohibition against use of other misconduct evidence as substantive evidence of guilt in child molest & deviate conduct cases.

Ct. rejected recidivism argument to justify DSI evidence, noting drug dealers have high recidivism rate, but evidence of similar misconduct isn't admissible in their prosecutions unless it fits within standard exceptions, such as common scheme or plan, res gestae, to show motive, identity, etc. Ct. also rejected argument that such evidence was necessary to allow complaining witness to be believed, because allegations of child molest are all too familiar to layperson in present day & age.

Ct. instead adopted Fed. R. Evid. 404(b), which allows for such evidence to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Rule 404(b) also requires reasonable notice to D of State's plan to use such evidence if D so requests. Ct. noted such evidence would still be admissible in number of instances & discussed such situations. Ct. applied rule to D & found some evidence against him was inadmissible under new rule but found sufficient admissible evidence to sustain conviction. Held, conviction affirmed, but DSI rule abolished, Givan, J., concurring in result, but dissenting as to abolition of DSI.

RELATED CASES: Santonelli, App., 743 N.E.2d 1281 (Lannan decision applied to D's case, where he was convicted almost 30 days before decision but he filed his praecipe for appeal 11 days after decision); Cossell, App., 675 N.E.2d 355 (Lannan does not apply retroactively to petitions for post- conviction relief); Posey, App., 624 N.E.2d 515 (Where D's trial was completed on October 1, 1992, 15 days before Lannan was issued & D was sentenced on November 25, 1992, & praecipe for appeal was filed December 4, 1992, Lannan rule was not applicable. Ct. interpreted Pirnat, 607 N.E.2d 973, to hold that any case not pending on appeal at time Lannan was decided was not eligible for its application, even if time for appeal had not yet run. Interpretation seems contrary to logic, as it would exclude any cases in the narrow window of time just shortly before Lannan, but allow older cases the benefit of the rule.); See, also, Moran, App., 604 N.E.2d 1258, & Vanover, App., 605 N.E.2d 218 (applying Lannan rule to cases pending on appeal); Pirnat, 600 N.E.2d 1342 (applying new rule to case pending on petition to transfer, & remanding to Ct. of appeals for reconsideration in light of Lannan); Pirnat, 607 N.E.2d 973, (On petition for rehearing, Ct. clarified retroactivity of new rule abandoning depraved sexual instinct (DSI) exception, & rejected State's argument that application of rule to cases pending on appeal would have "devastating effect on the administration of justice." Cases where issue was properly preserved & where direct appeal was pending at time Lannan was decided to receive benefit of review under new rule because they should not be penalized merely because Ct. happened to chose Lannan as vehicle for changing rule. Ct. noted its doubt as to whether rule would qualify for retroactive application to cases on collateral review, i.e., PCR, but reserved that question.)

TITLE: Pirnat v. State
INDEX NO.: O.4.d.8.
CITE: (1st Dist., 04-12-93), Ind. App., 612 N.E.2d 153
SUBJECT: Evidence of D's Depraved Sexual Instinct Inadmissible
HOLDING: After remand from S. Ct. (Pirnat 600 N.E.2d 1342), Ct. App. held that D's prior conviction for child molesting was inadmissible as other misconduct evidence in present trial for child molesting. Ct. looked to 7th Cir. in establishing test for admissibility of evidence under Fed. R. Evid. 404(b). Result was four-part test from U.S. v. Hudson (7th Cir. 1989), 884 F.2d 1016, cert. denied, (following Huddleston v. U.S. (1988), 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771). Test included following: 1) evidence must be directed toward establishing matter in issue other than D's propensity to commit charged act; 2) other crime must be similar enough & close enough in time to be relevant to matter in issue; 3) evidence must be sufficient to support finding by jury that D committed other crime; & 4) proponent of evidence must show probative value of other crime is not substantially outweighed by its prejudicial effect. Additionally, Tr. Cts. must always use F.R.E. 403 balancing test to evaluate prejudice to D to determine admissibility of evidence, Hardin, 611 N.E.2d 123, & U.S. v. Fairchild (7th Cir. 1975), 526 F.2d 185, cert. denied.

Ct. determined evidence of Pirnat's prior child molesting conviction was inadmissible for any legitimate purpose. Ct. noted incident leading to previous conviction occurred over 3 years prior to incident giving rise to present prosecution, & found it was not recent enough to meet part 2 of Hudson test. Ct. also found testimony concerning prior conviction & facts surrounding that incident were highly prejudicial to D & noted in footnote that this would be case whether there was testimony as to underlying facts, or merely introduction of a certified copy of conviction.

As to admissibility of evidence under common scheme or plan exception, Ct. first noted that although in both incidents victims were D's step-children & were fondled while lying in bed, those facts were insufficient to create unique modus operandi or "signature," because particular acts were typical & common in cases of child molestation. Ct. also rejected admission under res gestae prong of common scheme or plan exception, because they were too unrelated in time, character, & place of commission to establish plan which embraced them both.

Admissibility of evidence under intent exception was also rejected. Evidence of prior misconduct is admissible to prove intent if D places it in issue, or if intent is automatically in issue, U.S. v. Gruttadauro (7th Cir. 1987), 818 F.2d 1323. Additionally, intent is automatically at issue if charged crime involves specific intent, id., & child molesting is by statute, specific intent crime. In child molesting cases, however, specific intent may be inferred from circumstances. Ct. therefore found that to create automatic intent issue allowing for admission of 404(b) evidence in class of cases where intent is inferable from nature of the act charged, would create exception to 404(b) which would "virtually swallow the rule...." Ct. again also mentioned probative value/prejudicial impact weighing test, & lack of striking similarity of offenses. Ct. concluded that erroneous admission of prior conviction required reversal, because there was not other overwhelming evidence of D's guilt. Held, conviction reversed & remanded.

RELATED CASES: Hicks, 690 N.E.2d 215 (Ct. declined to adopt 4-part Hudson test; see card at O.4.d.1). Thomas, App, 612 N.E.2d 604 (While finding that D's prior Texas conviction for child molesting was erroneously admitted, admission did not require reversal because of other evidence to sustain verdict. Ct. discussed balancing test set forth in Hardin v. State, 611 N.E.2d 123, & rejected admissibility of document on issue of intent, as in Pirnat.)

TITLE: Ried v. State
INDEX NO.: O.4.d.8.
CITE: (06-18-93), Ind., 615 N.E.2d 893
SUBJECT: Admission of Depraved Sexual Instinct (DSI) evidence not fundamental error
HOLDING: Ind. S.Ct. granted transfer of decision at 610 N.E.2d 275, & summarily affirmed its ruling that admission of DSI evidence at trial held prior to abolition of that exception to other misconduct evidence in Lannan (1992), 600 N.E.2d 1334, did not constitute fundamental error & could not be argued on appeal without proper objection at trial. Ct. interpreted its decision in Pirnat, (1993), 607 N.E.2d 973, to have resolved issue. While D's case was pending on direct appeal at time of Lannan decision, D did not present objection to evidence at trial. Ct. therefore found that failure to preserve issue in this way was fatal to D's claim, as admission of such evidence does not qualify as fundamental error. See, also, Vela, App., 615 N.E.2d 913.

TITLE: Shanks v. State
INDEX NO.: O.4.d.8.
CITE: (2nd Dist., 09-28-94), Ind. App., 640 N.E.2d 734
SUBJECT: Depraved Sexual Instinct (DSI) evidence, error at bench trial
HOLDING: Erroneous admission of DSI evidence at bench trial was reversible error. D's child molest trial took place before decision in Lannan v. State, Ind., 600 N.E.2d 1334, found such evidence inadmissible, but was pending on appeal at time of Lannan decision & thus was entitled to its effect. Issue was whether admission of evidence required reversal of conviction, because trial was to bench, not jury. Where evidentiary error occurs, reversal isn't required if its apparent factfinder didn't rely on evidence. Ordinarily, where trial is to bench, reviewing Ct. can conclude improper evidence didn't have significant impact on judge & was not relied on, & can reach same conclusion if there is other overwhelming influence of guilt, regardless of factfinder. Here, however, application of "judicial-temperance" presumption where Lannan error occurred was improper because evidence was used for improper purpose, was admissible at time of trial, & was admitted over specific objection. Lannan decision meant DSI evidence could no longer be used to prove guilt of crime charged, & therefore because evidence was legally irrelevant, it was admitted for improper purpose to show guilt. It cannot be presumed judge did not consider it for that purpose. Where rules change after trial, it cannot be honestly assumed that judge applied correct, albeit non-existent, rule. Judicial-temperance presumption is inapplicable where evidence was admitted over specific objection, Fletcher v. State, Ind., 340 N.E.2d 771, because where judge overrules specific objection, it is clear he or she believes evidence is admissible & relevant. There was no other overwhelming evidence of guilt. Held, conviction reversed, Friedlander, J., dissenting.

RELATED CASES: Konopasek, 934 N.E.2d 762 (Ind. Ct. App 2010) (Ct. declined to extend Shanks beyond the unique situation before that panel, nor will it hold that inadmissible evidence will always be improperly relied on by a judge)

TITLE: Stout v. State
INDEX NO.: O.4.d.8.
CITE: (1st Dist., 04-26-93), Ind. App., 612 N.E.2d 1076
SUBJECT: Depraved Sexual Instinct (DSI) objection not specific enough to preserve error
HOLDING: Tr. Ct. did not commit reversible error in permitting the introduction of evidence D had previously raped a first cousin, because D's objection to evidence was not specifically related to abolishing DSI rule. Evidence, along with testimony that D molested her twice before she turned sixteen, & testimony from series of other family members alleging D had molested them, was admitted in D's trial for child molesting as DSI evidence. DSI evidence rule was abolished in Lannan, 600 N.E.2d 1334 & although D objected to admission of uncharged rape as DSI evidence, he did not object to evidence on ground that justifications for DSI exception were no longer valid or that rule should be abolished for other reasons. Ct. noted Lannan decision could be retroactively applied only to cases pending on appeal at time of the decision where issue has been properly preserved. Although D argued error was fundamental, Ct. found it was not. Held, conviction affirmed, Sullivan, J. dissenting. Note: Dissent found requirement that objection should have specified that justification for DSI no longer existed or that rule should be abolished, was tantamount to requiring counsel to anticipate precise holding of future cases. Discussion may provide language for argument on this issue.

RELATED CASES: Arndt, 642 N.E.2d 224 (D was not entitled to Lannan remedy because he did not claim any impingement from application of rule existing at time of trial which broadly sanctioned evidence of prior sexual misconduct); Reid, 614 N.E.2d 893 (error in admission of DSI evidence not fundamental; see separate card).

TITLE: Thompson v. State
INDEX NO.: O.4.d.8.
CITE: (4th Dist., 04-28-93), Ind. App., 612 N.E.2d 1094
SUBJECT: Depraved Sexual Instinct (DSI) evidence inadmissible
HOLDING: Where D objected to admission of DSI evidence at trial, & specifically argued on appeal that DSI exception should be abolished, his case came within provisions of new rule of Lannan, 600 N.E.2d 1334, & erroneously admitted evidence entitled him to reversal for retrial. State presented evidence of other sexual misconduct by D through complaining witness & 12 other witnesses. State relied on DSI exception to justify admission of evidence & jury was instructed to consider evidence for limited purpose of determining whether D possessed DSI & had instinct to commit charged crime. Such evidence became inadmissible to show DSI when Lannan decision adopted Fed. R. Evid. 404(b). After considering evidence submitted, & its prejudicial nature, Ct. concluded D was entitled to reversal for retrial.

RELATED CASES: Townsend, App., 612 N.E.2d 216 (D was entitled to reversal of conviction where evidence of other misconduct was admitted for sole purpose of establishing DSI even though evidence might have been admissible for proper purpose. D objected to evidence because it was irrelevant, remote in time, & unduly prejudicial, but evidence was admitted & jury was instructed that evidence was received "solely on the issue of the D's sexual propensities." Ct. found rule of Lannan, applied to case, & rejected State's argument that testimony could have been properly admissible under Fed. R. Evid. 404(b) for purposes other than to prove D had DSI. Record established it was offered & considered solely for determining sexual instinct & therefore, reversal was mandated even though evidence theoretically might have been admissible for proper purpose, Sink, App., 605 N.E.2d 270, Hoffman, J., dissenting.) See, also, Orr, App., 612 N.E.2d 213, reaching similar conclusion.

TITLE: Watkins v. State
INDEX NO.: O.4.d.8.
CITE: (3/19/84), Ind., 460 N.E.2d 514
SUBJECT: Other crimes - rapes; "similarities of conduct"
HOLDING: Tr. Ct. did not err in admitting in D's trial for attempted rape of S.H. testimony of C.G. that D had raped her. Here, Ct. finds "similarities:" both victims knew D, both lived within few blocks of D, both attacks occurred in early morning hours, entry into apartments was by rear windows, both attacks were carried out in sleeping areas & both victims were threatened with loss of life. "These similarities of conduct are sufficient to support inference that same person committed both offenses." Held, no error.

O. EVIDENCE

O.5. Witnesses

TITLE: Dodd v. State
INDEX NO.: O.5.
CITE: 993 P.2d 778 (Okla. Crim. App. 2000)
SUBJECT: Jailhouse Informers -- Special Discovery Requirements and Jury Instructions
HOLDING: On rehearing, Oklahoma Court of Criminal Appeals holds that when state plans to have jailhouse informer testify at trial, it must comply with special discovery scheme and jury must be given special instruction on reliability of jailhouse informers. At least 10 days before trial, state must disclose the following: 1)the complete criminal history of the informer; 2) any "deal, promise, inducement, or benefit that the offering party has made or may make in the future" to the informer; 3)specific statements the D is alleged to have made and the time, place, and manner of their making; 4)all other cases in which the informer testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informer received any deals, inducements, promises or benefits in exchange for or subsequent to that testimony or statement; 5)whether at any time the informer recanted that testimony or statement and, if so, a transcript or copy of such recantation; and 6)any other information relevant to the informer's credibility. If the informer testifies, the jury must be specially instructed on the credibility of informers, beginning with the following statement: "The testimony of an informer who provides evidence against a D must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the D is for you to determine." The instruction goes on to list five factors for the jurors to consider: 1)whether the witness has received anything in exchange for his/her testimony; 2)any other case in which the informer testified or offered statements, whether the statements were admitted, and whether the informer received any sort of benefit in exchange for the testimony or statements; 3)whether the informer has ever changed his or her testimony; 4)the informer's criminal history; and 5)any other evidence relevant to the informer's credibility.

TITLE: Meade v. Levette
INDEX NO.: O.5.
CITE: (8/15/96), Ind. App., 671 N.E.2d 1172
SUBJECT: Witnesses - oath not administered; waiver
HOLDING: In modification of child custody & support case, mother claimed error in manner in which evidence of attorney fees was admitted. Father's counsel stated "that he would like to testify to the Tr. Ct. concerning amount of attorney fees incurred, which exceeded $9,000." Although counsel was not placed under oath or cross-examined concerning his testimony, mother did not object to his testimony. Held, any error in manner which evidence of fees was admitted waived by mother's failure to object.

TITLE: Sweet v. State
INDEX NO.: O.5.
CITE: (10/14/86) Ind., 498 N.E.2d 924
SUBJECT: Witnesses - oath not administered
HOLDING: Appellate review is foreclosed where D failed to object when witness was allowed to testify without having been sworn to tell the truth. Statute provides that every witness shall be sworn to testify to the whole truth. Ind. Code 34-1-14-2. However, statutory requirement can be waived by parties, and if no objection is made to witness testifying without being sworn, such waiver will be presumed. Pooley, App., 62 N.E.2d 484. Here, Ct. notes D makes no contention that witness was not sworn during first trial. Ct. notes irregularity of failing to swear in witness did not result in harm because: (1) any substantial deviation from witness' testimony in first trial would have subjected him to impeachment for inconsistent statement; and (2) trial atmosphere and Ct. room conditions would have imposed degree of constraint upon witness to speak the truth. Held, conviction affirmed.

Note: I.R.E. 603 is identical to Ind. Code 35-1-14-2. Whenever, under law, oath is required to be taken by witness, solemn affirmation may be accepted in lieu of oath. Ind. Trial Rule 43(D).

RELATED CASES: Saylor, 55 N.E.3d 354 (Ind. Ct. App 2016) (Judge adequately administered oath by determining whether 12 year-old C.W. could distinguish between the truth and a lie); Griffith, App., 898 N.E.2d 412 (D waived issue that witness was not properly sworn by failing to object); Tomlin, 215 N.E.2d 190 (1966) (prejudicial error for Tr. Ct. to knowingly refuse to swear in witness presented to testify when requested to do so).

TITLE: U.S. v. Zizzo
INDEX NO.: O.5.
CITE: 120 F.3d 1338 (7th Cir. 1997)
SUBJECT: Witnesses - oath renounced
HOLDING: Ds claimed Tr. Ct. erred by failing to sua sponte exclude entire testimony of gov't witness who renounced his oath to testify truthfully. Ct. noted that although witness perjured himself in other proceedings, "even most dastardly scoundrels, cheats, & liars are generally competent to testify." F.R.E. 603 requires every witness to swear or affirm that he will tell the truth. Held, witness's testimony that oath to testify truthfully meant nothing to witness did not require exclusion of his entire testimony, by rendering him an unsworn witness, where witness took oath to tell truth, acknowledged Tr. Ct.'s admonishments that he was under oath, & was aware of consequences of perjury.

O. EVIDENCE

O.5. Witnesses

O.5.a. Competence

O.5.a.1. In general

TITLE: Casselman v. State
INDEX NO.: O.5.a.1.
CITE: (12/10/1991), Ind. App. 582 N.E.2d 432
SUBJECT: Witness competency - child testimony
HOLDING: Tr. Ct. did not err in finding 3-year-old victim competent to testify. All children, regardless of age, are presumed competent to testify. To be qualified to testify, child need not be model witness, have infallible memory, or refrain from making inconsistent statement. If Tr. Ct. reasonably could have inferred child understood nature & obligation of oath, Tr. Ct.'s ruling will be affirmed. Here, child was competent despite inconsistencies in her testimony. Further, even assuming Tr. Ct. erred in determining competency of child, error was not prejudicial because her testimony was merely cumulative of other evidence. Held, no error.

RELATED CASES: Aldridge, App., 779 N.E.2d 607 (D failed to show that children could not distinguish between the truth & a lie or that they did not understand the need to tell the truth at trial, & were therefore incompetent to testify); Newsome, 686 N.E.2d 868 (IRE 601 assumes competency unless otherwise demonstrated by opponent of testimony; Hoffman, J., concurring).

TITLE: Chadwick v. State
INDEX NO.: O.5.a.1.
CITE: (5/12/77), Ind., 362 N.E.2d 483
SUBJECT: Competency of Witness - Insanity
HOLDING: Tr. Ct. did not err in admitting testimony of witness who had been charged as co-D & who had entered plea of not guilty by reason of insanity, without first ordering psychiatric examination of witness. Ind. Code 34-1-14-5 provides that persons "insane at the time they are offered as witnesses, whether they have been so adjudged or not," shall not be competent witnesses. However, Tr. Ct. need not grant every request for psychiatric exam. Here, Tr. Ct. held competency hearing which revealed that witness had withdrawn insanity defense after psychiatric exams revealed that witness was not legally insane at time of crime & was competent to testify.

RELATED CASES: Young, 500 N.E.2d 735 (no error in finding witness competent to testify despite fact that witness had been released from mental institution 2 years before being offered as witness); Wallace, 428 N.E.2d 34 (In murder case, Tr. Ct. did not abuse discretion in finding witness, a patient suffering from schizophrenia at mental hospital at time of trial, was competent to testify).

TITLE: Forrester v. State
INDEX NO.: O.5.a.1.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: Witnesses - competence
HOLDING: Challenge to competence of witness to testify is properly overruled where witness is competent to testify about any matter. Estate of Niemic v. Western State Bank, App., 435 N.E.2d 570; Baker v. State Bank of Akron, App., 44 N.E.2d 257. Here, D contended rape prosecutrix should not be permitted to testify because police had hypnotized her. However, with possible exception of identification testimony, prosecutrix told hypnotist nothing she had not already told police. D's objection to competence of victim did not seek to limit her testimony but sought to exclude it all together. Held, no error in admission of testimony.

TITLE: Kentucky v. Stincer

INDEX NO.: O.5.a.1.

CITE: 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)

SUBJECT: D's presence at hearing to determine competency of witnesses - confrontation rights

HOLDING: Primary interest secured by Confrontation Clause is right of cross-exam (CX). Douglas v. AL (1965), 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934. Confrontation Clause guarantees only opportunity for effective CX, not CX that is effective in whatever way, & to whatever extent, defense might wish. DE v. Fensterer (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15. Limitation is consistent with concept that right to confrontation is functional one for purpose of promoting reliability. Here, court conducted in-chambers hearing to determine if 2 young girls were competent to testify. D, but not his counsel, was excluded from hearing. Issue at competency hearing is whether child is capable of observing/recollecting/narrating facts & whether child has moral sense of obligation to tell truth. Questions at competency hearing usually are limited to matters unrelated to basic issues of trial. Determination of competency is responsibility of judge & responsibility continues throughout trial. Questions asked during competency hearing were repeated during trial testimony for which D was present. At close of testimony D could have moved court to reconsider competency ruling based upon trial testimony. Held, since D had opportunity for full & effective CX & because of nature of competency hearing in this case D's confrontation rights were not violated. Marshall, joined by Brennan, & Stevens, DISSENTS.

TITLE: Kentucky v. Stincer
INDEX NO.: O.5.a.1.
CITE: 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)
SUBJECT: Due process - D's right to be present at competency hearing
HOLDING: Court assumes that, even in situations where D is not actually confronting witnesses or evidence against him, he has due process right "to be present in his own person whenever his presence has a relation, reasonably substantial to fullness of his opportunity to defend against the charge." Snyder v. MA (1934), 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674. Presence is not guaranteed "when presence would be useless, or the benefit but a shadow." Id. However, D is guaranteed right to be present at any stage of criminal proceeding that is critical to outcome if presence would contribute to fairness of procedure. Here, Court conducted in-chambers hearing to determine if 2 young girls were competent to testify. D, but not his counsel, was excluded from hearing. Court finds competency hearing in which witness is asked to discuss upcoming substantive testimony, might bear substantial relationship to D's opportunity to defend himself. Here, however, issue at competency hearing was whether witnesses were capable of observing & narrating facts & whether they had moral sense of obligation to tell truth. D has not shown that his presence would have been useful in ensuring more reliable determination as to competency. He presented no evidence indicating that his relationship with children or his knowledge of facts regarding their background could have been useful at competency hearing. Held, no violation of Due Process Clause in excluding D from competency hearing. Marshall, joined by Brennan, & Stevens, DISSENTS.

TITLE: McDonald v. State
INDEX NO.: O.5.a.1.
CITE: (10-3-02), Ind. App., 775 N.E.2d 1195
SUBJECT: Bailiff as witness - identification of D's photograph where trial held in absentia
HOLDING: D's right to due process was not violated when Tr. Ct. permitted bailiff to testify at trial, held in absentia, because bailiff was not key witness who identified D & his testimony was cumulative of other evidence. D was convicted of forgery based on obtaining false prescription. Because D failed to appear for trial, bailiff was called to stand to identify photograph of D as same person who appeared for pretrial conference. Relying on Turner v. Louisiana, 379 U.S. 466 (1965), D argued that Tr. Ct. committed reversible error & violated due process by allowing bailiff to testify for State. Ct. distinguished Turner, noting that jury here was not sequestered during two-day trial, which meant that jurors did not have very much contact with bailiff. In addition, here, unlike in Turner, bailiff's testimony was confined to more formal aspect of case - identification of D, rather than specific elements of crime. Further, bailiff was not only witness who testified that person in photograph was D. Held, judgment affirmed.

TITLE: Newsome v. State
INDEX NO.: O.5.a.1.
CITE: (3rd Dist., 10-14-97), Ind. App., 686 N.E.2d 868
SUBJECT: Witness competency - child testimony under Ind. R. Evid. 601
HOLDING: Tr. Ct. abused discretion by finding seven-year-old competent to testify; however, error was harmless because during subsequent questioning, child demonstrated she knew difference between truth & lie. Every person is competent to be witness except as otherwise provided in Rules of Ct. or by act of Ind. General Assembly. Ind. R. Evid. 601. Considering Fed. R. Evid. 601, which is nearly identical to Ind. R. Evid. 601, majority of federal Cts. have held that Tr. Ct. has obligation to ensure that minimum standards of competency are met before allowing witness to testify. In addition, purpose behind Fed. R. Evid. 601 is to prohibit blanket exclusions of classes of witnesses rather than to do away with any competency inquiry. Thus, Ind. R. Evid. 601 requires Tr. Ct. to continue to conduct inquiry into witness competency to ensure that minimum standards of competency are met & does not affect previous Ind. decisions regarding competence of children to testify.

Here, seven-year-old was not qualified as competent witness simply by stating she knew difference between truth & lie, along with consequences of telling both. In order for child to be found competent to testify, it must be established that child understands difference between telling lie & telling truth, knows she is under compulsion to tell truth & knows what true statement actually is. Cassleman, App., 582 N.E.2d 432. Proving that child knows what true statement is cannot be satisfied by flat statement such as: "I know what the truth is," but can be satisfied by asking child to give example of someone telling lie. Russell, 540 N.E.2d 1222. Although child stated she would be punished for telling lie, there was no evidence that indicated she truly understood difference between telling truth & lie. Thus, prosecutor failed to lay proper foundation for competency of this witness, & Tr. Ct. erred in finding child competent during competency hearing. However, error was harmless because child's testimony during trial established that she actually understood difference between truth & lie. Held, conviction affirmed; Hoffman, J., concurring in result.

RELATED CASES: Howard, App., 816 N.E.2d 948, rev'd on other grounds 853 N.E.2d 461 (although Tr. Ct. erred by not adequately establishing CW's competency prior to allowing her to testify, subsequent inclusion of her deposition testimony made it clear that she understood difference between truth & lie & importance of telling truth at trial); Harrington, App., 755 N.E.2d 1176 (fact that child's tesimony at trial could be interpreted as ambiguous goes to child's credibility, not his competency); Burrell, App., 701 N.E.2d 582 (D failed to establish 5 year-old victim's incompetency in this case).

TITLE: Stafford v. State
INDEX NO.: O.5.a.1.
CITE: (2d Dist. 10/26/83), Ind. App., 445 N.E.2d 402
SUBJECT: Witnesses - competence; standard; moderate mental retardation
HOLDING: Tr. Ct. did not err in determining mentally retarded rape victim was competent to testify. Party objecting to witness' competency has burden of establishing incompetency. Unsoundness of mind is no per se disqualification of witness. Ware 376 N.E.2d 1150. Test of competency is whether witness has sufficient mental capacity to perceive, to remember & to narrate incident observed & to understand & appreciate nature & obligation of an oath. Ware. Here, 25-year-old victim had mental age of 6 or 7-year-old child. A report filed by 2 Ct.-appointed psychiatrists indicated she was consistent in reporting incident, she was able to remember & recount in detail, there was no delusional thinking or hallucinatory experience, she recognized difference between right & wrong & that a lie was wrong. The report included examiner's expert opinion that she had "mental capacity to understand oath as she equates this to telling a lie." Held, no error.

RELATED CASES: Stewart 442 N.E.2d 1026.

TITLE: Thornton v. State
INDEX NO.: O.5.a.1.
CITE: (4th Dist., 7-12-95), Ind. App., 653 N.E.2d 493
SUBJECT: Competency of witness - multiple personality disorder
HOLDING: In child molesting prosecution, Tr. Ct. did not abuse discretion in allowing testimony of complaining witness (CW) who was receiving therapy for multiple personality disorder. Clinical psychologist testified at CHINS hearing that CW possessed six personalities. Thereafter, D filed motion in limine alleging that CW's disorder rendered her perception & memory of events inaccurate & that her memory had been impermissibly enhanced by psychotherapeutic techniques analogous to hypnosis. Tr. Ct. denied motion, & after questioning CW outside presence of jury, D lodged specific & continuing objection to CW's testimony. On appeal, D argued that risk that CW's memory had been enhanced through confabulation rendered her incompetent witness & denied him of his rights to effective cross-examination & confrontation. Ct. reviewed record & concluded that facts did not indicate that "integration" therapy created risk of confabulation. There was no evidence that therapy methods caused CW to fill in memory gaps with fantasy. Discrepancies among CW's various statements were not indicative of confabulation, because "there are any number of reasons a witness' statements might contain inconsistencies." D failed to carry his burden of establishing CW's incompetency. Held, judgment affirmed.

TITLE: Ward v. St. Mary Medical Center of Gary
INDEX NO.: O.5.a.1.
CITE: (12/12/95), Ind., 658 N.E.2d 893
SUBJECT: Competency of juror as witness - Ind. R. Evid. 606(b)
HOLDING: In medical malpractice action, Tr. Ct. abused its discretion by granting mistrial after Tr. Ct. allowed statement by jurors to impeach jury's verdict. A jury's verdict may not be impeached by testimony of jurors who returned it. Karlos, 476 N.E.2d 819; Bryant, 385 N.E.2d 415. Policy reasons for this rule are that: (1) there would be no reasonable end to litigation, (2) jurors would be harassed, & (3) an unsettled state of affairs would result. Here, jury, while still impaneled, made voluntary statement that it found no negligence in standard of care given to plaintiff but did find lack of aggressive care given to plaintiff during critical time period. Held, such statements could not be used to impeach verdict. DeBruler, J., dissenting.

NOTE: I.R.E. 606(b) comports with Indiana common law providing that testimony or affidavits of jurors may not be received to impeach their verdict. However, as with pre-existing law, Rule 606 permits jurors to testify about their deliberative process for limited purpose to show that jury was exposed to extraneous prejudicial information or improper extrinsic influences. See Fox, 457 N.E.2d 1088.

O. EVIDENCE

O.5. Witnesses

O.5.a.3. Hypnotically enhanced (see also O.12.h)

TITLE: Borawick v. Shay
INDEX NO.: O.5.a.3.
CITE: 68 F.3d 597 (2d Cir. 1995)
SUBJECT: Hypnotically Induced Memories - Admissibility
HOLDING: Second Circuit applies totality of circumstances test to determine whether testimony regarding hypnotically induced memories of childhood sexual abuse is admissible. Court notes this is its first case dealing with hypnotically retrieved memories, as opposed to hypnotically enhanced memories of particular known or suspected event. Court does not agree with state's argument that hypnosis functions more reliability when used to retrieve rather than to refresh memories, nor does it agree with D's suggestion of per se inadmissibility. Factors to be considered include purpose of hypnosis, any suggestions communicated before or during hypnosis, existence of permanent record of hypnosis and corroborating evidence of retrieved memories, hypnotist's training, and expert evidence as to reliability of procedures used.

TITLE: Forrester v. State
INDEX NO.: O.5.a.3.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: Witnesses - competence; hypnotically enhanced
HOLDING: Evidence obtained from witness in hypnotic trance is inherently unreliable & should be excluded from evidence as having no probative value. Strong 435 N.E.2d 969. Here, hypnotist's testimony about his conversation with rape prosecutrix, while she was in a trance, revealed nothing more than she had already told police. D contended at trial that victim should not be allowed to testify. Ct. finds D's objection overbroad because victim was competent to testify regarding necessary & relevant evidence of corpus delicti of charged offenses. Held, no error in allowing testimony.

NOTE: I.R.E. 602 provides that "witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis." Hence, I.R.E. 602 preserves pre-rule holdings that evidenced derived from hypnosis is inherently unreliable & inadmissible.

TITLE: Pearson v. State
INDEX NO.: O.5.a.3.
CITE: (11/12/82), Ind., 441 N.E.2d 468
SUBJECT: Witnesses - competence; hypnotically enhanced testimony
HOLDING: Rape prosecutrix was competent witness with respect to identification of D & necessary elements of corpus delicti about which she had made statements to police prior to hypnotic session. Here, hypnotist was state police officer with informal training in hypnosis. Police investigator was present during session. Tape recordings of session were inaudible. Improper suggestions may have been made to prosecutrix during session, including showing her D's picture. Prosecutrix unequivocally identified D (who had lived next door for 3 years) shortly after incident. She changed only 3 minor facts after hypnosis session (color of D's shirt, possibility D wore hat, how much of D's face she actually saw during crime). Six safeguards on hypnotic procedure recommended by Martin T. Orne & enumerated in State v. Hurd (N.J. 1981), 432 A.2d 86 are set forth in opinion. Hypnotic session conducted in this case was very unreliable, as few advisable safeguards were present. Jury could infer prosecutrix's statements which in any way resulted in hypnotic session were unreliable. However, she was competent as to information given prior to hypnotic session. Held, no error. CONCURRING IN RESULT, Prentice would hold that D's right to counsel was violated when prosecutrix was hypnotized & counsel was not present. D's right to counsel had attached. However, error is harmless because of earlier, unequivocal identification of D.

NOTE: I.R.E. 602 provides that "witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis." Hence, I.R.E. 602 preserves pre-rule holdings that evidence derived from hypnosis is inherently unreliable & inadmissible.

TITLE: Pearson v. State
INDEX NO.: O.5.a.3.
CITE: (11/12/82), Ind., 441 N.E.2d 468
SUBJECT: Witnesses - competence; hypnotically enhanced; instruction
HOLDING: Tr. Ct. did not err in refusing to give D's tendered instruction concerning testimony of rape victim & possible effects of hypnotic session on credibility of her testimony. This tendered instruction would have singled out one witness' testimony & attacked its credibility. It is erroneous to give such an instruction. Beasley 370 N.E.2d 360; Hackett 360 N.E.2d 1000. Held, no error.

TITLE: Peterson v. State
INDEX NO.: O.5.a.3.
CITE: (5/11/83), Ind., 448 N.E.2d 673
SUBJECT: Witnesses - recollection of identification refreshed by hypnosis
HOLDING: Admission of witness' testimony regarding D's identification (of which witness had no recall prior to pretrial hypnotic interview) denied D his due process rights to confront & cross-examine. Here, stockboy at drugstore witnessed murder of pharmacist. Murderer told stockboy he would be killed if he identified murderer. Stockboy was unable to identify D in photographic array or lineup. Three months later, stockboy agreed to be hypnotized by police detective. After hypnotic session, stockboy identified D & a co-D from photo array. D filed a motion to suppress & a motion in limine (both denied) & objected at trial to stockboy's testimony. Ct. distinguishes Strong 435 N.E.2d 969 (witness had identified D prior to hypnotic session). Ct. relies on State v. Mack, (Minn. 1980) 292 N.W.2d 764 (no recollection of cause of injury until after hypnotic session) & State v. Mena, (Ariz. 1981) 624 P.2d 1274 (doctors told victim he would remember what he had told them during session after he came out of hypnosis) & on writings of Dr. Martin Orne, Professor of Psychiatry at University of PA & Director of Unit for Experimental Psychiatry at Institute of PA Hospital, who had appeared at D's trial as an expert on his behalf. Ct. notes "hypnosis is an extremely useful investigating tool when a witness is unable to remember verifiable factual information which provides new leads to the solution of a crime." Held, conviction reversed, new trial ordered.

RELATED CASES: Gentry 471 N.E.2d 263 (victim's identification of D during hypnosis provided sufficient basis for establishing probable cause; see card at O.12.h).

TITLE: Rock v. Arkansas
INDEX NO.: O.5.a.3.
CITE: 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)
SUBJECT: Right of D to testify in own behalf - hypnosis
HOLDING: D's right to testify in own defense is guaranteed by Due Process Clause, Compulsory Process Clause, & 5th Amend.'s guarantee against compelled testimony. Here, D was hypnotized at suggestion of her attorney to facilitate increased memory of shooting incident. State rule made hypnotically enhanced testimony inadmissible per se. Tr. Ct. limited D's testimony to matters remembered & stated to examiner prior to hypnosis. Court reviews prior cases dealing with constitutional challenges to state rules designed to ensure trustworthy evidence that interfered with ability of D to offer evidence. Statute which prevents persons charged as principals, accomplices, or accessories in same crime from testifying for each other violates 6th Amend. Washington v. TX (1967), 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019. Nor may state apply rule of evidence that permits witness to take stand, but arbitrarily excludes material portions of his/her testimony. Chambers v. MS (1973), 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297. Right to present relevant testimony is not without limitation. However, restrictions of D's right to testify may not be arbitrary/disproportionate to interests they are designed to serve. State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in individual case. Here, results of test conducted on gun corroborated details D remembered about shooting. Held, per se rule excluding D's post-hypnosis testimony impermissibly infringes upon D's right to testify in own behalf. Rehnquist, joined by White, O'Connor, & Scalia, DISSENTS.

O. EVIDENCE

O.5. Witnesses

O.5.a.4. EVIDENCE

TITLE: Boyko v. State
INDEX NO.: O.5.a.4.
CITE: (3d Dist. 02/19/91), Ind. App., 566 N.E.2d 1060
SUBJECT: Competency of witness
HOLDING: Witness is not incompetent to testify solely because he is under influence of narcotics at time of testimony, unless drug ingestion causes impairment of one of traditional essential elements of competency. Ct. App. found this issue to be one of first impression, but looked to other jurisdictions including Illinois, Michigan, Nevada, & 9th Circuit, & found that they generally required such demonstration of impairment be made before reversal was warranted. Evidence showed that trial judge held hearing on extent of D's impairment & found that night before trial he had ingested anti-depressant that remained in system from 8 to 24 hours. D indicated that he was still "groggy" from medication & Ct. continued trial until approximately 16 hours had elapsed from ingestion. D took stand & indicated he wished to testify, & Ct. found he testified in lucid, coherent manner. Held, conviction affirmed.

RELATED CASES: Jones, 445 N.E.2d 92 (witness's intoxication at time of incident about which he is to testify goes to his credibility, not his competency); Stewart, 442 N.E.2d 1026.

NOTE: Neither I.R.E. 601 nor any statute renders intoxicated witness incompetent, & advisory committee's unofficial commentary suggests intent to continue existing Indiana law on this issue.

O. EVIDENCE

O.5. Witnesses

O.5.b. Lay opinion

TITLE: Almodovar v. State
INDEX NO.: O.5.b.
CITE: (6/22/84), Ind., 464 N.E.2d 906
SUBJECT: Lay opinion -- opinions generally admissible personal observations
HOLDING: Tr. Ct. did not err in allowing eyewitness to testify re caliber of guns used by D & decedent. Here, D contends state did not properly qualify witness as expert. Ct. finds testimony (set forth in opinion) admissible because it concerned witness' personal observation of crime. Fact witness could specifically describe guns does not disqualify him as lay witness. It simply provided jury with additional information in determining weight of witness' testimony. Tr. Ct. has discretion to determine that lay witness is qualified to & can give opinion testimony. Rowan 431 N.E.2d 805; Hedrick 430 N.E.2d 1150. Held, no error.

NOTE: I.R.E. 602 states that witness may not testify to matter unless evidence is introduced sufficient to support finding that witness has personal knowledge of matter.

RELATED CASES: Hawkins, 626 N.E.2d 436 (Case law holding lay witnesses may express opinion on numerous subjects if opinion is based on personal knowledge and proper factual basis is laid, is consistent with new IRE 701.) For examples of admissible lay opinion, see Kirby, 481 N.E.2d 372 (D was faking crying); Gerrick, 451 N.E.2d 327 (noises sounding like gunshots); Montano, 468 N.E.2d 1042 (D's sanity in criminal case); Poe, 445 N.E.2d 94 (physical condition, if based on personal observation, including identity).

TITLE: Angleton v. State
INDEX NO.: O.5.b.
CITE: (10/9/97), Ind., 686 N.E.2d 803
SUBJECT: Lay opinion - conjecture & comments on truthfulness of witness's testimony
HOLDING: D was convicted of murdering his wife. During D's trial, officer testified, "I do not believe a burglary occurred [at D's residence], sir." Officer also admitted that there is no standard burglary. D claimed that Tr. Ct. erred in allowing inadmissible opinion testimony because it amounted to mere conjecture and not helpful to jury. Lay witness' testimony in form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on perception of witness & (b) helpful to clear understanding of witness's testimony or determination of fact in issue. I.R.E. 701. Officer's testimony was rationally based on his perception of various burglaries & state of D's home. Further, officer's testimony was helpful to jury.

D further claimed that, because statement contradicted D's testimony that burglary took place, it was statement about truthfulness of D's testimony. Witnesses may not testify to opinions concerning truth or falsity of allegations or whether witness has testified truthfully. I.R.E. 704(b); Shepherd, 538 N.E.2d 242. Officer made no comment on truthfulness of D. Contradiction between witness's opinion & other evidence did not turn witness's statement into an attack on truthfulness of any other witness. Held, no error.

TITLE: Bostick v. State
INDEX NO.: O.5.b.
CITE: (8-19-02), Ind., 773 N.E.2d 266
SUBJECT: Admission of D's statements to police - claim of unfair prejudice; opinion re: D's guilt
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion in admitting transcript of D's interview with police. D waived her claim that interrogating officer's statements & opinions of guilt were inadmissible under Indiana Evidence Rule 704(b). However, D sufficiently presented her argument that probative value of interview was substantially outweighed by danger of unfair prejudice from allowing jury to hear her interrogators repeatedly assert their beliefs & opinions that D set fire that killed her children. Interview did not contain any explicit admission of guilt by D. Throughout entire several-hour interview, despite interrogators' insistence that she started fire, D maintained that she had no recollection of starting fire that killed her children. Although interrogator's accusations & D's responses had little probative value in establishing D's guilt, Ct. concluded that repeated accusations, in context of entire statement, did not create substantial risk of unfair prejudice under Ind.Evidence Rule 403. Held, convictions affirmed, sentences of life without parole vacated & remanded for further proceedings; Sullivan & Boehm, JJ., dissenting, believed interrogating officers' repeated assertions of fact of D's guilt were inadmissible under Evidence Rule 704(b) & therefore interview was inadmissible under Evidence Rule 403.

TITLE: Connell v. State
INDEX NO.: O.5.b.
CITE: (11/16/84), Ind., 470 N.E.2d 701
SUBJECT: Witnesses - characterization of evidence; certainty of eyewitness identification
HOLDING: Where D failed to show substantial injury by witness' answer to question, reversal is not required. Here, prosecutor asked witness if he was absolutely certain that D was same person who robbed his apartment. Ct. agrees question called on witness to characterize evidence. Ct. finds victim had already identified D as perpetrator of crime; thus, response to improper question was cumulative. "There is a point when repeated responses to questions which call for witness to characterize specific segment of evidence become unduly prejudicial." That point was not reached here. Held, conviction affirmed.

TITLE: Dietrich v. State
INDEX NO.: O.5.b.
CITE: (4th Dist., 10-27-94), Ind. App., 641 N.E.2d 679
SUBJECT: No "Voucher" testimony
HOLDING: Where prosecuting attorney asked complaining witness's mother whether she had told her daughter to lie during testimony, in no way did question elicit, nor did her answer provide, improper voucher testimony, since it did not involve direct assertion as to mother's belief in complaining witness's testimony. Although no witness is competent to testify that another witness is or is not telling the truth, special problem exists where children are called upon to describe sexual conduct. Adult witness testimony is allowed in form of opinion as to child's general competence & ability to understand subject, Stewart v. State, Ind., 555 N.E.2d 121, but not as to whether child is telling truth. Here, opinion about truthfulness was not elicited.

TITLE: Dunn v. State
INDEX NO.: O.5.b.
CITE: (1st Dist., 01-15-10), 919 N.E.2d 609 (Ind. Ct. App 2010)
SUBJECT: Lay opinion - sufficient personal knowledge
HOLDING: In class C felony battery prosecution, D's girlfriend's voicemail message to victim that D acted out of jealousy when he hit the victim was based on personal knowledge and admissible under Indiana Evidence Rule 602, even though D's girlfriend testified she did not see D hit the victim, because other witnesses testified that she saw the incident and tried to stop D from hitting the victim. Rule 602 states, in part: "Evidence to prove personal knowledge *may, but need not, consist of the testimony of the witness*." (emphasis added)

Voicemail message about D's motive was an admissible opinion under Evidence Rule 701 because it was one a "reasonable person could form based on the perceived facts" considering that girlfriend was with D that evening and had dated him off and on for several years. Voicemail also met Rule 701 requirement that opinion must be helpful because it helped determine a fact in issue, i.e., whether D instigated or participated willingly in the fight. Held, judgment affirmed.

TITLE: Erkins v. State
INDEX NO.: O.5.b.
CITE: (4/23/2013), 988 N.E.2d 299 (Ind. Ct. App 2013)
SUBJECT: Admission of lay witness testimony
HOLDING: In appeal of conspiracy to commit robbery causing serious bodily injury prosecution, Ds argued that Tr. Ct. abused its discretion in admitting detective's testimony that interpreted the slang used in their phone conversations. To be admissible under Ind. Evidence Rule 701, opinion testimony must be rationally based on perception of witness and helpful to a clear understanding of the witness's testimony or determination of a fact in issue. In this case, although not every phrase of Ds' phone conversations needed interpretation, the meanings of the majority of the phrases were not clear to persons who have no knowledge of street slang, thus Court concluded most of the detective's testimony was helpful to the jury and therefore admissible. Any error in admitting inadmissible interpretations of the conversations was harmless in light of independent evidence of Ds' guilt. Held, judgment affirmed.

TITLE: Gambill v. State
INDEX NO.: O.5.b.
CITE: (12/18/96), Ind., 675 N.E.2d 668
SUBJECT: Witnesses - Lay opinion; D's insanity
HOLDING: Jury found D guilty but mentally ill of murder. D contends that she proved that she was insane at time of murder. Burden rests with D to prove defense of insanity. Jury is free to disregard testimony of experts & rely on that of lay witnesses. Barany, 658 N.E.2d 60. Jury is not obligated to believe expert testimony on issue of insanity, Bonham, 644 N.E.2d 1123, & may consider lay opinion testimony on issue of insanity. Haggard, 537 N.E.2d 28. Here, all four expert witnesses testified that D was legally insane and two lay witnesses testified that D was able to appreciate wrongfulness of her actions. Held, jury could disregard expert testimony. Held, conviction affirmed.

RELATED CASES: Ferguson, 478 N.E.2d 673 (no error in permitting lay witnesses to give opinion whether D suffered from mental disease/defect); Mehidal, App., 623 N.E.2d 428 (lay persons may give opinion testimony as to whether D was intoxicated).

TITLE: Gee v. State

INDEX NO.: O.5.b.

CITE: (8/23/2022), Ind. Ct. App., 193 N.E.3d 1036

SUBJECT: No abuse of discretion in allowing Defendant's wife to identify him from surveillance video

HOLDING: In his trial on charges of murder and arson, Defendant's wife testified and identified Defendant as the person captured on surveillance video near the scene of the crime. His wife specifically explained that she knew it was Defendant because of the body build and how "when he walked away from the truck, he [] swoop[ed] his shoulders down and he look[ed] down" and testified that while she also recognized his clothing, it was his build and manner of walking that allowed her to identify him. The Court of Appeals cited precedent that the lay opinion of a police officer familiar with a defendant has been found admissible under Indiana Evidence Rule 701 if it is helpful to the jury in reaching a decision about the identity of the person depicted in the surveillance video admitted as a silent witness. Gibson v. State, 709 N.E.2d 11 (Ind. Ct. App. 1999). Here, the witness had been married to Defendant for eleven years, recognized his body type, his clothing, and the way he swooped his shoulders down and looked down as he was walking. Additionally, her testimony was helpful to the jury in determining the identity of the person in the surveillance video. The Court held her testimony provided an adequate foundation for demonstrating the rational basis for identifying Defendant and the trial court did not abuse its discretion in allowing her to identify him from the video. Held, affirmed.

TITLE: Gibson v. State
INDEX NO.: O.5.b.
CITE: (2nd Dist., 4-12-99), Ind. App., 709 N.E.2d 11
SUBJECT: Lay opinion testimony - identity of robber depicted in videotape
HOLDING: In robbery prosecution, where identity of robber was at issue, Tr. Ct. did not abuse its discretion in permitting police officer to testify under Ind. Evid. R. 701 regarding his opinion of identity of person depicted in surveillance videotape. Robbery victim was able to identify D as looking like robber, even though he was unable to do so with absolute certainty because of the way robber pulled hood of sweatshirt over his head. Officer who viewed videotape of robbery was positive that individual on videotape was D, based on his familiarity with D's build, style of speech, voice & bow-legged manner of walking. To be admissible under I.R.E. 701, opinion testimony of lay witness must be rationally based on perception of witness & helpful to clear understanding of witness's testimony or determination of fact in issue. Tr. Ct. properly determined that officer's lay opinion testimony would be helpful to jury in reaching decision about identification. Thus, trial counsel was not ineffective by failing to object to identification testimony at trial.

RELATED CASES: Vinson, App., 735 N.E.2d 828 (Tr. Ct. properly allowed officer to testify re: his opinion of D's identity as person depicted in surveillance video because officer's extensive viewing of video was basis for Tr. Ct. to conclude that officer was more likely to identify D correctly from video than jury).

TITLE: Goodson v. State
INDEX NO: O.5.b.
CITE: (5-30-01), Ind. App., 747 N.E.2d 1181
SUBJECT: Silent witness video evidence - inadmissible hearsay
HOLDING: Tr. Ct. did not abuse its discretion by allowing police officers to testify that they recognized D in videotape & photographs. Officer's opinion that he was familiar with D was admissible under Indiana Evidence Rule 701 as being helpful to jury in reaching decision about identification of person depicted in videotape admitted as silent witness. Gibson v. State, 709 N.E.2d 11 (Ind. Ct. App 1999). However, confidential informant's (CI's) statements on videotape detailing route he took to location of drug sale & description of appearance of person depicted in videotape was inadmissible because CI did not testify at trial & no limiting instruction was given to jury. However, improper admission of this evidence was harmless error because impact of CI's statements was insignificant in light of substantial independent evidence of guilt. Held, judgment affirmed.

RELATED CASES: Vaughn, 13 N.E.3d 873 (Ind. Ct. App 2014) (admitting video showing D selling cocaine to CI did not violate 6th Amendment; video showed conduct and conduct is not an assertion); Pritchard, App., 810 N.E.2d 758 (no error in admitting testimony of two prison officials regarding what they saw in a video recording that was later destroyed; not hearsay because testimony merely recounted what they saw in recording; "silent witness theory" did not apply to case since the video was never admitted).

TITLE: Hape v. State
INDEX NO.: O.5.b.
CITE: (1st Dist., 03-31-09), 903 N.E.2d 977 (Ind. Ct. App 2009)
SUBJECT: Skilled witness - scope of officer's testimony regarding dealer versus user
HOLDING: Tr. Ct. abused its discretion by not limiting an officer's testimony to that which was based upon his specialized knowledge as a police officer. A skilled witness may provide an opinion or inference that is: (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or determination of a fact in issue. Evidence Rule 701. Here, D was charged with dealing in methamphetamine and resisting law enforcement. An officer testified regarding the dose and dealing amounts of methamphetamine, how much it takes for someone to get high and the relationship between the quantity of methamphetamine and personal use. Regardless of whether the officer was a skilled or expert witness, it was improper for him to testify regarding how much methamphetamine it takes for a person to get high. Such information about the effect of a chemical substance upon a person's body is scientific in nature. Only an expert witness is permitted to testify regarding scientific knowledge, but in order to do so the expert witness must satisfy the Tr. Ct. that the scientific principles upon which the expert testimony rests are reliable. Because the officer did not testify as to any scientific principles of methodology used to reach his conclusion, the admission of this testimony was improper. However, the officer's testimony regarding the dose and dealing amounts and the relationship between quantity of methamphetamine and personal use was properly admitted. This testimony was rationally based on the officer's observations of drugs, which is specialized knowledge during his eight years of experience working as an Indiana State Trooper. Because the officer's testimony was helpful to the determination of a fact at issue (D makes no argument that it was not), Tr. Ct. did not abuse its discretion in admitting the officer's testimony regarding dose and dealing amounts. The error in admitting the officer's testimony regarding the amount of methamphetamine necessary to create a high was harmless in light of the substantial evidence from which the jury could infer D was a dealer. Held, judgment affirmed.

NOTE: This type of officer testimony may be objectionable under Evidence Rule 704. Scisney v. State, 690 N.E.2d 342 (Ind. Ct. App 1997); but see O'Neal v. State, 716 N.E.2d 82 (Ind. Ct. App 1999).

RELATED CASES: Clark, 977 N.E.2d 459 (Ind. Ct. App 2012) (officer's opinion as to the pseudoephedrine to methamphetamine ratio in a one-pot manufacturing method was properly admitted; officer had investigated over 200 methamphetamine labs, had twice cooked meth herself, completed a forty-hour course on manufacturing and participated in a 24-hour job training at the ISP clandestine laboratory); Jones, 957 N.E.2d 1033 (Ind. Ct. App 2011) (officer was properly qualified as a skilled witness to testify that the methamphetamine lab was based on the one-pot reaction method); Davis, 948 N.E.2d 843 (Ind. Ct. App 2011) (Tr. Ct. abused its discretion by allowing a detective to testify as a skilled witness that the denomination of currency found on D were indicative of drug dealing; harmless error); Romo, 929 N.E.2d 805 (Ind. Ct. App 2010) (it can be inferred that a Drug Task Force detective possesses knowledge beyond that of the average juror with regard to the dealing of narcotics, and is thus, sufficiently familiar with the language of narcotics trafficking to provide testimony regarding the meaning of drug-dealing terminology).

TITLE: Hawkins v. State
INDEX NO.: O.5.b.
CITE: (4th Dist., 04-29-08), Ind. App., 884 N.E.2d 939
SUBJECT: Officer's skilled witness testimony re: attempt to conceal murder admissible
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion by allowing police officer to testify regarding his opinion of how victim was shot, and a crime concealed. Officer based his opinion on his experience as a crime scene technician, the presence of three drops of blood in truck cab that were purportedly victim's, a nine-millimeter bullet casing found in dashboard of truck, and absence of blood where he had anticipated finding it. Court held that officer's opinion testimony that someone attempted to conceal a shooting was reasonable, rationally based on his perceptions and assisted the jury in understanding his testimony as is required under Indiana Evidence Rule 701. Court noted that skilled witness testimony generally needs only rise to a relatively low bar in order to be admissible and the testimony regarding the concealment of victim's shooting reaches this standard.

Court also held that officer's opinion that victim was shot in the semi-truck cab and that the shooting was then covered up was independent evidence of corpus delicti to support admission of D's confession. Production of a body is not necessary where, as here, circumstantial evidence shows that a death occurred. Held, judgment affirmed.

TITLE: Hoglund v. State
INDEX NO: O.5.b.
CITE: (03-08-12), 962 N.E.2d 1230 (Ind. 2012)
SUBJECT: Vouching - no exception for child molest cases
HOLDING: Tr. Ct. abused its discretion by allowing State witnesses to indirectly vouch for alleged child molest victim. Prior to the Rules of Evidence, common law permitted a witness to testify that an alleged child molest victim is not prone to exaggerate or fantasize about sexual matters as long as the testimony did not take the direct form of "I believe the child's story" or the "child is telling the truth." Lawrence v. State, 464 N.E.2d 923, 925 (Ind. 1984). However, Indiana Rule of Evidence 704(B) provides that "Witnesses may not testify 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." Because testimony concerning whether an alleged child victim is not prone to exaggerate or fantasize about sexual matters is an indirect but nonetheless functional equivalent of saying the child is telling the truth, the holding in Lawrence is inconsistent with the mandate of Rule 704(b) and overruled. Moreover, Court declined to carve out a common law exception to Rule 704(b) for sexual abuse cases. Thus, all indirect vouching is inadmissible under Rule 704(b).

Here, in D's jury trial for child molesting, the alleged victim's treating pediatrician was allowed to testify, over objection, that she believed the child is not prone to exaggerate or fantasize in sexual matters. A mental health counselor and a psychologist each were permitted to testify, over objection, that there was no indication that the child fabricated her story out of some need. Even though this testimony did not take the direct form of "I believe the child's story," the testimony constituted improper comments on the child's truthfulness. However, the errors were harmless. Not only was the testimony of the child unshaken and consistent under aggressive cross-examination, trial counsel did not object to all the vouching testimony admitted through these three witnesses. Thus, the erroneously admitted opinions were cumulative to other opinions properly in front of the jury. Held, transfer granted, judgment affirmed and Court of Appeals' opinion at 945 N.E.2d 166 vacated except for portion concerning the appropriateness of the sentence, which is summarily affirmed.

RELATED CASES: Richardson, 189 N.E.3d 629 (Ind. Ct. App. 2022) (harmless error given substantial evidence of guilt and because the objected-to-statement was merely cumulative of a detective's previous, unobjected-to testimony); Garber, 152 N.E.3d 642 (Ind. Ct. App 2020) (emergency-room physician's testimony that C.W. told her she was digitally penetrated came close to crossing the line into impermissible vouching, but did not quite rise to that level because rather than specifically opining that C.W. was telling the truth, she offered only a general observation on how emergency room patients behave based on her experience); Norris, 53 N.E.3d 512 (Ind. Ct. App 2016) (erroneous admission of vouching testimony was harmless because of other substantial evidence of guilt); Nichols, 55 N.E.3d 854 (Ind. Ct. App 2016); Wilkes, 7 N.E.3d 402 (Ind. Ct. App 2014) (detective's statements that complaining witness's reports were "consistent" and there is no reason why he would make up something like this were impermissible vouching; harmless error); Kindred, 973 N.E.2d 1245 (Ind. Ct. App 2012) (investigator's testimony that child was not coached, in addition to his repeated assertions in an interview played for the jury that the child was truthful and believable, constituted impermissible vouching and fundamental error); Palilonis, 970 N.E.2d 713 (Ind. Ct. App 2012) (examining nurse's testimony that victim's case was noteworthy to her because her statement that she was raped was believable was impermissible vouching testimony); Thompson, 529 N.E.2d 877 (App.) (Tr. Ct. erred in allowing child's father to testify, "As hysterical & crying that she was I knew she was telling the truth..."); Douglas, 484 N.E.2d 610 (App.) (Tr. Ct. erred in allowing psychiatric social worker to give opinion, over

D's objection, re truthfulness of child in molestation case; witness testified: "I believe M.R. I think he's telling the truth;" held, conviction reversed; Connover DISSENTS finding instruction cured error).

TITLE: Kent v. State
INDEX NO.: O.5.b.
CITE: (12/31/96), Ind., 675 N.E.2d 332
SUBJECT: Witnesses - Lay opinion
HOLDING: In murder prosecution, Tr. Ct. did not abuse discretion in permitting officer to testify regarding D's state of mind. Lay witnesses may testify in form of opinion if testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness & (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." I.R.E. 701. Determination of whether witness is qualified to give opinion is within Tr. Ct.'s discretion. Hawkins, 626 N.E.2d 436. Officer's eyewitness testimony that D was trying to harm rather than help victim by roughly thrusting on victim's abdomen, & that condition of victim was not consistent with fall in bathtub, was permissible lay opinion testimony. Officer based his opinions on his own observations; thus, these conclusions were rationally based on his perception and were "helpful to clear understanding of officer's testimony." I.R.E. 701. Held, no error.

RELATED CASES: Hanson, App., 704 N.E.2d 152 (officer was qualified to testify as expert and as skilled witness re: firearms & obliterated serial numbers).

TITLE: Kirby v. State
INDEX NO.: O.5.b.
CITE: (8/5/85), Ind., 481 N.E.2d 372
SUBJECT: Lay opinion - short-hand rendition of facts exception
HOLDING: Testimony of police officer that D "appeared to fake cry" when informed of son's death (D charged with his murder) was admissible under "short-hand exception of facts" exceptions to the opinion rule. Travelers Indemnity Co. v. Woods (Mo.App. 1983), 663 S.W. 2d 392. Such testimony is allowed when it is impossible or extremely difficult for witness to convey accurate/actual meaning & nature of thing described may be more clearly conveyed to jury by summary of witness' impressions/comparison with some ordinary object/condition familiar to Ct./jury. Id. Here, Ct. concludes statement fell within exception even though officer later was able to testify re observations of D's conduct which formed basis of conclusory statement. Tr. Ct. was in best position to determine whether it was impossible/extremely difficult for officer to convey to jury his mental impressions of observable facts in manner other than that employed. Held, no error.

TITLE: Mariscal v. State
INDEX NO.: O.5.b.
CITE: (4th Dist., 11-24-97), 687 N.E.2d 378 (Ind. Ct. App. 1997)
SUBJECT: Lay opinion - Rule 701; skilled witness testimony
HOLDING: Tr. Ct. did not abuse discretion by allowing witness to testify as skilled witness whose opinion may be helpful to jury under Ind. R. Evid. 701. Skilled witness is person with degree of knowledge short of that sufficient to be declared expert, but somewhat beyond that possessed by ordinary jurors. To be admissible under Ind. R. Evid. 701, opinion testimony of skilled witness or lay person must be rationally based on perception of witness & helpful to clear understanding of witness's testimony or determination of fact in issue. Here, eyewitness testified that D, & not victim, "probably stabbed himself in leg or hip" during fight. Although witness' training as security guard, reserve police officer & martial artist did not qualify witness as expert under Ind. R. Evid. 702, it was sufficient to qualify him as skilled witness. Because witness' testimony could be helpful to jury in explaining what witness meant when he testified earlier that "stabbing motions ended before they went past D's body," Tr. Ct. did not abuse discretion in allowing witness to give his opinion. Held, conviction affirmed.

RELATED CASES: Buelna, 20 N.E.3d 137 (Ind. 2014) (testimony of skilled witness under Evid. Rule 701 necessary for State to argue that if D had finished cooking 13 grams of "intermediate mixture" of meth precursors, it would have yielded at least 3 grams of meth, and thus provide sufficient evidence for class A felony manufacturing meth conviction); Davis, 948 N.E.2d843 (Ind. Ct. App 2011) (Tr. Ct. abused its discretion by allowing a detective to testify as a skilled witness that the denomination of currency found on D were indicative of drug dealing; harmless error); Hape, App., 903 N.E.2d 977 (although officer could testify, based on his specialized knowledge, about the dose and dealing amounts of methamphetamine, the officer could not testify about how much drugs is needed to create a high without setting forth the scientific reasoning or methodology on which he was relying; testimony about how much methamphetamine is needed to create a high is based on science, not specialized knowledge); Ashworth, 901 N.E.2d 567 (Ind. Ct. App. 2009) (a Second Circuit opinion supports interpreting "perception" within the meaning of IRE 701 as excluding officer opinion testimony that is based on a colleague's investigation); Davis, App., 791 N.E.2d 266 (officer was sufficiently qualified to testify as skilled witness that, based on his training & experience, cocaine that D dropped in this case was packaged for dealing because it was uncommon for a drug user to carry amount of cocaine that D possessed); O'Neal, App., 716 N.E.2d 82 (Tr. Ct. did not abuse its discretion in allowing police officer to testify as skilled witness regarding whether 66 grams of crack cocaine & $1,128 in cash recovered from D were consistent with amounts possessed by "user" of cocaine).

TITLE: Montgomery v. State
INDEX NO.: O.5.b.
CITE: (12/11/2014), 22 N.E.3d 768 (Ind. Ct. App 2014)
SUBJECT: Detective's identification of two precursors properly admitted
HOLDING: In trial on charge for dealing methamphetamine, Tr. Ct. properly admitted testimony of detective who identified two precursors admitted at trial - lye and ammonium nitrate.

An opinion of someone sufficiently experienced with a substance or drug may establish its identity. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). Thus, testimony of a police officer who, by his or her training, knowledge, and experience, is sufficiently experienced with a compound, may establish its identity. Clark v. State, 6 N.E.3d 992, 999 (Ind. Ct. App. 2014); Boggs v. State, 928 N.E.2d 855, 866 (Ind. Ct. App. 2010). Here, Detective McDonald, who testified at trial, was part of a Joint Drug Task Force within the Methamphetamine Suppression Unit. He went through extensive training at the DEA Academy in Quantico, Virginia, where he learned about methamphetamine production, including chemicals used to make methamphetamine. Training from the Indiana Law Enforcement Academy taught him how to identify precursors used to make methamphetamine. Thus, Tr. Ct. did not abuse its discretion in admitting Detective McDonald's testimony that identified one substance as lye and another as ammonium nitrate. Held, judgment affirmed.

TITLE: Nordstrom v. State
INDEX NO.: O.5.b.
CITE: (5th Dist., 02-09-94) Ind. App., 627 N.E.2d 1380
SUBJECT: Testimony not improper "voucher" testimony
HOLDING: Testimony by officer that during post-arrest questioning he advised D that he did not believe his account of events surrounding shooting of wife & advised him to "tell me the truth," & testimony about inconsistencies in D's story, what they meant & why they concerned officer, was not improper voucher testimony. Therefore, counsel was not ineffective for failing to object to testimony. While neither lay nor expert witnesses can testify as to whether another witness is telling the truth, Ct. found taken in context, officer's testimony did not go to whether D was being truthful as witness. He was merely repeating statements he made during questioning, to explain his role in investigation & inherent inconsistencies in D's various accounts.

TITLE: People v. Veren
INDEX NO.: O.5.b.
CITE: 140 P.3d 131 (Colo.Ct. App. 2005)
SUBJECT: Expert Witness - Police Testimony About Meth Precursors & Manufacture
HOLDING: Testimony regarding the significance of possession of methamphetamine ingredients and manufacture is not lay opinion but expert testimony that is admissible only if the witness has been properly qualified as an expert. The distinction between lay opinion testimony and expert opinion testimony depends on the nature of the testimony itself, and not on the identity of the witness. Lay opinion testimony results from a process of reasoning familiar in everyday life. See also State v. Rothlisberger, 95 P.3d 1193 (Utah Ct. App. 2004).

TITLE: Powers v. State
INDEX NO.: O.5.b.
CITE: (10/21/82), Ind., 440 N.E.2d 1096
SUBJECT: Witnesses - lay opinion on ultimate issue/intent
HOLDING: Opinion by police officer that drugs were possessed for delivery & not for personal use was properly admitted. Here, D objected to testimony by officer that amount of drugs found in D's possession indicated his intent to sell them. Witness may give opinion regarding ultimate fact question. Shelby 428 N.E.2d 1241; Woods 372 N.E.2d 178. See Wofford 394 N.E.2d 100 (intoxication); Porter 391 N.E.2d 801 (truth of statements to police); Bobbitt 361 N.E.2d 1193 (sanity); Ball, App., 406 N.E.2d 305 (child abuse). Held, no error. CONCURRING IN RESULT, Prentice would hold that question of person's intent at time crime committed, not related to insanity issue, is question of fact for jury & not a proper subject of expertise. Simpson 381 N.E.2d 1229. Prentice distinguishes cases cited by majority. Circumstance of possession of large quantity of drugs does not change between time of offense & time of trial. However, Prentice finds sufficient evidence of intent to render error harmless.

RELATED CASES: Wagner 474 N.E.2d 476 & Moritz, App., 465 N.E.2d 748 (Tr. Ct. properly excluded testimony re thought processes/mental state of D, citing Clay 346 N.E.2d 574); Springer 437 N.E.2d 998 (question calling for conclusion by witness is properly excludable, citing Strickland 359 N.E.2d 244, Clay & Gayer 210 N.E.2d 852, thus, inquiry to co-workers re their belief D could commit child molesting/incest was improper).

TITLE: Sampson v. State
INDEX NO.: O.5.b.
CITE: (7/30/2015), 38 N.E.3d 985 (Ind. 2015)
SUBJECT: Vouching - opinions that child did not show signs of being coached
HOLDING: Testimony of a forensic interviewer regarding whether there were indicators that the child victim was coached was erroneously admitted. Disagreeing with the Court of Appeals in Acher v. State, 996 N.E.2d 341 (Ind. Ct. App 2013), the Indiana Supreme Court held that the subtle distinction between an expert's testimony that a child has or has not been coached versus an expert's testimony that the child did or did not exhibit any signs or indicators of coaching is insufficient to guard against the dangers that such testimony will constitute impermissible vouching. Thus, testimony about the signs of coaching and whether a child exhibited such signs or has or has not been coached is admissible only if the D has opened the door to such testimony. Here, in a child molest case, the forensic interviewer testified about the signs of a child being coached and that there were no such signs in her interview with the alleged victim. Although the State was careful to limit the testimony to the witness' observations of coaching indicators, this was neither in response to defense questioning, or to rebut an express claim that the victim had been coached. Although the testimony was improper vouching, it did not rise to the level of fundamental error. Held, transfer granted, Court of Appeals' memorandum opinion summarily affirmed in all other respects, judgment affirmed.

RELATED CASES: Alvarez-Madrigal, 71 N.E.3d 887 (Ind. Ct. App 2017) (pediatrician's testimony regarding statistical evidence about the possibility a witness is lying did not constitute vouching; see full review at O.7.b); Hamilton, 43 N.E.3d 628 (Ind. Ct. App 2015) aff'd on rehearing, 49 N.E.3d 554 , (admitting forensic interviewer's testimony that neither complaining witness showed any indicators of being coached was impermissible vouching testimony).

TITLE: Satterfield v. State

INDEX NO.: O.5.b.

CITE: (6/26/2015), 33 N.E.3d 344 (Ind. 2015)

SUBJECT: Detective's testimony about D's "evasiveness" during interview was lay observation, not specialized knowledge

HOLDING: In murder and arson prosecution, detective's testimony about D's "evasiveness" during interview was not erroneously admitted as skilled witness testimony under Indiana Evidence Rule 701 or "human lie detector" testimony. It was simply lay opinion testimony--a helpful summary of observations any juror could have made while listening to D's responses. Although Tr. Ct. mischaracterized detective's testimony as skilled witness testimony, it made no comment about his ability to identify untruthfulness as Tr. Ct. in Tolliver v. State, 922 N.E.2d 1272 (Ind. 2015), had mistakenly done. Held, judgment affirmed.

TITLE: Shephard v. State
INDEX NO.: O.5.b.
CITE: (3/23/89), Ind., 538 N.E.2d 242
SUBJECT: Opinion on truthfulness of witness's testimony not admissible
HOLDING: In murder case, Tr. Ct. committed reversible error in permitting lay witness to testify as to whether D was telling truth when she denied killing victim. Here, witness testified that D at all times denied having anything to do with the murder. Prosecuting attorney then asked witness, "Do you believe that to be the truth?" Question highly improper. Neither lay nor expert witnesses competent to testify that another witness is or is not telling truth. Head, 519 N.E.2d 151. Held, conviction reversed.

RELATED CASES: Kimp, 546 N.E.2d 1193 (speculation & conjecture by witnesses who lack personal knowledge of underlying facts generally not admitted); Mitchell, 535 N.E.2d 498 (legal conclusions of witness); Head, 519 N.E.2d 151 (credibility of witnesses, & whether witness believed accusation).

TITLE: Shephard v. State

INDEX NO.: O.5.b.

CITE: 157 N.E.3d 1209

SUBJECT: Video interview of child witness inadmissible where D effectively cross-examined witness at trial

HOLDING: In aggravated battery and voluntary manslaughter prosecution, Defendant's right to confrontation and cross-examination was not infringed when the trial court excluded video recordings of the police interview with Defendant's son. Indiana Evidence Rule 613(a) provides that a witness may be examined about a prior statement. However, a prior inconsistent statement is not admissible under Rule 613 if the witness has already acknowledged the prior inconsistent statement on cross-examination because impeachment is complete after such an acknowledgment. Dixon v. State, 967 N.E.2d 1090, 1092 (Ind. Ct. App. 2012). Here, Defendant was able to call the son as a witness in order to impeach him with inconsistent statements regarding the time he woke his father, what he knew about the victim's condition when he wrote an essay at school, and his initial false claim he attempted CPR. Further, a small portion of the video was played for the jury, allowing it an opportunity to observe the child's demeanor and physical size at the time of the events.

TITLE: Smith v. State
INDEX NO.: O.5.b.
CITE: (12-21-99), Ind., 721 N.E.2d 213
SUBJECT: Admissibility of police officer's opinions on D's guilt in taped interview
HOLDING: Tr. Ct. erred in admitting portion of taped police interview with D where detective offered opinion of D's guilt. During interview, detective stated, "I thought it was you." Indiana Evidence Rule 704(b) prohibits witnesses from testifying to opinions concerning intent, guilt, or innocence in criminal case. Ct. rejected State's argument that detective's statements were designed to elicit a reaction from D, & that statement was admissible because it was not testimony in Ct. Same reasoning underlying Rule 704(b)'s prohibition of opinions of guilt during live in-Ct. testimony applies to statements offered at trial that were made at another time or place.

Police questions & comments in interview may be designed to elicit responses from D & if so, are not offered as proof of facts asserted therein. Strong, 538 N.E.2d 924. Ct. concluded that detective's two other statements appeared to be hearsay assertions of fact, not mere questions, & their admission without limiting admonishment was error. Specifically, detective stated, "half of the people at the jail's [sic] called me wanting to tell me that you did it," & "[witness] said you did it because it was over him [victim] ripping you off your dope, your stash." Admission of these statements was likewise erroneous. Held, convictions reversed & remanded on other grounds; Shepard, C.J., concurring.

RELATED CASES: Butler, 951 N.E.2d 641 (Ind. Ct. App. 2011) (harmless error to admit portions of D's statement where interviewing officer asserted opinion on D's guilt); Washington, 808 N.E.2d 617 (because D did not direct Tr. Ct.'s attention to a possible 704(b) violation, he waived consideration of this argument on appeal); Lampkins, 778 N.E.2d 1248 (although jury should have been advised that detective's statements intended to elicit information from D were not evidence, admission of statements was harmless); Bostick, 773 N.E.2d 266 (no error in admitting transcript of D's interview with police; see full review, this section).

TITLE: State v. Farr-Lenzini
INDEX NO.: O.5.b.
CITE: 970 P.2d 313 (Was.Ct. App. 1999)
SUBJECT: Officer's Opinion Testimony as to Driver's State of Mind
HOLDING: Officer should not have been allowed to give opinion testimony concerning state of mind of driver charged with attempting to elude him. After describing how D drove 4 1/2 miles at speeds of up to 100 mph and ran a red light after he had activated siren and red light, officer was asked by prosecutor whether he had an opinion "as to what the D's driving pattern exhibited to [him]." He testified that D's driving pattern exhibited to him that she "was attempting to get away from me and knew I was back there and refusing to stop." Court of Appeals holds that officer should not have been allowed to offer this testimony, either as expert opinion, pursuant to R.E. 702, or as lay opinion pursuant to R.E. 701. R.E. 702 was not satisfied, because there was no evidence that officer had specialized training or experience necessary to distinguish between distracted speeding driver and eluding driver. Further, requirement that such testimony be helpful to the fact finder was not met. Determining whether a driver is attempting to elude a police officer is not beyond the understanding of the ordinary lay person. Admission as lay opinion would have required substantial factual basis, which was lacking here.

TITLE: Steinberg v. State
INDEX NO.: O.5.b.
CITE: (01-21-11), 941 N.E.2d 515 (Ind. Ct. App 2011)
SUBJECT: Rule 704(b) - recorded statements from jailhouse phone conversation
HOLDING: In murder prosecution, Tr. Ct. did not err in failing to redact recorded jailhouse phone conversation between D and his mother, pursuant to Indiana Evidence Rules 704(b) and 403. Rule 704(b), which applies to both in-court testimony and out-of-court statements offered at trial, prohibits witnesses from testifying to "opinions concerning intent, guilt, or innocence in a criminal case; the truth of falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

D argued that his mother's tone of voice and repetitive questioning expressed disbelief and that her responses to D's reference to masked men who framed him and nanotechnology directly attacked his truthfulness, sanity and innocence. Court disagreed, noting that none of the objectionable statements expresses a direct opinion as to D's guilt, the truth of his statements, or his sanity. Moreover, Court agreed with State that there is no rule of evidence that excludes statements because of the tone of voice in which they are made. Rule 704(b) does not prohibit presentation of evidence that leads to an inference, even if no witness could state an opinion with respect to that inference. 13 Miller, Ind. Practice ' 704.201 at 589 (3d ed. 2007). D failed to establish that probative value of his mother's statement is substantially outweighed by danger of unfair prejudice pursuant to Evidence Rule 403. Held, judgment affirmed.

TITLE: Tolliver v. State
INDEX NO.: O.5.b.
CITE: (03-18-10), 922 N.E.2d 1272 (Ind. Ct. App 2010)
SUBJECT: Skilled witness opinion - disapproving of body-language testimony
HOLDING: In appeal from murder conviction, Court found Tr. Ct. abused discretion by finding that officer who questioned victim at hospital was skilled witness uniquely qualified to determine victim=s truthfulness based on officer's skill to read body language. Body-language testimony was disapproved because it portrays officer as a "human lie detector." However, because officer did not testify about victim's truthfulness but lack of cooperation during questioning, officer's observations about lack of cooperation were common-sense conclusions not requiring a skilled witness foundation and were admissible as lay opinions under Indiana Evidence Rule 701. Further, Tr. Ct. later retracted its endorsement of body language testimony by admonishing jury that officer's testimony was not entitled greater weight than any other witness's testimony. Finally, error was harmless because conviction was supported by substantial independent evidence of guilt. Held, judgment affirmed.

TITLE: Walker v. State
INDEX NO: O.5.b.
CITE: (5/14/2013), 988 N.E.2d 341 (Ind. Ct. App 2013)
SUBJECT: Comments re: D's guilt did not constitute fundamental error
HOLDING: In child molesting prosecution, complaining witness's father's comments concerning D's guilt did not constitute fundamental error. D argued that father's outburst and testimony that he believed D was guilty violated Ind. Evidence Rule 704(b)(prohibiting testimony re: guilt in a criminal case) and denied him the presumption of innocence to which he is entitled. However, any error was waived by failure to object, resulted from invited error, and cured by Tr. Ct.'s admonition. Court agreed with Tr. Ct. that jurors would understand this basic human response and presume that the jury followed the instruction to disregard father's remarks. Further, State's remark in closing that the father was upset did not constitute vouching for father's truthfulness. Held, judgment affirmed.

RELATED CASES: Kress, 133 N.E.3d 742 (Ind. Ct. App. 2019) (several of the witnesses' testimony that referred to C.W.'s out-of-court allegations were not used to bolster C.W.'s in-court testimony on the specific allegations); Saylor, 55 N.E.3d 354 (Ind. Ct. App 2016) (prosecutor's comments on witnesses' credibility during closing argument were based on reasons arising from the evidence presented at trial and was not vouching).

TITLE: Weaver v. State
INDEX NO.: O.5.b.
CITE: (12-5-94), Ind., 643 N.E.2d 342
SUBJECT: Lay opinion testimony
HOLDING: Tr. Ct. properly excluded victim's testimony as to what she believed caused D's attack, & whether she believed D intended to kill her. Applicable rule at time of trial & Ind. Evid. R. 704(b) prevents lay opinion testimony as to state of mind or thought processes of another person, Kimp v. State, Ind., 546 N.E.2d 1193. Victim could describe what happened & let jury draw its own conclusions. Held, judgment affirmed.

Note: DeBruler, J., concurring, noted that evidence rules do not prohibit opinion testimony of person's capacity to form intent. Here, victim might have testified as to her opinion about D's state of intoxication & capability of forming any intent to commit charged crimes.

RELATED CASES: Gall, App. 811 N.E.2d 969 (no error in excluding testimony from the passenger who was shot as to her opinion that D did not intend to hurt her); Griffin, App., 692 N.E.2d 468, *sum. aff'd*, 717 N.E.2d 73 (Ind. 1999) (psychologist's testimony that planning & thought and/or careful activity is beyond D" in criminal trial was excludable under R 704(b).

TITLE: Wilder v. State
INDEX NO.: O.5.b.
CITE: (1/9/2018), 91 N.E.3d 1016 (Ind. Ct. App 2018)
SUBJECT: D opened door to detective's legal conclusion
HOLDING: Indiana Evidence Rule 704(b) prohibits witnesses from testifying to opinions concerning intent, guilt, or innocence in criminal cases. In battery prosecution, detective's testimony that he "felt the evidence was sufficient that a battery had occurred," even if a statement of legal conclusion in violation of Rule 704(b), was admissible because D opened the door to such testimony by attacking the sufficiency of the police investigation. In both his opening statement and his cross examination of another police officer, D attacked the State's decision to bring charges against D before police spoke with him and his witnesses. This necessarily left the jury with the false impression that police must interview all witnesses before the State may file criminal charges. The State was entitled at that point to elicit testimony about why it brought charges against D without first interviewing him or his witnesses. Thus, Tr. Ct. did not commit fundamental error by failing to, sua sponte, exclude detective's testimony. Held, judgment affirmed.

TITLE: Williams v. State
INDEX NO.: O.5.b.
CITE: (10/26/2015), 43 N.E.3d 578 (Ind. 2015)
SUBJECT: Forbidden guilt testimony under Ind. Evidence R. 704(b) includes opinion testimony that D was dealing drugs
HOLDING: Indiana Evidence Rule 704(a) generally allows witness opinion testimony to "embrace" an ultimate issue--but as a matter of constitutional right, only a jury may "resolve" an ultimate issue. And Evidence Rule 704(b) explicitly prohibits, in criminal cases, witness opinions concerning the ultimate issue of guilt. Opinion testimony concerning guilt invades the province of the jury in determining what weight to place on a witness's testimony. Blanchard v. State, 802 N.E.2d 14 (Ind. Ct. App 2004).

Here, in dealing in cocaine prosecution, detective's testimony that he had "zero doubt" that what he saw was a drug transaction was an outright opinion of D's guilt that violated Indiana Evidence Rule 704(b). Paraphrasing all elements of an offense resolves the ultimate issue of guilt just as much as saying, "I know the D did it." Police officers' opinions on issues of intoxication or identity may imply guilt, but do not embrace the ultimate question of guilt because the State still must prove the other elements in order for the jury to find guilt. Although detective's statement that "there's zero doubt in my mind that that was a transaction fo cocaine" crossed the line into declaring D's guilt, its admission was harmless error because there was substantial, independent evidence of guilt to support both convictions. Held, transfer granted, Court of Appeals' opinion at 29 N.E.3d 144 vacated on this issue, summarily affirmed on all other issues, judgment affirmed.

RELATED CASES: Neal, 175 N.E.3d 1193 (Ind. Ct. App. 2021) (harmless error in child molesting prosecution where investigating detective testified that guilty defendants typically give "a little bit more truth" with each statement they make to law enforcement, as D had in speaking with him; this is precisely the type of opinion testimony that Evidence Rule 704(b) prohibits because it invades the province of the jury in determining what weight to place on a witness's testimony).

TITLE: Willner v. State
INDEX NO.: O.5.b.
CITE: (4th Dist., 04-13-93), Ind. App., 612 N.E.2d 162
SUBJECT: D opened door to otherwise inadmissible opinion testimony
HOLDING: Where on direct exam D asked officer whether State's witness could be summed up as "con artist," he opened door to admissibility, on CX, of officer's opinion about whether witness was telling truth. After defense counsel asked question, prosecutor then asked officer if he felt witness tried to con him in this case, & officer responded, "no." Ct. rejected D's argument that allowing testimony invaded province of jury to determine credibility of witness. Ct. found situation similar to that in Porter, 391 N.E.2d 801, where Ct. found admission of opinion testimony on ultimate fact was within discretion of Tr. Ct., & that D had opened door on CX for officer to state opinion that D was not telling truth in first statement. Held, conviction affirmed. **Note:** This decision is result of remand to Ct. App. for consideration of other issues, after reversal of its first decision on petition to transfer, Willner, 602 N.E.2d 507.

O. EVIDENCE

O.5. Witnesses

O.5.c. Immunity (Ind. Code 35-37-3)

TITLE: Arnold v. State
INDEX NO.: O.5.c.
CITE: (3/2/84), Ind., 460 N.E.2d 494
SUBJECT: Immunity - only prosecutor may give/use
HOLDING: D is not denied due process where only state can grant immunity to witnesses. Here, robbery victim refused to testify for state because certain felony charges were pending against him. State granted him use immunity (Ind. Code 35-6-3-1, now Ind. Code 35-37-3-1) & Tr. Ct. ordered him to testify over D's objection. An equal protection challenge to use immunity statute was rejected in Walters 394 N.E.2d 154. See Williams v. Rhodes (1968), 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24; Wallace 426 N.E.2d 34. State has responsibility to prosecute crimes. To meet responsibility, state, not D, must have authority to grant immunity. Held, no error.

RELATED CASES: Fancher, App., 918 N.E.2d 16 (D's equal protection rights were not violated by admission of testimony of informant who received a reduced sentence in exchange for his testimony); Lucas 499 N.E.2d 1090 (Witn. 304(1); Tr. Ct. did not err in refusing to order witness, who had been given use immunity by prosecutor provided she would testify in deposition & who refused to testify at pretrial hearing when called by defense, to testify; D was requesting extension of immunity in manner unauthorized by Ind. Code 35-37-3-3).

TITLE: Brown v. State
INDEX NO.: O.5.c.
CITE: (3-15-00), Ind., 725 N.E.2d 823
SUBJECT: State's evidence not based on D's immunized testimony; Kastigar hearing unnecessary
HOLDING: Tr. Ct. did not err in overruling D's objection to State's evidence, which he argued was derived from his immunized testimony in his co-conspirators' trial. Once immunized, any evidence that witness gives, or evidence derived from that evidence, may not be used in any criminal proceeding against that witness. Ind. Code 35-37-3-3. State has heavy burden of proving that all evidence it proposes to use was derived from legitimate source wholly independent of compelled immunized testimony. Kastigar v. United States, 406 U.S. 441 (1972). Although Indiana Cts. have never addressed sufficiency of Kastigar hearing, it requires more than generalized arguments about sources of State's evidence.

In this case, oral argument of counsel was insufficient to establish that evidence used against D was obtained wholly through independent sources & not through any of his immunized testimony. Under these facts, however, Ct. held that Kastigar hearing was not necessary because D gave two statements to police which were not subject to his grant of immunity. D testified that his testimony at co-conspirator's trial was substantially the same as his statements to police. Thus, there was no error in failing to conduct full evidentiary Kastigar hearing or in allowing State to present its evidence at trial. Held, judgment affirmed.

TITLE: Bussberg v. State
INDEX NO.: O.5.c.
CITE: (4th Dist., 05-3-05), Ind. App., 827 N.E.2d 37
SUBJECT: Immunity forces D's admission to probation violation
HOLDING: D challenged his probation revocation based on self-incrimination & chain of custody grounds. At revocation hearing, State asked D if he ingested methamphetamine prior to submitting a urine specimen. State requested & Tr. Ct. granted use immunity to D so that an affirmative answer could not be used against him in a future prosecution. D's counsel objected on self-incrimination grounds which was overruled by Tr. Ct. & D answered he had used meth prior to giving the urine specimen. *Citing* Minnesota v. Murphy, 465 U.S. 420 (1984), Ct. determined a probationer only has a limited Fifth Amendment right against self-incrimination. He could only invoke the Fifth Amendment if he were exposed to future prosecution & not if the answer simply is in relation to the alleged probation violation. The granting of use immunity removed the danger of future prosecution against D & thus the Tr. Ct. did not err in ordering D to answer the question. The testimony also did not run afoul of Ind. Code 35-37-3-3, the immunity statute, which states any evidence given "may not be used in any criminal proceeding against that witness" as a probation revocation hearing is not a criminal proceeding. Held, judgment affirmed.

TITLE: Carter v. U.S.
INDEX NO.: O.5.c.
CITE: 684 A.2d 331 (D.C. Cir. 1996)
SUBJECT: Immunity for Defense Witnesses
HOLDING: Where witness called by the D asserts 5th Amendment privilege, D.C. Court of Appeals holds that judges should consider only whether there is any legal impediment to prosecution, not likelihood of prosecution, in accepting this assertion. However, where D shows that a witness' privileged testimony is material, exculpatory, not cumulative, and unobtainable from another source, government must have a legitimate reason for not granting the witness immunity. This stems from Government's constitutional duty to disclose exculpatory evidence. In order to determine whether legitimate reason for withholding immunity exists, government may have to afford limited immunity for purposes of "debriefing" to determine possibility of perjury, future prosecution, and other matters. If government cannot provide legitimate reason for depriving D of material, exculpatory, non-cumulative and otherwise unobtainable testimony, D's right to fair trial will compel court to dismiss charges.

TITLE: Chanley v. State
INDEX NO.: O.5.c.
CITE: (1st Dist. 2/19/90), Ind. App., 550 N.E.2d 764
SUBJECT: Contempt - petition for use immunity during pretrial discovery
HOLDING: Tr. Ct. properly granted state's petition for use immunity for D when D refused to testify during pretrial deposition in another criminal proceeding. D appeals 2 contempt citations, based on his refusal to answer questions at deposition & at trial in criminal prosecution of another individual. After D refused to answer question at deposition, state petitioned for use immunity, & D objected that state had no standing to do so at that point. Petition was granted, & when deposition was resumed, D again refused to answer question. Tr. Ct. found D in contempt & sentenced him to 6 months in jail. Later at trial of same individual, D refused to answer certain questions resulting in 2d 6-month sentence. On appeal, D argues that state's original petition for use immunity was premature. According to D, when petition was filed, state had no reason to believe that D would refuse to testify at trial, & thus state had no standing to seek use immunity. D further argues that since first petition was invalid, state's "renewal" of petition at trial was invalid, & thus both contempt findings are void. Ct. App. disagrees, finding that D's refusal to answer questions at deposition gave state sufficient reason to believe that D would refuse to testify at trial. It is not speculative to assume that D's counsel & prosecutor would be seeking same or similar information at trial as at deposition, & that if D refused to answer questions on behalf of individual D, he would likewise refuse to answer them when asked by prosecutor. First petition for use immunity was valid, & consequently so was renewal at trial, & D's contempt citations are valid. Held, contempt findings affirmed.

TITLE: Cox v. State
INDEX NO.: O.5.c.
CITE: (5/19/86), Ind., 493 N.E.2d 151
SUBJECT: Immunity - contempt; refusal to testify
HOLDING: Tr. Ct. did not err in holding witness in contempt following grant of use immunity & witness' refusal to testify. Here, D argues coercive effect was to compel witness' testimony. Ct. reviews present record as well as factual basis of In re Contempt Findings Against Schultz, App., 428 N.E.2d 1284 & finds cases nearly identical. Ct. cites at length from latter case; grant of immunity need only extend protection commensurate with that afforded by privilege against compulsory self-incrimination. Kastigar v. US (1972), 406 U.S. 441, 92 S.Ct. 1653, L.Ed.2d 212. Grant of immunity is sufficient to supplant this privilege once witness has been protected against use of compelled answers & evidence derived therefrom. Lefkowitz v. Turley (1973), 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274. Ct. in Schultz found use immunity constitutionally sufficient. 428 N.E.2d 1284 at 1288-89. Ct. finds no error in granting of immunity or in finding witness in contempt. Held, conviction affirmed.

RELATED CASES: Wilson, 988 N.E.2d 1211 (Ind. Ct. App. 2013) (Indiana constitutional privilege against self-incrimination does not require transactional immunity); Matter of Cudworth, App., 815 N.E.2d 1019 (Tr. Ct. properly found D in contempt for failing to testify after being given use immunity; Tr. Ct. had authority to provide use immunity for D's trial which was taking place in another county & D did not purge himself from contempt when, prior to State resting, he offered to testify).

TITLE: Douglas v. Alabama
INDEX NO.: O.5.c.
CITE: 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965)
SUBJECT: Witness immunity - refusal to testify; confederate's assertion of 5th Amend
HOLDING: Prosecutor called to stand D's alleged accomplice, who had been convicted but was appealing & therefore refused to testify, asserting 5th Amend. privilege. Tr. Ct. ruled that his conviction barred his reliance on privilege & permitted prosecutor to examine witness. Prosecutor, under guise of cross- examination to refresh witness's recollection, read from witness's alleged confession & repeatedly asked witness if he had made these statements. Witness continued to claim 5th Amend. Held, since evidence "tended to show only that [co-D] made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of [co-D] to test truth of statement itself." Inferences from witness' refusal to answer added critical weight to prosecution's case in form not subject to cross-examination, & thus unfairly prejudiced D. Held, conviction reversed.

TITLE: Furrer v. State
INDEX NO.: O.5.c.
CITE: (2nd Dist., 4-23-99), Ind. App., 709 N.E.2d 744
SUBJECT: Immunity statute protects against prosecution for past perjurious statements
HOLDING: On interlocutory appeal. Tr. Ct. did not err in ordering complaining witness (CW) to testify in battery case in exchange for grant of use immunity offered by State. CW argued that implementation of use immunity statute, Ind. Code 35-37-3-3, violated her constitutional privilege against self-incrimination because State will force her to testify either that she gave false information in her first statement to police or that she perjured herself in later sworn statement to prosecutor's office recanting her prior statement. CW erroneously interpreted Ind. Code 35-37-3-3(b) to mean that use immunity will protect her from prosecution for false informing, but not for perjury in her statement to prosecutors. Although use immunity will not protect witness who testifies untruthfully at trial, prosecution may not use compelled testimony to support prosecution for perjury antedating immunity order. In re Contempt Findings Against Schultz, App., 428 N.E.2d 1284. Held, judgment affirmed.

TITLE: J.J. v. State
INDEX NO.: O.5.c.
CITE: (4th Dist.,12-14-06), Ind. App., 858 N.E.2d 244
SUBJECT: IAC - failure to inform jury of State witness' use immunity
HOLDING: Trial counsel was ineffective for failing to inform jury that State's witness, who was Co-D, was granted use immunity. To effectively analyze a witness's credibility, a jury should have before it all the relevant circumstances which cause or induce the witness to testify, including the rewards for such testimony & any promises by the State or prosecuting attorney to grant immunity. Here, the D was charged with Burglary & Theft, & the Co-D was given use immunity to testify against the D. Although in opening the prosecutor stated that the Co-D was a liar, the prosecutor called the Co-D who unexpectedly stated that both he & the D were involved in the burglary. In closing, the prosecutor stated that the Co-D was much more candid than expected & that his testimony had "cooked" him. Due to no strategic reason, the defense attorney failed to tell the jury that the Co-D could not get in trouble due to his testimony because he was granted use immunity. Although circumstantial evidence would be sufficient to support a conviction, it is also open to inferences of nonguilt. Thus, the credibility of the Co-D was of great consequence to the jury's consideration. Held, rehearing granted & the denial of the D's petition for post-conviction relief reversed; Robb, J., concurring on basis that trial counsel was also ineffective for failing to object to the State calling the Co-D for the sole purpose of impeaching him, as evidenced by the State's opening argument.

TITLE: Moore v. State
INDEX NO.: O.5.c.
CITE: (5th Dist., 10-4-95), Ind. App., 655 N.E.2d 1251
SUBJECT: Use immunity - refusal to compel did not deny due process
HOLDING: Tr. Ct.'s refusal to compel State to grant use immunity to defense witness did not deny D due process. To establish insanity or intoxication defense, D requested that State grant use immunity to his drug supplier in order for supplier to testify as to exactly what drug D ingested at time of offense. State, not D, has authority under Ind. Code 35-37-3-2 to grant immunity. Walters v. State (1979), Ind., 394 N.E.2d 154. Although D has no due process right to compel immunization of defense witnesses, State cannot use its power to interfere with defense's presentation of its case or to prevent its witnesses from testifying. Bubb v. State (1982), App., 434 N.E.2d 120. Here, D failed to show that his drug supplier refused to testify without immunity or because of threats made by prosecutor. Further, D did not show that supplier's testimony would have been exculpatory or led to exculpatory evidence. Without making showing of effects drug might have had on D, D did not show that he had defense that was unavailable only because State did not grant use immunity to his supplier. Held, judgment affirmed.

RELATED CASES: Ritchie, 809 N.E.2d 259 (mere fact that State charged accomplice after D listed him as a witness does not establish that State purposely did this to distort fact-finding in D's case).

TITLE: Reed v. State
INDEX NO.: O.5.c.
CITE: (6-8-01), Ind., 748 N.E.2d 381
SUBJECT: Denial of confrontation/cross-examination - reversible error
HOLDING: In murder prosecution, D was denied his Sixth Amendment right of confrontation when Tr. Ct. refused to compel deposition of prosecution witness. Witness's credibility was critical & his testimony was cornerstone of prosecution's case against D. All other evidence & testimony against D was circumstantial. Record established that State's continued & vigorous opposition to D's efforts to depose witness & its refusal to grant use immunity until moments before D took stand at trial constituted interference with D's case. Baxter v. State, 727 N.E.2d 429 (Ind. 2000); Bubb v. State, 434 N.E.2d 120 (Ind. Ct. App 1982). Inability to depose witness left D with no opportunity to expose several inconsistencies in D's various accounts. At very least, D was entitled to access to D prior to trial to have opportunity to develop & pin down witness's testimony or at least have sworn testimony to impeach any variances.

Ct. also found reversible error in Tr. Ct.'s refusal to permit D to impeach witness with his videotaped interview with prosecutors. Tr. Ct.'s refusal to play tape interfered with D's right to cross-examine D & impeach his inconsistent testimony & therefore prejudiced him. Although D was able to cross-examine D on specific inconsistent statements, that impeachment was compromised by Tr.Cts.' refusal to play tape for jury. Held, conviction reversed & remanded for new trial.

TITLE: Resnover v. State
INDEX NO.: O.5.c.
CITE: (5/27/87), Ind., 507 N.E.2d 1382
SUBJECT: Witness immunity - refusal to answer; hearing
HOLDING: In capital murder case, D claimed Tr. Ct. erred by failing to conduct hearing pursuant to Ind. Code 35-37-3-1 to determine if invocation of privilege was justified. Predecessor statute, Ind. Code 35-6-3-1, existed solely for benefit of State. Wallace, 426 N.E.2d 34. Further, witness' assertion at PCR hearing of her 5th Amend. privilege against self-incrimination did not deny D right of compulsory process & due process of law, even if Tr. Ct. was required to conduct hearing to determine if invocation of privilege was justified, where ct. permitted extensive discussion & made inquiry into propriety of witness' assertion of privilege.

In rejecting D's claim of due process violation based on State's refusal to offer witness immunity, Court found that neither State nor Tr. Ct. was compelled to grant use immunity to witness. State has responsibility of prosecuting crimes & State, not D, must have authority to grant immunity. Held, no error.

RELATED CASES: Martin, 535 N.E.2d 493 (Tr. Ct. sufficiently complied with Ind. Code 35-37-3-1(a), requiring it to conduct hearing if witness refuses to answer question when it permitted witness, who was expected to take 5th Amend., to be called in absence of jury & concluded hearing after it became apparent that witness did intend to invoke 5th Amend.).

TITLE: In re S.H.
INDEX NO.: O.5.c.
CITE: (3/27/2013), 984 N.E.2d 630 (Ind. 2013)
SUBJECT: Self-incrimination - prosecutor cannot request use immunity before filing charges
HOLDING: Where no charges have been filed and no grand jury has been convened, a prosecutor may subpoena witnesses pursuant to Ind. Code 33-39-1-4. However, if those witnesses invoke their constitutional right against self-incrimination, the prosecutor cannot petition for use immunity and compel them to testify without first filing charges or convening a grand jury. Court disapproved of any contradictory language in In re Order for Indiana Bell Telephone to Disclose Records, 274 Ind. 131, 409 N.E.2d 1089 (1980), which involved a subpoena duces tecum to a non-party, not the target of the prosecutor's investigation.

In this case, sooon after S.C. gave birth at home, the father (S.H.) took S.C. and the infant to the hospital because S.C. was bleeding and infant had multiple puncture wounds. The prosecutor petitioned for subpoenas to compel the parents to testify about the circumstances of the infant's birth, but Tr. Ct. granted the parents' motion to quash the subpoenas on Fifth Amendment grounds. Tr. Ct. then erroneously granted State's request to grant use immunity to parents and ordered them to testify. Held, transfer granted, Court of Appeals' opinion at 969 N.E.2d 1048 vacated, judgment reversed and remanded for further proceedings.

TITLE: State v. I.T.

INDEX NO.: O.5.c.

CITE: (3/12/2014), 4 N.E.3d 1139 (Ind. 2014)

SUBJECT: Protection against self-incrimination - Juvenile Mental Health Statute confers use and derivative use immunity

HOLDING: Juvenile Mental Health Statute, Ind. Code § 31-32-2-2.5(b), bars a child's statement to a mental health evaluator from being admitted into evidence to prove delinquency, except for purposes of a probation revocation proceeding or a modification of disposition decree. Here, during course of treatment ordered as a condition of probation, I.T. revealed additional delinquent behavior that would be Class B felony child molesting if committed by an adult, and those admissions were used by the State to file additional allegations of delinquency.

Court held that evidence derived from I.T.'s statements was protected by use immunity and derivative use immunity to encourage the child to participate "openly in treatment to reduce their likelihood of reoffending." By participating in treatment, the juvenile may reveal previously unknown victims, and the statutory reporting requirements (to the Indiana Department of Child Services for investigation) enable victims to receive treatment as well. Moreover, the juvenile's statements may be used for purposes other than proving delinquency, such as at a CHINS hearing, at an expungement hearing, or at a Sex-Offender Registry hearing. And the Juvenile Mental Health Statute does not prevent the State from introducing evidence of a juvenile's delinquency, if it can "affirmative[ly] . . . prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Thus, Tr. Ct. properly granted I.T.'s motion to dismiss the State's new delinquency petition, because Juvenile Mental Health Statute prohibited using I.T.'s statements to evaluator or evidence derived from those statements. Held, transfer granted, Court of Appeals' opinion at 986 N.E.2d 280 vacated, judgment affirmed.

TITLE: Tucker v. State
INDEX NO.: O.5.c.
CITE: (3/10/89), Ind., 534 N.E.2d 1111
SUBJECT: Witness immunity - refusal to testify; hearing
HOLDING: In drug case, Tr. Ct. committed reversible error in permitting confederate to be called to testify before jury when all parties knew in advance that he would invoke 5th Amend. Tr. Ct. further erred in refusing to admonish jury to disregard situation. Natural, even inevitable, inference which is raised in jury's mind when alleged accomplice refuses to testify is that withheld testimony would be damaging, not only to witness, but also to D. Aubrey, 310 N.E.2d 556. When accomplice refuses to testify in presence of jury, D is entitled to have jury admonished. Held, convictions reversed.

RELATED CASES: Eubanks, App., 729 N.E.2d 201 (trial counsel was not ineffective for failing to object and ask for admonishment when prosecutor called accomplices knowing that they would assert 5th Amend. privilege; D was not prejudiced due to overwhelming evidence; Darden, J., dissenting); Johnson, 719 N.E.2d 812 (counsel was not ineffective in failing to ask Tr. Ct. for immediate limiting instruction when alleged accomplice called by State refused to testify; whether to ask for instruction is decision for defense to make); Steele, 672 N.E.2d 1348 (mistrial not required in rape prosecution when co-D refused, in jury's presence, to testify after State called co-D to stand; State believed co-D would testify because of grant of immunity, jury only heard co-D indicate he would not testify, not that he would assert 5th Amend., & Tr. Ct. admonished jury to disregard co-D's appearance on stand); Cox, 493 N.E.2d 151; Hovis, 455 N.E.2d 577; Pitman, 436 N.E.2d 74.

O. EVIDENCE

O.5. Witnesses

O.5.d. Direct examination

TITLE: Forrester v. State
INDEX NO.: O.5.d.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: Direct examination - testimony re item not in evidence
HOLDING: Regardless of admissibility of evidence, witness may testify concerning it. Dixon 62 N.E.2d 629 (witnesses may testify that certain items were stolen, even if items not admitted into evidence); Holler 38 N.E.2d 242 (witnesses allowed to identify plate similar to ones alleged stolen, which were not available). Here, D contends Tr. Ct. erred in not granting his motion for mistrial or alternatively his request to admonish jury not to consider witness' references to jacket allegedly worn by D on night of attack & when arrested. Jacket was identified by victim & by police officer as belonging to D. Jacket was not allowed to be entered into evidence. Held, no error.

O. EVIDENCE

O.5. Witnesses

O.5.d.1. In general

TITLE: Hedges v. State
INDEX NO.: O.5.d.1.
CITE: (12/27/82), Ind., 443 N.E.2d 62
SUBJECT: Direct examination - narrative testimony
HOLDING: Tr. Ct. has discretion to permit testimony in narrative form rather than by question & answer. Muehlman v. Keilman 272 N.E.2d 591; Temple 195 N.E.2d 850. Here, D objected to question "what happened next;" objection overruled. As testimony progressed, D objected again; objection sustained. Held, no error.

TITLE: Moritz v. State
INDEX NO.: O.5.d.1.
CITE: (1st Dist. 6/26/84), Ind. App., 465 N.E.2d 748
SUBJECT: Direct examination - speculation re thought processes
HOLDING: Tr. Ct. did not err in excluding evidence during D's direct testimony. Here, state's objection (hearsay) was sustained. Reversible error cannot be predicated upon ruling on evidentiary objection if sustainable on any basis. Citation omitted. D was asked his impression of person's willingness to deal with chemical salesman. Witnesses may not speculate re thought processes of another person. Clay 346 N.E.2d 574. Held, no error.

TITLE: Walker v. State
INDEX NO.: O.5.d.1.
CITE: (12/16/82), Ind., 442 N.E.2d 696
SUBJECT: Direct examination - scope of
HOLDING: Scope of cross-exam (CX) is limited to subject matter covered in direct exam (DX); scope of re-CX is limited to scope of re-DX. Dean 398 N.E.2d 1270; Skaggs 293 N.E.2d 781; Potter 274 N.E.2d 699. Here, on re-DX, defense counsel asked witness to robbery if police ever conducted lineup. State objected (question outside scope of re-DX over photographic identification); sustained. Held, no error in ruling on objection. Conviction affirmed.

O. EVIDENCE

O.5. Witnesses

O.5.d.2. Leading questions

TITLE: Ingram v. State
INDEX NO.: O.5.d.2.
CITE: (4th Dist. 5/14/84), Ind. App., 463 N.E.2d 483
SUBJECT: Direct examination - leading questions (LQs)
HOLDING: Tr. Ct. did not err in allowing prosecution to ask LQs of robbery victim who was special education student. Here, prosecutor's questions referred to victim's background/relationship with D. Questions were phrased to allow victim to testify coherently & did not control substance of testimony. See Borosh, App., 336 N.E.2d 409. Victim aptly narrated events surrounding robbery without suggestion by prosecutor. Tr. Ct. has discretion to allow LQs (Hedges 443 N.E.2d 62); reversible error requires showing of abuse of discretion (King 460 N.E.2d 947; Bell 366 N.E.2d 1156; Siblisk 336 N.E.2d 650). LQs on direct may be proper where witness is young child/weak-minded adult. See McCormick Evidence Section 6, p.10 (2d ed. 1972); accord Johnson 359 N.E.2d 525. Held, no error.

RELATED CASES: Stinson, 126 N.E.3d 915 (Ind. Ct. App. 2019) (no error in allowing leading questions of victim who had sustained injuries which left him with limited ability to speak); Jones, 982 N.E.2d 417 (Ind. Ct. App 2013) (State's leading questions were permissible because they did not address material facts in dispute.); Vance, App., 860 N.E.2d 617 (although prosecutor's question embodied a material fact & was therefore leading, it was merely cumulative of witness's testimony on cross-examination); Doerner 500 N.E.2d 1178 (case discusses LQs & finds witness did not distort testimony in order to fit it into categories posed by Q); Beland 476 N.E.2d 843 (improper questioning elicited answers cumulative of other testimony, including D's own confession; held, harmless error); Wagner 474 N.E.2d 476 (no error in denial of defense counsel's request to ask LQ on direct exam of own witness); Gentry 471 N.E.2d 263 (to constitute reversible error, D must also show substantial injury by answer to LQ, *citing* Hedges; held, no error in allowing prosecutor to ask victim LQ re her address (where crime occurred), Q was intended in good faith to refresh victim's memory by directing her attention to persons/occurrences); Fielden 437 N.E.2d 986 (hostile witness may be asked LQs).

TITLE: Thompson v. State
INDEX NO.: O.5.d.2.
CITE: (12/26/96), Ind., 674 N.E.2d 1307
SUBJECT: Direct examination of witness - leading questions
HOLDING: Tr. Ct. did not commit reversible error in permitting State to ask rape victim how far D pushed his penis insider her. Leading questions should not be used on direct examination of witness except as may be necessary to develop witness's testimony. I.R.E. 611(c). While purpose of rule is to prevent substitution of language of attorney for thoughts of witness as to material facts in dispute, use in rule of term "should" indicates that use of leading questions rests within Tr. Ct.'s discretion. Garrison, 589 N.E.2d 1156. Held, question was not improperly leading where previous questions had been asked & answered without objection covering substance of answer given to question objected to.

RELATED CASES: Stinson, 126 N.E.3d 915 (Ind. Ct. App. 2019) (no error to allow the State to ask attempted murder victim leading questions on direct examination due to the injuries the victim sustained from D).

TITLE: Williams v. State
INDEX NO.: O.5.d.2.
CITE: (8-18-00), Ind., 733 N.E.2d 919
SUBJECT: Direct examination - erroneous leading questions
HOLDING: Leading questions should not be used on direct examination of witness except as may be necessary to develop witness's testimony. Ind. Evidence Rule 611(c). State argued that leading questions were proper in this case because witness was reluctant to testify for fear of her own safety & that of her children. Ct. noted that apprehensive & vulnerable emotional state of witness may well increase his or her susceptibility to suggestive questions & impair accuracy of resulting responses. Such circumstances amplify wisdom of proscription against leading questions. However, in this case Ct. declined to reverse conviction because Tr. Ct.'s action in permitting numerous leading questions, even if erroneous, was not inconsistent with substantial justice & did not affect substantial rights of D. Held, conviction affirmed, remanded for new sentencing hearing.

RELATED CASES: Lampkins, 778 N.E.2d 1248 (no error in permitting State to ask leading questions of its witness, D's cousin, who testified that he had misled police when he was first arrested to protect D).

O. EVIDENCE

O.5. Witnesses

O.5.d.3. Refreshing recollection

TITLE: Gaby v. State
INDEX NO.: O.5.d.3.
CITE: (06-07-11), 949 N.E.2d 870 (Ind. Ct. App 2011)
SUBJECT: Refreshing recollection - witness must not remember
HOLDING: Tr. Ct. abused its direction by permitting State to allow complaining witness (CW) to read the transcript of her previous statement when the witness had not testified that she could not recall the information sought by the prosecutor. Although Evidence Rule 612(a) clearly envisions the use of writings to refresh a witness's memory, it does not address the method by which the witness's memory may be refreshed. Regardless, the witness must first state that he does not recall the information sought by the questioner. Thompson v. State, 728 N.E.2d 155 (Ind. 2000).

Here, D was being tried for child molest. On direct, CW testified that D did not make any noises or statements during the molestation. Nor did he touch her anywhere besides the vagina or make her touch him. Over objection, the prosecutor then had CW "refresh her memory" by reading her prior statement to the police where she claimed D did make heavy breathing noises, spoke to her, touched her chest and made her touch his penis. But CW never testified to any lack of recollection regarding the molestation before the prosecutor showed her the transcript. Rather, the witness simply gave answers the prosecutor neither expected nor desired. Moreover, the prosecutor was not impeaching the witness with her prior inconsistent statements because State did not want to attack her credibility. Their case rested on her credibility. Allowing the State to get her previous statements into evidence under the guise of refreshing her recollection was error. Held, judgment reversed due to the cumulative prejudicial effect caused by this error and prosecutorial misconduct.

TITLE: Gault v. State
INDEX NO.: O.5.d.3.
CITE: (01-15-08), Ind., 878 N.E.2d 1260
SUBJECT: Refreshing recollection - adverse party's access to document used to refresh testimony
HOLDING: Tr. Ct. committed harmless error by refusing to allow D to inspect a police report being used to refresh a police officer's testimony on cross-examination. If, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying. Indiana Rule of Evidence 612(a). Consistent with the purpose behind Rule 612, an adverse party entitled to access to the document or object is a party "whose interests could be harmed by the testimony that was based on refreshed memory." 28 Wright & Gold, Federal Practice and Procedure, ' 6183, at 451.

Here, as D was cross-examining the police officer, officer stated that reviewing his report would refresh his memory. The prosecutor handed the report to D's counsel, who handed it to the officer. The fact that the refreshing of testimony occurred during D's questioning does not change the fact that D was the party who could be harmed from the police officer's testimony and therefore was the adverse party. Moreover, the State waived any work product privilege it might have had in the report when it failed to object to the handing over of the report to defense counsel for the police officer's use. Thus, Tr. Ct. should have allowed D access to the report. However, under the circumstances of this case, the failure to do so was harmless. Held, transfer granted,Court of Appeals' opinion at 861 N.E.2d 728 vacated except for that portion disposing of D's insufficiency claim, which is summarily affirmed, and Tr. Ct.'s judgment affirmed.

TITLE: Gaunt v. State
INDEX NO.: O.5.d.3.
CITE: (12/30/83), Ind., 457 N.E.2d 211
SUBJECT: Direct examination - refreshing recollection; foundation; timeliness
HOLDING: Tr. Ct. did not err in permitting state to use S.P.'s deposition to refresh his memory, despite fact deposition was taken more than a year after crime occurred. Clark (1853), 4 Ind. 156 sets forth foundation requirements for using written memorandum to refresh recollection of forgetful witness: (1) written memorandum; (2) written either by himself or another; (3) at or near time of occurrence; (4) memorandum cannot be substituted for recollection of witness - witness must be able to inspect writing, recall facts previously known & testify to such facts as being within own personal knowledge. See Carter, App., 412 N.E.2d 825. Here, at trial S.P. was asked & answered affirmatively if he remembered giving deposition on 6/24/81, & if memory of events was better on that day than on day of trial. S.P. identified deposition as true copy of testimony given & stated he had reviewed it. Whether deposition was unreliable because remote was issue for Tr. Ct. to resolve. Held, no abuse of discretion.

RELATED CASES: Buck 453 N.E.2d 993.

TITLE: Hutcherson v. State
INDEX NO.: O.5.d.3.
CITE: (04-30-12), 966 N.E.2d 766 (Ind. Ct. App 2012)
SUBJECT: Refreshing recollection - illiterate witness; right to confrontation
HOLDING: Prosecutor's reading aloud illiterate witness's prior statement in order to refresh the witness=s memory did not constitute reversible error. When a witness claims he cannot recall a prior statement, a party may seek to refresh the witness's memory by handing the witness his prior statement, asking him to examine the writing and then asking whether such examination has refreshed his memory. A witness's act of reading his own prior statement under Evidence Rule 612 is foundational in the sense that before proceeding, counsel must establish whether such reading was successful in refreshing the witness's memory.

Here, the witness who did not remember his prior statement was illiterate. Therefore, the prosecutor could not merely hand him the statement to read silently as contemplated by Evidence Rule 612. Rather, the prosecutor read the prior statement aloud to D. Although the better method would have been for Tr. Ct. to excuse the jury prior to the actual reading of the statement in order to avoid potential prejudice, due to the cumulative nature of the evidence contained in the witness=s prior statement, D was not prejudiced when it was read aloud to the jury. Further, the reading aloud did not violate D=s right to confront the witness face-to-face. Although Lee could not initially recall any specifics concerning the night of the incident, he eventually testified that he could remember about half of the information contained in his prior statement. A D's right to confront and cross-examine a witness does not guarantee the quality of the cross-examination. Held, judgment affirmed.

TITLE: Mitchem v. State
INDEX NO.: O.5.d.3.
CITE: (2/10/87), Ind., 503 N.E.2d 889
SUBJECT: Refreshing recollection - use of exhibit on CX
HOLDING: Although prosecutor properly withheld evidence because it was not beneficial to D (prosecutor also argued work product), once exhibit was marked for identification & handed to witness to refresh his memory & witness then testified from his refreshed memory, defense counsel was entitled to see contents of exhibit & to use exhibit in his cross-examination. Here, D's friend made statement to prosecutor that he had agreed to lie for D. This statement was used to refresh witness' memory. Ct. reviews entire record & finds error harmless. Held, conviction affirmed. Dickson DISSENTS without opinion.

TITLE: Robinson v. State
INDEX NO.: O.5.d.3.
CITE: (6/15/94), Ind. App., 634 N.E.2d 1367
SUBJECT: Witness - refreshing recollection
HOLDING: In dealing in cocaine case, D claimed Tr. Ct. committed reversible error in allowing State to use police report to refresh informant's memory regarding drug transaction. As general rule, it is acceptable to revive memory of witness by calling his attention to any thing, event, or fact having relation to subject under inquiry. Ward, 438 N.E.2d 966. Memory of forgetful witness may be refreshed by written memorandum prepared by himself or someone else. Gaunt, 457 N.E.2d 211. Here, record shows State made 2 attempts to refresh informant's memory of 2 drug transactions. Assuming, arguendo, Tr. Ct. committed error in permitting State to refresh informant's memory of first transaction, there was no reversible error because D was acquitted of that offense. Further, D withdrew any objection to refreshment of memory regarding 2nd transaction. Held, conviction affirmed.

Note: See I.R.E. 612 (governing writings or objects used to refresh memory).

RELATED CASES: Thompson, 728 N.E.2d 155 (because D handed State witness his statement to police to refresh his recollection, State was entitled to admit only part of witness's statement relating to incident under IRE 612 (c)); Wilson, 511 N.E.2d 1014 (written memorandum may be used to refresh recollection of forgetful witness, but memorandum cannot be substituted for memory of witness); Poore, 501 N.E.2d 1058.

TITLE: Thompson v. State
INDEX NO.: O.5.d.3.
CITE: (5-19-00), Ind., 728 N.E.2d 155
SUBJECT: Use of deposition to refresh witness's recollection
HOLDING: Tr. Ct. erred in refusing to permit D to use State witness's deposition to refresh her recollection on cross-examination. Although Indiana Evidence Rule 612(a) clearly envisions use of writings to refresh witness's memory, it does not address method by which witness's memory may be refreshed. Simple colloquy is all that is required under Rule 612. Witness must first state that he does not recall information sought by questioner. Witness should be directed to examine writing & be asked whether that examination has refreshed his memory. If witness answers negatively, examiner must find another route to extracting testimony or cease line of questioning. Evidence Rule 612 does not suggest, much less require, that writing used to refresh witness's memory must have been prepared by witness. Ct. has long held that writing used to refresh witness's memory could be prepared by witness or another person. Gaunt, 457 N.E.2d 211. Because D did not include deposition in record, made no offer of proof, & pointed to nothing in deposition that was not covered in witness's testimony, there was no showing that Tr. Ct.'s erroneous ruling affected his substantial rights.

Ct. also held that, because D handed another State witness his statement to police to refresh witness's recollection about timing of conversation about weapon, State was entitled to admit part of witness's statement relating to that incident under Ind. Evidence Rule 612(c). However, Tr. Ct. committed harmless error in admitting remainder of statement over D's objection. Only those portions of statement which relate to testimony of witness are admissible under Rule 612(c). Held, conviction affirmed.

RELATED CASES: Cole, 970 N.E.2d 779 (Ind. Ct. App 2012) (although there is no requirement that the item used to refresh the witness's memory must have been written by the witness, this evidence would have been merely cumulative of the nurse's testimony from earlier in the trial re: how much witness had had to drink).

O. EVIDENCE

O.5. Witnesses

O.5.e. Cross-examination (impeachment, see O.6; confrontation, see J.9)

TITLE: Hovis v. State
INDEX NO.: O.5.e.
CITE: (10/31/83), Ind., 455 N.E.2d 577
SUBJECT: Cross-examination - witness claims 5th Amend
HOLDING: D was not denied his 6th Amend right to confront & crossexamine witness (convicted in earlier trial of murder; D on trial for same murder) who claimed 5th Amend privilege, not to testify where judge, after holding witness in contempt admonished jury to disregard incident & to draw no inferences, favorable or unfavorable, on behalf of D or state. Judge refused to give final instruction containing same admonishment. Here, D cites Douglas v. AL (1965), 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (D's inability to cross-examine witness, who claimed 5th Amend & whose entire pretrial statement was read to him while on the stand, as to statement denied D his 6th Amend rights); Aubrey 310 N.E.2d 556 (conviction reversed where judge refused to admonish jury to disregard accomplice-witness' refusal to answer questions). Refusal to testify may well be equivalent in jury's mind of testimony. Douglas; Aubrey. Ct. concludes admonishment was sufficient to cure any prejudice. Pitman 436 N.E.2d 74 does not require both admonishment & final jury instruction. Held, no error.

RELATED CASES: Townsend, 616 N.E.2d 47, reversed on other grounds, 632 N.E.2d 727 (Where D did not attempt to prevent State from calling co-D as witness, did not object when she took stand, & did not request jury admonishment after she invoked 5th Amendment, calling her as witness was not reversible error. State did not know of her intention to invoke 5th amendment, unlike situation in Tucker (1989), 534 N.E.2d 1110).

TITLE: Hudgins v. State
INDEX NO.: O.5.e.
CITE: (8/12/83), Ind., 451 N.E.2d 1087
SUBJECT: Cross-examination (CX) - sua sponte strike of Q & A
HOLDING: Tr. Ct. did not err in sua sponte striking Q & A & admonishing jury to disregard Q & A where D informed Ct. he did not intend to submit evidence on question. Here, D, on trial for robbery, asked victim on CX whether victim had made sexual advances toward D. Victim answered: "No." Scope & extent of CX is within discretion of Tr. judge. Smith 439 N.E.2d 634; Ingram 426 N.E.2d 18. Sua sponte action does not automatically constitute advocacy. US v. Wright (CA7 1976), 542 F.2d 975; Bruce 375 N.E.2d 1042. Tr. Ct. need not wait for objection before correcting improper procedure. CX must lie within scope of direct exam. Solomon 439 N.E.2d 570; Ingram. A party may not establish defense by CXing witness beyond scope of direct unless it is otherwise germane to issues to be tried. Solomon; Ringham 308 N.E.2d 863. Since D demonstrated neither basis nor relevancy of question, it was properly stricken. Held, no error.

TITLE: Lycan v. State
INDEX NO.: O.5.e.
CITE: (9/25/96), Ind. App., 671 N.E.2d 447
SUBJECT: Witness - scope of cross-examination
HOLDING: Tr. Ct. did not err in failing to limit State's cross-examination of witness. Proper scope of cross-examination is matter within Tr. Ct.'s discretion, & appellate courts will reverse only upon showing of abuse of that discretion. Marbley, 461 N.E.2d 1102. Generally, cross-examination must be directed toward issues raised upon direct examination. However, scope of permissible cross-examination extends to all phases of subject matter covered in direct examination & is not limited to those parts specifically included in direct examiner's questions. Talley, App., 400 N.E.2d 1167. Where D raises issue on direct, he cannot thereafter close door on subject at his convenience. Here, State was entitled, on cross-examination of detective, to question him concerning extensive list of weapons purchased by D from local gun dealer, after D, on direct examination, elicited testimony that D had purchased weapon similar to, but with serial number different from, weapon that killed victim. Held, no error.

RELATED CASES: Sturma, App., 683 N.E.2d 606 (Tr. Ct. has discretionary power to allow cross-examination to exceed scope of direct examination; thus, tr.ct's statement that State "didn't have to stay within the scope of direct examination on cross-examination" did not show clear abuse of discretion).

TITLE: Marbley v. State
INDEX NO.: O.5.e.
CITE: (4/19/84), Ind., 461 N.E.2d 1102
SUBJECT: Cross-examination - limit on length
HOLDING: Considering limited scope of pathologist's testimony, D was not denied his right to confrontation by Tr. Ct.'s limitation on length of cross-exam. Here, Tr. Ct. told D he would have 40 minutes to cross-examine pathologist who had performed autopsy in order to expedite pathologist's return to Seattle, WA. Judge curtailed cross-exam at 5 p.m. (after 55 minutes), telling D he'd had ample time to cross-examine witness & admonishing him for wasting his time on irrelevant matters. D contends he was deprived of opportunity to ask pathologist certain questions. Tr. judge should control extent of cross-exam; reversal necessary only upon abuse of discretion (McNew 391 N.E.2d 607; Smith 388 N.E.2d 484), which requires D to show prejudice. Held, no error.

RELATED CASES: Heald 492 N.E.2d 671 (Crim L 489; Tr. Ct. did not err in limiting each side to 20-minute cross-examination of each psychiatrist on issue of D's sanity, in light of amount of time Tr. Ct. spent in establishing foundation for each expert's opinion & their qualifications; Dixon, joined by Shepard, offers strong DISSENT).

TITLE: McCarthy v. State
INDEX NO.: O.5.e.
CITE: (6-28-01), Ind., 749 N.E.2d 528
SUBJECT: Cross-examination - harmless error; admission of 404(b) evidence
HOLDING: In child molesting prosecution, where D was teacher charged with molesting two students, it was error to deny D the opportunity to cross-examine complaining witness's (CW's) mother about having filed a Notice of Tort Claim against school. Denial of opportunity to impeach a witness for bias is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). State will be required to show beyond a reasonable doubt that error did not contribute to the jury's verdict. Error in this case was harmless, because D was allowed to cross-examine the mother about discrepancies between her testimony & that of her daughter, & about having helped her daughter prepare her trial testimony, effectively demonstrating her bias & implying that the accusations were fabricated. Held, transfer granted, judgment affirmed.

RELATED CASES: Seketa, App., 817 N.E.2d 690 (Tr. Ct. correctly limited cross-examination of the victim regarding a civil tort claim he had filed in relation to jailhouse beating in this case. D brought out that the tort claim had been filed & little more existed that the jury could learn about this civil lawsuit); Brown, 770 N.E.2d 275 (erroneous exclusion of accomplice's testimony that he accidently struck victim in head & did not intend to kill her was not harmless).

TITLE: McIntyre v. State
INDEX NO.: O.5.e.
CITE: (2d Dist. 2/23/84), Ind. App., 460 N.E.2d 162
SUBJECT: Cross-examination (CX) - compelled testimony
HOLDING: Tr. Ct. erred in refusing to permit D to CX child molesting victim (D's granddaughter) concerning fact she testified only after threatened with punishment for contempt. Tr. Ct.'s exercise of discretion in regulating scope of CX must be consistent with due process. Higginbotham, App., 427 N.E.2d 896; Haeger, App., 390 N.E.2d 239. D must be granted full, adequate & effective CX. Id. Any doubt re legitimacy of CX "must be resolved in favor of the questioner." Sears 282 N.E.2d 807; Higginbotham. "Exposure of a witness' motivation in testifying is a proper & important function of the constitutionally protect right of CX." Davis v. AK (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347. Threats, promises of leniency, duress, or coercion of any kind upon witness must be revealed to jury. See Newman 334 N.E.2d 684. Here, jury was entitled to know of witness' reluctance to testify & to draw its own conclusions about that reluctance. Held, conviction reversed.

TITLE: McKinley v. State
INDEX NO.: O.5.e.
CITE: (4th Dist. 6/25/84), Ind. App., 465 N.E.2d 742
SUBJECT: Cross-examination (CX) - improper curtailment
HOLDING: Tr. Ct. erred in restricting D's CX of state's key witness (Officer Rarey) & in preventing D from presenting evidence of incidents surrounding his arrest (severe beating by officer) & later charge of attempted battery on police officer. Here, D & officer gave conflicting accounts of incident (who forced who off road). Officer (dressed in blue jeans & sport shirt) approached D's car; D contends officer jumped out of pickup truck & charged toward him with an angry look on his face. D picked up tire iron to protect himself/ wife but dropped it when officer pulled gun & shouted, he was an officer. Officer then beat D severely (broken rib, broken jaw). Officer arrested D for DWI. D, bleeding profusely, was taken to station & given breathalyzer. Officer cursed D & spit on him at station. Another officer told Rarey he should file charge against D to protect himself. DWI charge was dropped; present charge was filed. D's first trial ended in hung jury. State offered to dismiss charge if D dropped civil lawsuit against officer/municipality. Ct. finds evidence re beating admissible under 4 theories: (1) res gestae; (2) insight into motives/intentions of parties; (3) buttressed D's self-defense testimony; (4) motive for bias & prejudice of officer (who faced civil suit & departmental discipline if beating proven). Evidence re officer's behavior at station should have been admitted to, impeach officer's credibility. Higginbotham, App., 427 N.E.2d 896. Held, reversed.

RELATED CASES: Reed 491 N.E.2d 182 (Witn 271(1); Tr. Ct. properly restricted D's CX re precise location of confidential VIN; it was not relevant); Komyatti 490 N.E.2d 279 (Witn 345(4); only total denial of CX re W's credibility would amount to unconstitutional denial of right to CX, *citing* Rinard 394 N.E.2d 160; here, substantial amount of evidence was admitted from which jury could have found motive & bias; held, no error).

TITLE: Morrison v. State
INDEX NO.: O.5.e.
CITE: (10-10-97), Ind., 686 N.E.2d 817
SUBJECT: Proper limitation on cross-examination
HOLDING: Tr. Ct. did not deprive D of fair trial by prohibiting D from cross-examining police officer for purpose of showing there was no trace of evidence linking D in victim's apartment, except in kitchen & bedroom. If evidence is of marginal relevance, Tr. Ct. has authority to prohibit cross-examination on that topic. Ingram, 547 N.E.2d 823. Individual who aids another person to commit crime is as guilty as actual perpetrator. Pike, 532 N.E.2d 3. Here, D's theory of defense was that co-D fired fatal shots at victim. However, D admitted in open Ct. that he was in victim's home with co-D to harm victim. Thus, whether co-D fired fatal shots was immaterial to D's guilt, & Tr. Ct.'s limitation on cross examination was not abuse of discretion. Held, conviction affirmed.

TITLE: Nasser v. State
INDEX NO.: O.5.e.
CITE: (2nd Dist., 2-7-95), Ind. App., 646 N.E.2d 673
SUBJECT: Limiting cross-examination - no error
HOLDING: Tr. Ct. did not err in refusing to permit D to cross examine operator of breath test regarding pharmacology of alcohol absorption. At trial, State offered this witness to testify concerning her role in accident investigation & about her Intoxilyzer test administration but did not attempt to tender her as expert in pharmacology of alcohol absorption. When D cross-examined witness regarding training she received at Department of Toxicology, Tr. Ct. sustained State's objection on grounds that she was not offered as expert witness. Cross-examination must lie within scope of direct, Hudgings v. State, Ind., 451 N.E.2d 1087. D was not precluded from calling operator of test as his own witness to elicit testimony he sought. Lambert v. State, Ind., 516 N.E.2d 16. Even if Tr. Ct. had committed error in limiting scope of cross-examination, D failed to show any prejudice, thus error was harmless. Small v. State, Ind. App., 632 N.E.2d 779. Held, judgment affirmed.

RELATED CASES: Orta, 940 N.E. 2d 370 (Ind. Ct. App 2011) (Tr. Ct. properly limited scope of D's cross examination to prevent questioning doctor about effect of voluntary intoxication on D's ability to form requisite mental state for murder).

TITLE: Oatts v. State

INDEX NO.: O.5.e.

CITE: (2nd Dist., 01-20-09), Ind. App., 899 N.E.2d 714

SUBJECT: Rape shield rule - Sixth Amendment & admissibility of CW's prior sex acts under sexual innocence inference theory

HOLDING: In child molesting prosecution, Tr. Ct. did not abuse its discretion by excluding evidence that complaining witness (CW) had previously viewed an allegedly pornographic video and had previously been molested by a different person. Evidence did not fall into one of the enumerated exceptions of Ind. Evidence Rule 412 or under common law prior false allegation exception, thus exclusion was not erroneous under Indiana's Rape Shield Statute and Rule. Tague v. State, 539 N.E.2d 480 (Ind. 1989).

When considering effect of precluded evidence on D's Sixth Amendment rights, Court initially determines relevance of evidence. Borosh v. State, 336 N.E.2d 409, 412 (Ind. Ct. App 1975). Here, there was no evidence other than CW's testimony that sexual contact occurred. D argued that excluded evidence was relevant to demonstrate that CW had knowledge of nature of sex acts and the investigative process, i.e., the sexual innocence inference theory. Acknowledging split in jurisdictions as to whether this theory of logical relevance can trump Rape Shield Law, Court held that D has burden to show that prior sexual act occurred and that it was sufficiently similar to present sexual act to give the victim the knowledge to imagine the molestation charge.

In this case, D failed to show that either the prior molestation or the videotape were similar to the current offense. Defense attorney only stated that two alleged touchings occurred while CW was in bed. D also failed to show that evidence was relevant or that the probative value outweighed the prejudicial effect. Thus, Court could not say that exclusion of evidence violated D's right to cross examine witnesses under Sixth Amendment of U.S. Constitution and Article 1, ' 13 of Indiana Constitution. Held, judgment affirmed.

TITLE: Pierce v. State
INDEX NO.: O.5.e.
CITE: (2nd Dist., 09-28-94), Ind. App., 640 N.E.2d 730
SUBJECT: Restriction of cross-exam proper, prejudice to witness
HOLDING: Although generally confrontation right to cross-examination gives Ds right to inquire as to witness' address, Smith v. Illinois (1968), 390 U.S. 131, Crull, 540 N.E.2d 1195, right is not absolute. Here, witness was currently in prison on unrelated cocaine-dealing conviction. Dealing cocaine is not proper conviction for impeachment of witness' credibility, & Tr. Ct. prohibited questioning witness regarding his address on ground jury would be prejudiced against his testimony because he was in prison. Tr. Ct. did not err in limiting cross-exam because prejudice is appropriate basis for restriction of such exam. Ct. noted that even if D's right to confrontation took precedence over possibility of prejudice to witness, here there was no harm because witness' testimony actually supported D's theory of defense, intoxication. Held, conviction affirmed.

RELATED CASES: Taylor, App., 677 N.E.2d 56 (Tr. Ct. properly determined that there was valid basis to exclude evidence of informant's address on cross-examination; D was not prejudiced by exclusion of address & there was sufficient evidence to support finding that informant would be put in jeopardy by revealing his address).

TITLE: Pigg v. State
INDEX NO.: O.5.e.
CITE: (11-23-92), Ind., 603 N.E.2d 154
SUBJECT: Questioning informant regarding address
HOLDING: Ind. S.Ct. affirmed holding in Pigg, App., 591 N.E.2d 582, regarding ability to question informant regarding address, & set forth procedure for Tr. Ct. to follow. Ct. App. ruled that D was entitled to new trial because Tr. Ct. had not allowed him on cross-examination (CX) to question informant concerning his address. Although D had argued that information was starting point for investigating impeachment information, Tr. Ct. upheld State's objection on relevancy grounds, & because D had opportunity to depose informant & seek discovery before trial. In reversing Tr. Ct., Ct. App. relied on Smith v. Illinois (1968), 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, & Crull, 540 N.E.2d 1195, & found State failed necessary showing that information was irrelevant. Right of CX is fundamental under U.S. & Ind. Constitutions, & although regulation of CX is discretionary with Ct., any doubt as to legitimacy of question should be resolved in favor of questioner. Asking witness for address has been found to be legitimate question for CX, Smith & Crull, supra. Ct. distinguished Johnson, 518 N.E.2d 1073, & Corbin, 563 N.E.2d 86. In Johnson, CX was limited only after in camera hearing where Ct. found there was reasonable fear that disclosure would endanger informant's safety. In Corbin there was no such hearing, but Tr. Ct.'s limiting of address information to city of residence was upheld because that witness' testimony was merely consistent with testimony of others. In instant case there was no in camera hearing, & informant was only witness to alleged controlled buys from D. Ct. found that abuse of discretion could be shown without D demonstrating prejudice when informant was only witness to critical acts & supplied crucial testimony to D's conviction. D's are presumptively entitled to CX witnesses concerning their addresses. Questioning may be limited if State can show proper reason such as reasonable fear of danger to witness. Determination of whether information must be disclosed in face of relevancy objection should be made by Tr. Ct. after in camera hearing where Ct. obtains information necessary to make meaningful decision. That decision is then reviewed for abuse of discretion, with burden to show abuse on party seeking information. During hearing, information requested must be made known which would give D necessary information to show prejudice. Because there was no such hearing in present case, D was entitled to new trial. **Note:** In Crull, cited with approval by Ct., informant first refused to answer, & State objected on grounds witness was frightened to give information. Ct. held hearing outside presence of jury, & witness claimed he'd been advised of threats, & that questions would jeopardize his safety. Tr. Ct. refused defense offer to have hearing on whether actual threats existed, & precluded testimony. Ind. S.Ct. found even this amount of information inadequate to preclude questioning, because specific information was not divulged to Tr. Ct. & there was no finding that informant had any reason other than speculation to be fearful. Therefore, it appears that State's showing of danger, etc., must be strong & specific to overcome presumption of D's right to question.

RELATED CASES: Dickerson, 957 N.E.2d 1055 (Ind. Ct. App 2011) (where D was friends with CI, took CI's deposition and did not establish how identifying CI by number rather than name hindered his defense and cross-examination, Tr. Ct.'s decision to allow CI to testify anonymously was not fundamental error); Morrison, App., 609 N.E.2d 1155.

TITLE: Solomon v. State
INDEX NO.: O.5.e.
CITE: (9/1/82), Ind., 439 N.E.2d 570
SUBJECT: Cross-examination (CX) - scope
HOLDING: A party is permitted to test credibility of witness on CX. However, it is improper to CX witness about matter not within scope of direct exam (DX). Ringham 308 N.E.2d 863; Carter, App., 422 N.E.2d 742. Scope & extent of CX are largely within discretion of Tr. Ct. Dean 398 N.E.2d 1270. Dean holds permissible CX extends to all phases of subject matter covered on DX & may include any matter which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by witness. See also, Wofford 394 N.E.2d 100; Pearish 344 N.E.2d 296. Here, defense CX sought to elicit details of prosecutrix's 3-year pursuit of Cincinnati Reds player in order to show rape prosecution was initiated to revenge insulting remarks made by D regarding prosecutrix's past failures with men. State's objection on relevancy grounds was sustained. Held, no error in restricting CX.

RELATED CASES: Foust 489 N.E.2d 39 (D may not be CXed re uncharged crime; effect of such CX may be devastating to defense, *citing* Bryant 301 N.E.2d 179; held, harmless error because such CX did not contribute to guilty verdict); Seaton 478 N.E.2d 51 (Witn 278; Tr. Ct. did not abuse discretion by allowing prosecutor to CX defense witness (co-D) re details of crime where only testimony on direct was witness' name); Wallace 449 N.E.2d 1066 (Witn 270(2); no error in sustaining state's objection to D's CX of victim re prior arrests; D could not show by extrinsic evidence that victim answered irrelevant questions untruthfully); Hiner, App., 470 N.E.2d 363 (Crim L 330(1); no error in curtailing D's CX to rape prosecutrix re her drug usage prior to date of rape; Ct. distinguishes Lusher, App., 390 N.E.2d 702 (abuse of discretion to prevent D from presenting evidence of witness' hallucinations, caused by heavy drug usage); Staton DISSENTS).

TITLE: Sweet v. State
INDEX NO.: O.5.e.
CITE: (10/14/86), Ind., 498 N.E.2d 924
SUBJECT: Witnesses - cross-examination; specificity
HOLDING: Tr. Ct. did not err in prohibiting cross-examination as to witness' prior drug usage. D argues state "opened the door" by asking witness questions on direct exam concerning his knowledge of illegal drugs. D contends he had right to inquire whether prior drug usage influenced witness' perception abilities during controlled buys. Right of full/adequate/effective cross-examination is fundamental/essential to fair trial. Haeger, App., 390 N.E.2d 239. Tr. Ct. has discretion to determine scope of cross-examination & only clear abuse of that discretion warrants reversal. Blankenship 462 N.E.2d 1311. Ct. finds evidentiary goal of D's questions was vague & contained potential to distract/prejudice jury. D's questions were: "You've never used any other drugs other than pot?" & "Did you ever use hard drugs?" Held, no abuse of discretion.

TITLE: Thakkar v. State
INDEX NO.: O.5.e.
CITE: (5th Dist., 05-17-93), Ind. App., 613 N.E.2d 453
SUBJECT: Erroneous restriction of cross-examination (CX)
HOLDING: In prosecution for performing illegal abortion, Tr. Ct. erroneously prevented D's CX of complaining witness concerning her medical history of miscarriages, because evidence was relevant to establish defense that pregnancy was terminated by miscarriage rather than abortion. D was also prevented from having expert testify that woman who miscarries once is more likely to miscarry again, & from eliciting testimony that complaining witness had told others that she had miscarried baby D was accused of aborting. Evidence was excluded as being irrelevant. Although regulation of CX is within discretion of Tr. Ct., D also is entitled to present his theory of defense. Evidence excluded was relevant to defense, & it was error for Tr. Ct. to exclude it. Because conviction on this count was reversed because of SL violation, however, error was harmless, see, card at L.7.b. **Note:** Ct. discussed error because D argued that it, coupled with other errors, had cumulative effect affecting all convictions. In discussing other conduct of Tr. Ct., Ct. found judge's actions improper in several regards, but concluded they did not rise to level to require new trial. Discussion may be helpful to those dealing with issues relating to irregularity of trial.

TITLE: Turnbow v. State
INDEX NO.: O.5.e.
CITE: (1st Dist., 07-19-94), Ind. App., 637 N.E.2d 1329
SUBJECT: Limitation of cross-examination (CX) not improper
HOLDING: Tr. Ct. did not err in denying D right on CX to question victim's brother concerning his address. Although Ds are "presumptively entitled to cross-examine a witness concerning such matters as the witness's address," (Pigg v. State, Ind., 603 N.E.2d 154), right to CX is not absolute if there is good reason to prevent questioning. Here there was no danger to witness from disclosure of his address, but witness was currently in jail because of charges of DWS & failure to pay fine. Ct. found D's motive in questioning witness concerning address was to put before jury fact witness had been arrested. Witness had not yet been convicted & evidence of specific acts of misconduct not reduced to conviction are not admissible for impeachment. It is improper to allow CX of witness about prior bad acts if evidence is directed only to credibility & character of witness. Because D did not demonstrate legitimate purpose for evidence that would make it admissible, Tr. Ct. did not err in excluding evidence. Held, conviction affirmed.

O. EVIDENCE

O.5. Witnesses

O.5.f. Redirect/recross

TITLE: Cronk v. State
INDEX NO.: O.5.f.
CITE: (1st Dist. 1/11/83), Ind. App., 443 N.E.2d 882
SUBJECT: Redirect examination - prior statements
HOLDING: Once D inquires, into subject on cross-exam, state is entitled to prove matter further on redirect to avert false or misleading impression. Estep 394 N.E.2d 111. Once party opens subject on cross-exam, opposing party may pursue that subject on redirect exam. Woodford 405 N.E.2d 522. Here, D's statements to police at stationhouse were inadmissible because no Miranda warnings given. D opened the door to these statements during cross-exam; therefore, prosecutor was justified in bringing them out on redirect. Ct. holds D, having opened issue could not have it closed at his convenience. Drollinger 409 N.E.2d 1084. Held, no error.

RELATED CASES: Flowers 481 N.E.2d 100 (Witn 414(2); Tr. Ct. did not err in permitting W's prior inconsistent statements to be introduced during redirect; D's CX raised inference that earlier statements varied; statements were admissible during redirect to meet such inference).

TITLE: Walker v. State
INDEX NO.: O.5.f.
CITE: (12/16/82), Ind., 442 N.E.2d 696
SUBJECT: Redirect/recross examination - scope of
HOLDING: Scope of cross-exam (CX) is limited to subject matter covered in direct exam (DX); scope of re-CX is limited to scope of re-DX. Dean 398 N.E.2d 1270; Skaggs 293 N.E.2d 781; Potter 274 N.E.2d 699. Here, on re-DX, defense counsel asked witness to robbery if police ever conducted lineup. State objected (question outside scope of re-DX over photographic identification); sustained. Held, no error in ruling on objection. Conviction affirmed.

RELATED CASES: Lycan, App., 671 N.E.2d 447 (evidence concerning silencer device found in D's van at crime scene was properly admitted on redirect examination, to rebut implication that D's possession of pistol was legal); Jones 600 N.E.2d 544 (it was not error for Ct. to allow State to exceed scope of direct examination on re-direct exam, where defense elicits testimony on cross-exam which could leave false or misleading impression, & where defense is allowed to pursue testimony on re-cross exam); May 502 N.E.2d 96 (Witn 286(2,3), 288(1); Tr. Ct. properly sustained objection to defense attorney's redirect exam of D; attorney was asking same questions previously answered on direct exam); Bowling 493 N.E.2d 783 (Q re W's animosity toward D was beyond scope of redirect exam & properly disallowed); Staggers 477 N.E.2d 539 (Crim L 1170 (5); although prosecutor's questioning was beyond scope of CX & should not have been allowed, D has failed to show harm in that several other witnesses also testified to same information that exhibits had not been altered).

O. EVIDENCE

O.6. Impeachment

TITLE: Crull v. State
INDEX NO.: O.6.
CITE: (7/7/89), Ind., 540 N.E.2d 1195
SUBJECT: Confrontation - re residence & employment
HOLDING: Tr. Ct. erred in denying D right to cross-examine (C-X) civilian informant, state's key witness, as to current residence, employment, & other personal matters that would allow jury to judge his credibility in light of his environment. D was charged with dealing in cocaine, & informant's testimony made up state's entire case. At trial, informant refused to answer questions on C-X re residence, employment, & other personal matters, stating that he was afraid of possible connections D & his family might have. State objected to questions on relevancy grounds, & Tr. Ct. sustained, stating that it was difficult to imagine what relevancy this information might have. Tr. Ct. stated that it did not have slightest idea whether informant's fears were well founded & rejected D's request to conduct hearing into matter. U.S. S. Ct. decided same issue 60 years ago in Alford v. US (1931), 282 U.S.687, 51 S. Ct. 218, 75 L.Ed. 624. Alford Ct. found it permissible purpose of C-X that witness be identified with his community in effort to elicit independent testimony as to reputation for truthfulness in community; to allow jury to place informant's testimony in context of his environment; & to allow D to probe for evidence of bias. Counsel need not show that C-X would necessarily bring out facts tending to discredit testimony but should be allowed reasonable latitude. Again, in Smith v. IL (1968), 390 U.S. 129, 88 S. Ct. 748, 19 L.Ed.2d 956, U.S. S. Ct. found denial of such C-X to be error which cannot be harmless. Where informant claims that divulging such information would endanger him, Tr. Ct. must conduct in camera hearing into matter. Palermo v. US (CA7 1969), 410 F.2d 468. See also Johnson 518 N.E.2d 1073. Held, reversed & remanded.

TITLE: Hughes v. State
INDEX NO.: O.6.
CITE: 4 S.W.3d 1 (Tex.Crim.App. 1999)
SUBJECT: Proper Test for Party's Right to Impeach Own Witness
HOLDING: Where party called and impeached witness primarily for purpose of placing otherwise inadmissible evidence before jury, court should assess admissibility of statements used to impeach witness under R.E. 403 rather than R.E. 607. D here was charged with sex offense against his step-daughter, who claimed to have told her mother about the offense. At pretrial hearing, mother had denied telling caseworkers that she had confronted D with child's allegation and that he had responded by confessing to her. At trial state called mother, who again denied making any statements inculpating D. Tr. Ct. allowed state to impeach witness by calling two caseworkers who testified that mother had told them D admitted molesting child. On appeal, D argues that state called mother solely for purpose of impeaching her with testimony of caseworkers, which would otherwise have been inadmissible. Court reverses, and writes to explain how Tr. Ct.s should respond when a party proposes to impeach a witness it called despite knowing in advance that witness would testify unfavorably. R.E. 607 permits parties to impeach their own witnesses, but makes no reference to any consideration which should be given to party's knowledge that witness would testify unfavorably. Court writes that this knowledge should be considered pursuant to balancing test of R.E. 403, which weighs probative value of evidence against danger of unfair prejudice. Here, because state called mother knowing she would deny that D had confessed to her, the only probative value of the hearsay testimony from the caseworkers derives from jurors' improper consideration of it for its truth. Its probative value is substantially outweighed by its prejudicial effect. (Court also rejected government's argument that statements were statements against interest.)

TITLE: Ohler v. U.S.

INDEX NO.: O.6.

CITE: 529 U.S. 753, 120 S.Ct. 1851 (2000)

SUBJECT: Right to testify, impeachment, rulings in limine, waiver, Evidence Rule 609, drawing the sting

HOLDING: Before Ohler's trial on drug charges, the court ruled in limine that if she testified, a prior felony drug conviction would be admissible as impeachment evidence under Federal Rule 609(a)(1). The D testified at trial and, to draw the sting from the anticipated impeachment evidence, admitted to the prior conviction on direct examination. Held, a D who introduces evidence of a prior, impeaching conviction on direct examination waives the right to challenge the admission of the evidence on appeal.

TITLE: U.S. v. Alexius
INDEX NO.: O.6.
CITE: 76 F.3d 642 (5th Cir. 1996)
SUBJECT: Pending Charges Against State's Witness - Cross-Examination
HOLDING: Tr. Ct. abused its discretion by not allowing D to inquire into pending charges against state's witness to elicit evidence that witness might be testifying in order to curry favor with government even in absence of formal agreement and despite witness' assertions to contrary. Courts may not speculate as to whether jury, as sole judge of credibility, would have accepted D's line of reasoning had he been able to fully present it. Cf. Ebb v. State (Md. Ct. App. 2/14/96), No. 117-1994 (Absent evidence that witness believes that he or she will receive favorable treatment in exchange for testimony, Tr. Ct. may prohibit cross-examination on pending charges).

O. EVIDENCE

O.6. Impeachment

O.6.a. In general

TITLE: Appleton v. State
INDEX NO.: O.6.a.
CITE: (1-8-01), Ind., 740 N.E.2d 122
SUBJECT: Inappropriate impeachment - line-by-line recitation of pretrial statements
HOLDING: After State witness testified that D had not even been present at scene of crime, Tr. Ct. erred in permitting prosecution to impeach this witness by reading line-by-line from prior inconsistent pretrial statement in which witness described D's participation. Only prior inconsistent statements made under oath can be considered as substantive evidence. Ind. Evidence Rule 801(d); Modesitt v. State, 578 N.E.2d 649 (Ind. 1991). Party may impeach witness by extrinsic evidence of prior inconsistent statement, Ind. Evidence Rule 613(b), but once witness has admitted inconsistent prior statement, she has impeached herself, & further evidence is unnecessary for impeachment purposes. Pruitt v. State, 622 N.E.2d 469 (Ind. 1993). Moreover, party is prohibited from placing witness on stand when party's sole purpose in doing so is to present otherwise inadmissible evidence cloaked as impeachment. Impson v. State, 721 N.E.2d 1275 (Ind. Ct. App 2000).

Here, Ct. could not definitively declare that State placed its witness on stand for sole purpose of impeaching him. Nevertheless, once witness admitted that he made police statement prior to trial that was inconsistent with his testimony regarding D's involvement in incident, impeachment was complete. Reciting segments of D's pretrial statement was thus superfluous. Even though jury heard evidence they should not have during State's line-by-line recitation of witness's pretrial statements, error was harmless because essentially same evidence was properly before jury through another witness's testimony. Held, judgment affirmed.

RELATED CASES: Hall, 177 N.E.3d 1183 (Ind. 2021) (as in Pruitt, 622 N.E.2d 469 (1993), D's attempt to introduce extrinsic evidence of Co-D's statement to police to further impeach Co-D was unnecessary; jury was read Co-D's deposition in its entirety and heard him admit and explain that he lied in his first statement to police; further, Co-D had an opportunity to explain or deny this inconsistent statement during his deposition, and he explained that he lied to avoid or lessen his potential culpability in victim's murder); Weedman, 21 N.E.3d 873 552 (Ind. Ct. App. 2014) (given overwhelming evidence against D, there is no substantial likelihood that use of hearsay testimony during closing argument as substantive evidence rather than impeachment evidence contributed to the conviction); Herron, 10 N.E.3d 552 (Ind. Ct. App. 2014) (reversible error where court allowed State to call D's girlfriend solely to impeach line-by-line her testimony with a pretrial statement); Malloch, 980 N.E.2d 887 (Ind. Ct. App 2012) (prosecutor committed error by having witness read two prior statements where she admitted making the first prior inconsistent statement and did not even testify inconsistently with second statement; but, error did not place D in position of grave peril and was harmless); Julian, App., 811 N.E.2d 392 (Tr. Ct. did not abuse its discretion in allowing State to call J.H. as a key witness & then impeach him with his prior inconsistent statements; Tr. Ct. Sustained D's objection to line-by-line impeachment and advised State to redirect its questions to give J.H. the opportunity to explain his inconsistencies); Kendall, App., 790 N.E.2d 122 (no error to allow State to play witness's out-of-court statement to jury as substantive evidence without

limiting instruction, because statement was admissible under Rule 801(d)); Martin, App., 779 N.E.2d 1235 (it was harmless error for Tr. Ct. to allow State to use impeachment evidence as substantive evidence by leading witness through prior statement); Edmond, App., 790 N.E.2d 141 (D failed to establish that State witness's testimony was offered for sole purpose of impeaching him with his prior unsworn statement in which he identified D as shooter; also, witness's trial testimony was not significantly different from his prior statement to police).

TITLE: Benson v. State
INDEX NO.: O.6.a.
CITE: (2-15-02), Ind., 762 N.E.2d 748
SUBJECT: Impeachment by unsubstantiated allegation - harmless error
HOLDING: Tr. Ct. erred in allowing State to confront its own witness with unsubstantiated suggestion that his reluctance to testify was due to threats received while witness was incarcerated. Over objection, Tr. Ct. also permitted State to present testimony of police detective that testifying inmates in some cases are subjected to abuse & physical assault by other inmates. *Citing* Cox v. State, 422 N.E.2d 357 (Ind. Ct. App 1981), D argued that State's questioning constituted extremely prejudicial evidentiary harpoon because there was no evidence that D, who was also incarcerated in same jail, even knew that witness was also incarcerated there.

Ind. Professional Conduct Rule 3.4(e) prohibits lawyer from alluding at trial to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. Ct. noted that there was no evidence that witness received any threats whatsoever, which makes State's trial strategy particularly questionable. Prosecutor's questions & evidence encouraged jury to unfairly speculate, without any evidentiary support or foundation, that any unfavorable aspects of witness's testimony were attributable to his fear of inmate retribution. To condone this improper trial tactic would put at risk credibility of every witness who testifies during incarceration. Any party seeking to discredit such a witness would be able, without substantiation, to unfairly imply to jury that witness was being less than truthful. Despite State's improper tactics, Ct. declined to order new trial because these tactics did not affect D's substantial rights & were not inconsistent with substantial justice. Held, conviction affirmed.

RELATED CASES: Kien, App., 782 N.E.2d 398 (D's substantial rights were not violated by erroneous admission of evidence on collateral matter of D writing two suicide notes).

TITLE: Bridwell v. State
INDEX NO.: O.6.a.
CITE: (4th Dist. 5/18/87), Ind. App., 507 N.E.2d 645
SUBJECT: Impeachment - acts not reduced to conviction
HOLDING: Tr. Ct. did not err in refusing to permit D to cross-examine police officer concerning omissions officer made in his application for employment & in excluding application from evidence. Here, officer did not reveal all of his arrests for illegal conduct, including possession of marijuana. Officer was assigned to investigate use & sale of controlled substances on Terre Haute Fire Department. Ct. distinguishes case from Poore 401 N.E.2d 1138. In Poore, D questioned witness re prior statement either to refresh his recollection or to impeach his truth & veracity by showing that in-Ct. testimony was inconsistent with prior statement. Questions were permissible for either purpose. In this case, D was attempting to impeach officer's truth & veracity by prior act of misconduct which had not been reduced to conviction. Although such impeachment would have been permitted under federal rules, it is not permitted in IN. Randall 455 N.E.2d 916. Federal Cts. (including 7th Cir.) & legal scholars are in agreement that perjury, false statements & false swearing are probative of truthfulness or untruthfulness. [Citations omitted.] Ct. notes this case illustrates that it is inappropriate to prohibit totally such impeachment. Many jurors may reasonably give more weight to testimony of police officer, presuming that person selected for position is not only a law abiding citizen, but also an honest one. This officer was not. Jury's knowledge of this fact may have had an impact on weight it gave officer's testimony, particularly because conviction rested in substantial way upon officer's testimony. Nonetheless, a Ct. is compelled to follow IN's ruling precedent & hold that Tr. Ct. properly excluded evidence & limited cross-examination. Held, conviction affirmed.

qaqq

TITLE: Cox v. State
INDEX NO.: O.6.a.
CITE: (5/19/86), Ind., 493 N.E.2d 151
SUBJECT: Impeachment - own witness (W)
HOLDING: Tr. Ct. did not err in permitting state to call W & impeach him with prior inconsistent statements. Here, D contends state's only purpose for calling W was to set up impeachment. D cites federal cases holding this is impermissible. Ind. Code 34-1-14-15 provides party producing W shall not be allowed to impeach credibility by evidence of bad character, unless it was indispensable that parties should produce W, or in case of manifest surprise, when party shall have this right; however, party in all cases may contradict W by other evidence & by showing that W made statements different from present testimony. See Slayton 481 N.E.2d 1300 & Taylor 469 N.E.2d 735. Ct. in Slayton stated Ind. Code 34-1-14-15 (now repealed) creates exception to general common law rule against impeaching own W. Ct. dismisses D's contention that state failed to establish Drake was hostile W. Record shows state engaged in extensive examination of W. Denial during direct examination of existence of prior incriminating statement is sufficient to permit impeachment under Slayton. Held, no error.

NOTE: Ind.R.Evid. 607, without limitations, provides that "credibility of a witness may be attacked by any party, including the party calling the witness." Thus, any remaining adherence to traditional rule that prohibits impeaching one's own witness has been abandoned. The Committee Commentary to I.R.E. 607 provides that a Tr. Ct. should prevent a party from impeaching the party's own witness if the court finds the proponent of impeachment has an improper motive.

TITLE: Gaston v. State
INDEX NO.: O.6.a.
CITE: (4th Dist. 7/26/83), Ind. App., 451 N.E.2d 360
SUBJECT: Impeachment - collateral matters
HOLDING: Tr. Ct. erred in admitting testimony of alibi witness' prior arrest by investigating officer as it was irrelevant to show bias against state. No nexus existed between arrest & state's conclusion of bias; thus, testimony improperly impeached witness & tended to prejudice jury against D. Evidence of person's arrest may not be considered as affecting credibility. Banks 351 N.E.2d 4. Held, conviction reversed on other grounds.

RELATED CASES: Hudson 496 N.E.2d 1286 (Witn 270(2); collateral matters cannot be made basis for impeachment, *citing* Smith 455 N.E.2d 346; party is generally bound by witness' answer on cross-examination to question relating solely to collateral matter; here, prosecutor's questioning of witness re PCR petition challenging guilty plea had no relevance to whether witness gave prior inconsistent statements at guilty plea hearing; however, D fails to show substantial rights were prejudiced, so reversal is not required).

TITLE: Gaston v. State
INDEX NO.: O.6.a.
CITE: (4th Dist. 7/26/83), Ind. App., 451 N.E.2d 360
SUBJECT: Impeachment - prior drug use inadmissible in dealing case
HOLDING: Tr. Ct. erred in allowing state to introduce impeachment testimony regarding D's use of cocaine during his trial for cocaine dealing. Impeachment of D/witness by matters collateral to case is prohibited. Brown 417 N.E.2d 333. A matter is collateral if party seeking to introduce it for purposes of contradiction would not be entitled to prove it as part of case-in-chief. Brown; Bryant 301 N.E.2d 179. Here, state could not have introduced evidence of D's use of cocaine as proof D sold cocaine to informant. Evidence of criminal activity not reduced to conviction is inadmissible if irrelevant/produced merely to show D's unsavory character. Kerlin 265 N.E.2d 22; Meeks 234 N.E.2d 629; Coker, App., 399 N.E.2d 857. When entrapment is not an issue, evidence tending to prove D's propensity to commit crime charged is inadmissible. Evidence of prior criminal activity may be an issue if it: (1) shows common scheme/plan, Manuel 370 N.E.2d 906; (2) establishes D's guilty knowledge/motive, Coker; (3) shows witness was under influence of drugs at time of offense, Lusher, App., 390 N.E.2d 702; or (4) addresses unrelated incident after other party opens door, Gilliam 383 N.E.2d 297. Ct. finds above exceptions inapplicable. Manuel (evidence of unrelated drug use/transaction admissible to show common scheme/plan) cannot be read as creating unqualified exception for narcotics cases. Held, conviction reversed.

TITLE: Griffin v. State
INDEX NO.: O.6.a.
CITE: (9-7-01), Ind., 754 N.E.2d 899
SUBJECT: Hearsay cloaked as impeachment
HOLDING: Trial Ct. properly declined to permit D to call his former attorney to testify that another person confessed to the crime. The person who allegedly confessed had taken the stand & in response to defense questioning, denied having confessed to D's former attorney. Citing Ind. Evidence Rule 607, which allows party to attack his or her own witness's credibility, & Rule 613(b), which allows evidence of prior inconsistent statements, D argued that he should have been allowed to elicit testimony from former attorney that witness had confessed to crime. Ct. disagreed, noting that under Rule 607, a party is forbidden from placing witness on stand when party's sole purpose in doing so is to present otherwise inadmissible evidence cloaked as impeachment. Appleton v. State, 740 N.E.2d 122 (Ind.2001). Here, defense called witness solely to create opportunity to impeach him with attorney's otherwise inadmissible hearsay testimony. Held, transfer granted, judgment affirmed.

RELATED CASES: Griffin, 763 N.E.2d 450 (on rehearing, Ct. rejected D's claim that Chambers v. Mississippi, 410 U.S. 284, stands for proposition that exclusion of hearsay evidence about single confession, standing alone, violates federal due process; see full review at O.14).

TITLE: Henson v. State
INDEX NO.: O.6.a.
CITE: (4th Dist. 11/30/88), Ind. App., 530 N.E.2d 768
SUBJECT: Impeachment - collateral matters improper
HOLDING: Tr. Ct. erred in admitting rebuttal testimony concerning D's adulterous affairs. D was convicted of voluntary manslaughter in killing of her husband. D testified at trial. On cross-examination, although D properly objected that such questions exceeded scope of direct examination, state was allowed to question D re adulterous acts. Ct. App. notes error in this regard. Further, state was allowed to present rebuttal witnesses who testified about D's alleged adulterous acts. D argues on appeal that this testimony was improper as impeachment evidence because question of adulterous acts was collateral. Impeachment by matters collateral to case is prohibited. Smith 455 N.E.2d 346; Gaston, App., 451 N.E.2d 360. Matter is collateral if party seeking to introduce it would not be entitled to prove it as part of case-in-chief. Id. Testimony re D's adulterous acts was not directly admissible in state's case-in-chief. Further, only purpose for introducing it was to prejudice jury. Use of improper evidence in this manner constitutes "evidentiary harpoon," & its admission is improper. Hooper 443 N.E.2d 822. Held, reversed & remanded.

TITLE: Jackson v. State
INDEX NO.: O.6.a.
CITE: (5-19-00), Ind., 728 N.E.2d 147
SUBJECT: Impeachment on collateral issue prohibited
HOLDING: Following well-established common law rule, Ct. held that Indiana Evid. R. 613 does not authorize use of extrinsic evidence of prior inconsistent statements to impeach witnesses on collateral matters. Here, in murder prosecution, detective was cross-examined by defense counsel regarding conversation detective had with D's sister in which he allegedly surmised that shooting was accidental. Ct. held that Tr. Ct. properly refused to allow defense counsel to call D's sister for purpose of impeaching detective's testimony with prior inconsistent statement. Sister's testimony would have constituted impeachment on collateral matter, which is impermissible under Indiana Evid. R. 613(b). Assuming detective's prior statement to sister was inconsistent with his trial testimony, whether or not detective had ever expressed belief that killing was accidental was collateral matter & also irrelevant. Detective did not & could not properly testify on direct as to either his belief that shooting was accidental or underlying fact that it was an accident. Ind. Evid. R 704(b). Thus, Tr. Ct. did not abuse its discretion in refusing to allow sister's testimony on this non-issue. Held, judgment affirmed.

TITLE: Timmons v. State
INDEX NO.: O.6.a.
CITE: (01/27/92), Ind., 584 N.E.2d 1108
SUBJECT: D's right to present evidence to impeach State's witness
HOLDING: D's constitutional right to present evidence was not infringed upon by limiting testimony of his expert witnesses, offered to impeach State's witnesses by showing interview bias. In trial for sexual deviate conduct with child, child's psychologist, therapist & caseworker all testified concerning child's statements & actions with them. Defense presented 2 psychologists to testify concerning interview bias. One was allowed to testify as to interview bias in general, & psychologist's bias in particular, but was not allowed to testify that interview bias made child's statements unreliable & tainted subsequent interviews by therapist & caseworker. Other witness, expert in field of interpersonal communications, was not allowed to testify that interview bias made child's statements to State's witnesses unreliable. Ct. found exclusion of testimony not erroneous, given its purpose of impeaching credibility of State's witnesses by showing their interview techniques were inadequate & tainted child's responses. Ct. found D fully cross-examined witnesses in this respect & presented testimony on interview bias, & therefore additional testimony would have been cumulative & not helpful to jury. Held conviction affirmed, Dickson & Krahulik J.J., dissenting.

TITLE: Tunstall v. Manning
INDEX NO.: O.6.a.
CITE: 6/26/2016, 124 N.E.3d 1193 (Ind. 2019)
SUBJECT: Use of expert witness's professional disciplinary history to challenge credibility
HOLDING: An expert witness's professional licensure status and the reasons for professional discipline may be admissible to impeach that expert's credibility. But the evidence's admissibility is subject to statutory restrictions and specific rules of evidence. Here, in personal injury case, trial court abused its discretion by excluding evidence that Plaintiff's expert-doctor's medical license had been on probation. But it properly excluded the reasons for his past professional discipline, i.e., misdemeanor convictions and use of "fraud or material deception" to retrieve his license. This evidence is inadmissible under Ind. Evidence Rules 608(b) and 609. Excluding evidence of expert's licensure probation was harmless error. Held, transfer granted, judgment affirmed; Slaughter, J., dissenting, believes exclusion of evidence of expert's past licensure status was not harmless, and would remand for a new damages trial.

TITLE: U.S. v. Medley
INDEX NO.: O.6.a.
CITE: 913 F.2d 1248 (7th Cir. 1990)
SUBJECT: Impeachment - Rule 607; limitations on who may impeach
HOLDING: Gov't did not act in bad faith when it called witness in bribery prosecution then impeached witness when he failed to testify consistently with plea colloquy & grand jury testimony. Gov't is permitted to impeach co-D even though called by gov't. U.S. v. Peterman, 841 F.2d 1474 (10th Cir. 1988); Fed. R. Evid. 607. However, impeachment not permitted where it is merely gov't subterfuge to get before jury evidence otherwise not admissible. U.S. v. Webster, 734 F.2d 1191 (7th cir. 1984). In reviewing propriety of gov't's decision to call witness & then impeach him, Ct. applies "good faith." standard Id. Court affords great deference to trial judge. Here, adverse testimony from co-D came from his own admissions on stand, & impeaching statements from grand jury & plea proceedings were not used to introduce otherwise inadmissible hearsay. Held, conviction affirmed.

RELATED CASES: U.S. v. Kane, 944 F.2d 1248 (7th Cir. 1990) (impeachment not allowed where it is merely gov't subterfuge to get before jury evidence otherwise inadmissible); U.S. v. Ienco, 92 F.3d 564, 568 (7th Cir. 1996) ("Rule 607 abolishes the voucher rule & its corollaries, such as having to declare your witness adverse before cross-examination him or to show that his testimony surprised you.").

O. EVIDENCE

O.6. Impeachment

O.6.b. Prior statements

TITLE: Birdsong v. State
INDEX NO.: O.6.b.
CITE: (9/4/97), Ind., 685 N.E.2d 42
SUBJECT: Impeachment - prior inconsistent statement; rehabilitation
HOLDING: Tr. Ct. did not err in admitting transcript of witness' grand jury testimony. Once witness has been impeached on cross-examination by reference to prior inconsistent written statement, party may rehabilitate its witness on redirect by introducing other pertinent portions of that statement. Evans, 643 N.E.2d 877; Hudgins, 451 N.E.2d 1087. After witness' credibility has been attacked using portions of prior statement, the fact finder "must be permitted to determine for itself the extent of the inconsistencies in context." Id. This proposition must be even more true when alleged discrepancies relate to small details while majority of statements are consistent. Id. When prior statements are used to impeach & rehabilitate, witness they are not hearsay because they are not used to prove truth of matter asserted. Here, D used grand jury testimony to attempt to impeach witness' testimony. State could respond to these attacks on witness' credibility by introducing testimony to put isolated inconsistencies in context. Held, no error in admitting witness' testimony.

RELATED CASES: Bassett, 895 N.E.2d 1201 (if an adversary has made an express or implied charge against the witness of recent fabrication or improper influence or motive, and the prior consistent statement is admissible as substantive evidence of the truth of the matter asserted; if the prior consistent statement was made after the motive to fabricate arose, however, it is only admissible to rehabilitate the witness); Flake, App., 767 N.E.2d 1004 (it was proper for State to rehabilitate its witness using prior consistent statements after being impeached with inconsistencies between trial testimony & deposition); Moreland, App., 701 N.E.2d 288 (Tr. Ct. properly admitted complaining witness's prior consistent statements to rehabilitate her after she was impeached by use of her prior inconsistent statement; Rule 801(d)(1)(B) did not allow admission of statements as substantive evidence because statements were not offered to rebut charge against CW of recent fabrication).

TITLE: Burris v. State
INDEX NO.: O.6.b.
CITE: (2/17/83), Ind., 444 N.E.2d 1187
SUBJECT: Impeachment - prior inconsistent statement
HOLDING: Prosecutor's comment in closing argument that the first time D said he shot decedent in self defense was 1½ years after shooting was permissible because D had made a prior inconsistent statement. Here, D contended prosecutor's comment referred to his post arrest silence, thereby violating Doyle v. OH (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (prosecutor may not impeach D's exculpatory story told for first time at trial by cross-examining D about failure to tell this story to police after receiving Miranda warnings; use of D's post arrest silence in such manner violates due process). Ct. finds Doyle inapplicable where D has made an inconsistent statement. Held, no error.

RELATED CASES: Humphrey, 680 N.E.2d 836 (because witness's prior inconsistent statement was not under oath, it was not admissible under Rule 801(d)(1); however, it was admissible to impeach witness); Dixon, 621 N.E.2d 1152 (Tr. Ct. did not err in allowing officer to testify as to witness' prior inconsistent statement, because testimony was offered to impeach witness after he testified to contrary in Ct. Extrinsic proof of prior inconsistent statements can be admitted for impeachment over hearsay objection, Collins, Ind., 521 N.E.2d 682. Decision in Modesitt, Ind., 578 N.E.2d 649, overruling Patterson, 324 N.E.2d 482, did not change well-established rule allowing use of prior inconsistent statements for impeachment).

TITLE: Dixon v. State
INDEX NO.: O.6.b.
CITE: (05-25-12), 967 N.E.2d 1090 (Ind. Ct. App 2012)
SUBJECT: Impeachment - admission of prior inconsistent statement
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion when it permitted State to introduce extrinsic evidence, in the form of testimony from a police detective, as impeachment of another of State's witnesses. Witness testified that she did not remember or recall telling detective that she saw D get out of his car when he came to scene. Over D's objection, Tr. Ct. allowed detective who took the witness's statement to provide extrinsic impeachment of her testimony, and reading the written transcript of her statement did not refresh her memory. In Dunlap v. State, 761 N.E.2d 837 (Ind. 2002), Court held that, for purposes of Evidence Rule 613(b), a statement at trial of "I am not sure" or "I don't remember" is not necessarily inconsistent with an earlier statement that provides the answer to the question being asked. As in Dunlap, this does not take the decision on whether to admit the detective's testimony and the written version of witness's statement outside the ambit of Tr. Ct.'s discretion to determine inconsistency. Even if Tr. Ct. had abused its discretion, error was harmless because there were eyewitnesses who saw D get out of his car and identified him as the shooter. Held, judgment affirmed.

TITLE: Dunlap v. State
INDEX NO.: O.6.b.
CITE: (1-29-02), Ind., 761 N.E.2d 837
SUBJECT: Exclusion of prior inconsistent statement - no error
HOLDING: In murder prosecution, Tr. Ct. did not err in excluding transcription of tape- recorded statement witness gave to police, which D sought to admit into evidence as prior inconsistent statement. At trial, witness testified that she tried to turn D around but was not sure whether she was holding on to or touching D when shots were fired. In typewritten transcript of her statement to police a year & a half earlier, witness told detective she grabbed D while D was shooting. State objected to admission of transcript, arguing that it was not inconsistent with witness's trial testimony. For purposes of Indiana Evidence Rule 613(b), which permits impeachment of witness by extrinsic evidence of prior inconsistent statement, a statement at trial of "I am not sure" or "I don't remember" is not necessarily inconsistent with an earlier statement that provides answer to question being asked. Ct. considered differences between witness's trial testimony & her statements in transcribed police interview to be within ambit of Tr. Ct.'s discretion to determine inconsistency. Ct. declined to find error in sustaining the State's objection asserting that prior statements were not inconsistent. Held, judgment affirmed; Sullivan, J., dissenting on other grounds.

TITLE: Griffith v. State
INDEX NO.: O.6.b.
CITE: (6/2/2015), 31 N.E.3d 965 (Ind. 2015)
SUBJECT: No error in excluding extrinsic evidence of prior inconsistent statements
HOLDING: It was within Tr. Ct.'s discretion to deny D the opportunity to present evidence of prior inconsistent statements when D failed to first provide the opportunity to the witness to explain or deny the statements. Under Indiana Evidence Rule 613(b), the requirement that a witness be given an opportunity to explain or deny a prior inconsistent statement may be afforded to that witness at any point during the proceedings. However, the preferred method of proceeding is still the traditional method of confronting a witness with his inconsistent statement prior to its introduction into evidence. Despite this preferred method, Tr. Ct.s are still given broad discretion in excluding or admitting extrinsic evidence under rule 613(b). Tr. Ct.s are encouraged to consider a variety of relevant factors in making the determination, 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. Here, D was on trial for Battery as a Class C felony for stabbing his son-in-law during a fight. His son-in-law and two eye-witnesses testified that D was the aggressor. D had told the police that he was hit by a two-by-four first. After the State rested, D attempted to call two witnesses who would testify that D's son-in-law told them that he had hit D with a two-by-four. The Tr. Ct. did not allow the testimony as the D never questioned son-in-law about the inconsistent statements. The Tr. Ct. did not abuse its discretion by excluding the evidence because it was never established whether the son-in-law was still available to be recalled to explain or deny the statements, this was not just a he said/she said case as there were eye-witnesses and D provided no reason why he failed to ask son-in-law about the statements during cross-examination. Held, judgment affirmed and Court of Appeals' Opinion at 18 N.E.3d 625 vacated.

TITLE: Holderfield v. State
INDEX NO.: O.6.b.
CITE: (09/30/91), Ind., 578 N.E.2d 661
SUBJECT: Alibi notice as evidence - No 5th Amend. violation
HOLDING: Admission of D's notices of alibi to impeach alibi witness presented at trial, did not violate his right against self-incrimination. D had filed three different notices of alibi, the first & third indicating he was with one person at time of offense, & the second indicating he was with another person. At trial D presented only alibi testimony of person in second notice. During rebuttal, other notices of alibi were admitted in evidence, & D argued their admission impermissibly called attention to fact he didn't testify & interfered with right to avoid self-incrimination. Ct. noted that while not sworn to, alibi notice is statement of D. Ct. also noted that when D makes pretrial statement & forgoes testifying, his statement is hearsay, but found that alibi notices were not being admitted for truth of the matter contained therein, but to impeach his alibi witness. If D had erred in giving other two alibi notices, he should have requested they be withdrawn. While D can explain errors in previous statements, they are still admissions which can go to jury. Ct. found that D wasn't unconstitutionally forced to chose between taking stand or remaining silent & suffering consequences by admission of prior alibi notices, *citing* to Williams v. Florida (1970), 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446. Held, convictions affirmed, J. DeBruler dissenting on this issue.

TITLE: Randall v. State
INDEX NO.: O.6.b.
CITE: (11/17/83), Ind., 455 N.E.2d 916
SUBJECT: Impeachment - prior statements; alibi
HOLDING: Tr. Ct. did not err in permitting reference to D's notice of alibi during his cross-examination & in admitting notice of alibi into evidence. Here, D's direct testimony conflicted with specific times, places & individuals alleged in alibi notice. D attacks ruling on 2 grounds: (1) document is required pleading; (2) notice is neither certified to nor signed by D personally. Ct. finds notice of alibi is D's statement & is voluntarily filed. Admission of document was proper because references were being made to it. D's claim that he did not remember anything about notice of alibi goes to weight, not admissibility. Held, no error.

TITLE: State v. Wolff

INDEX NO.: O.6.b.

CITE: (1st Dist. 10/25/89), Ind. App., 545 N.E.2d 39

SUBJECT: D's statements at guilty plea hearing - unrelated to charge; may form basis for perjury prosecution

HOLDING: Tr. Ct. erred in dismissing perjury charge against D based on statements made at guilty plea hearing on separate charge. At guilty plea hearing, D misrepresented his criminal record, as result of which state charged D with perjury. Tr. Ct. granted D's motion to dismiss, & state appeals. Generally, evidence relating to guilty plea or plea negotiations is inadmissible in subsequent proceedings, [Citations omitted], due to public interest in promoting free negotiations. Legislature has passed 2 statutes prohibiting admission of statements from plea negotiations (Ind. Code 35-35-3-4) or hearing (Ind. Code 35-35-1-4(d)) at subsequent proceedings. Interpreting Ind. Code 35-35-1-4(d), Ct. App. held that statements which establish factual basis for offense charged are not admissible in subsequent proceedings. Tyree, App., 518 N.E.2d 814. Here, however, state is not seeking to use statements forming factual basis for, or even related to, charge to which D pled guilty. D argues that if Ind. allows use of his statements, it should adopt Fed.R.Crim.P. 11(e)(6), which allows use of statements made under oath, on record, & in presence of counsel, & following advisement that statements may be used in perjury prosecution. Ct. App. here declines to adopt federal rule, in part because it would allow perjury prosecution even in connection with statements relating to charged offense. Further, those who take oath are already put on notice that they may be subject to perjury prosecution. To admit statements made during plea or sentencing hearing at subsequent perjury prosecution, state must demonstrate that D's statements were: (1) unrelated to offense previously charged; (2) made under oath, & (3) on record. Held, dismissal reversed.

TITLE: Taylor v. State
INDEX NO.: O.6.b.
CITE: (10/22/84), Ind., 469 N.E.2d 735
SUBJECT: Impeachment - prior inconsistent statements; foundation
HOLDING: Tr. Ct. properly allowed prosecutor to use D's sister's prior statement to refresh police officer's memory in order to impeach sister. Prosecution may utilize impeachment statute (Ind. Code 34-1-14-15) against its own witness when witness has given prior inconsistent statement. Adams 314 N.E.2d 53. Proper foundation for prior inconsistent statement is (1) date & (2) time & (3) to whom given. Lewis 451 N.E.2d 50; Smith 414 N.E.2d 299. Here, sister denied truth of statement & claimed she was forced to make it. Officer who took statement testified she did make statement at given time/place. Ct. distinguishes LaBine 447 N.E.2d 592 (witness claimed 5th Amend, refused to reply/admit memory on any point not available for cross; held, no error in admission of statement, jury instructed to consider statement only for impeachment purposes). Ct. finds sister testified; D made no showing sister couldn't be recalled for cross. Held, no error.

RELATED CASES: Orr, 968 N.E.2d 858 (Ind. Ct. App 2012) (a witness's requisite opportunity to explain or deny a prior inconsistent statement may be satisfied at any point in the proceedings, with two caveats; the first is that the traditional method of confronting a witness with the statement before extrinsic evidence is introduced remains the preferred method; second, the Tr. Ct. has wide discretion in this matter; no fundamental error allowing state to admit extrinsic evidence of inconsistent statement without first confronting declarant); Roberts, App., 712 N.E.2d 23 (in order to establish foundation for prior inconsistent statement, witness must deny or not recall making statement; if witness admits making statement, D cannot put in extrinsic evidence to prove prior statement; however, 7th circuit holds differently); Hilton, 648 N.E.2d 361 (Tr. Ct. did not err in excluding testimony of witness, where D waived issue & failed to lay requisite foundation for admission of prior inconsistent statements); Poore, 501 N.E.2d 1058 (Tr. Ct. erred in sustaining state's objection that memorandum must be made by testifying witness; memorandum used to refresh recollection must be written by witness or another at or near time of occurrence; held, conviction reversed); Jones, 500 N.E.2d 1166 (proper foundation for admitting impeaching testimony includes requiring witness to recall & admit, explain, or deny prior statement, *citing* Bowling, 493 N.E.2d 783); Music, 448 N.E.2d 1082 (Tr. Ct. did not err in admitting tape recording of defense W's prior statement to police where statement was inconsistent with in-Ct. testimony; tape recording was admissible to refute W's explanation of inconsistency).

TITLE: Tyree v. State
INDEX NO.: O.6.b.
CITE: (2d Dist. 2/1/88), Ind. App., 518 N.E.2d 814
SUBJECT: Impeachment - use of D's testimony at guilty plea hearing
HOLDING: Statement made by D to establish factual basis at guilty plea hearing are not admissible at trial if plea is withdrawn or rejected. Here, D was allowed to withdraw plea before sentencing, & at trial, Tr. Ct. allowed state to use D's statements from guilty plea hearing for impeachment. Plea of guilty or guilty but mentally ill which is withdrawn or rejected is not admissible in any other proceedings. Ind. Code 35-35-1-4(d). Because factual basis is required for guilty plea, statements establishing factual basis are inseparable from plea. Ct. App. finds additional authority for this view in other jurisdictions. If statements from guilty plea hearing are admitted, jurors will recognize that D once pled guilty. People v. George (Mich.App. 1976), 245 N.W.2d 65. Furthermore, when guilty plea is vacated, it is nullity, as is everything which transpired pursuant to plea. Id. MS & MO have rules similar to Ind. Code 35-35-1-4(d), & exclude statements from guilty plea hearing. Ind. Code 35-35-1-4(d) was adopted from ABA standards which have since been amended to include statements made in connection with plea. These changes are "clarifications" rather than additions. Finally, compelling of statements establishing factual basis is justified because plea constitutes waiver of 5th Amend. privilege. When plea becomes nullity, compelled statements should not be admissible. 2 LaFave & Israel, Criminal Procedure, 20.5, (1984). Admission of these statements at trial was fundamental error. Held, reversed & remanded.

TITLE: Rafferty v. State
INDEX NO.: O.6.b.
CITE: (1st Dist., 03-22-93), Ind. App., 610 N.E.2d 880
SUBJECT: Impeachment of State's own witness with prior statement
HOLDING: In D's trial for child molesting, it was not error to allow State to impeach it's witness, D's son, with prior contradictory statement. Son was called as witness by State & was asked if he saw any sexual activity between D & alleged victim (AV). When son responded negatively, State was allowed to introduce his prior statement, subsequently recanted, that he & D had sexual relationship. Jury was instructed that it could consider son's denial of incestuous relationship solely for impeachment purposes. Ct. examined Ind. Code 34-1-14-15 & Fed. R. Evid. 607, & concluded that State clearly had authority to impeach son with prior inconsistent statement. Ct. then considered whether State's motive in calling son was for purpose of placing otherwise inadmissible substantive evidence before jury. Ct. concluded that although son's testimony related to allegations of uncharged sexual misconduct, he was not examined for primary purpose of putting this evidence before jury as substantive. Ct. found State questioned son to see if he would corroborate another witness' claim that son had seen D in bed with him & AV. Because State had legitimate reason to call son as witness, it was not error to allow impeachment with recanted statement. Held, reversed on other grounds & remanded for retrial.

O. EVIDENCE

O.6. Impeachment

O.6.c. Interest/bias/prejudice

TITLE: Beaty v. State
INDEX NO.: O.6.c.
CITE: (3rd Dist., 11-21-06), Ind. App., 856 N.E.2d 1264
SUBJECT: Impeachment with facts of witness' dismissed charges to show bias
HOLDING: Tr. Ct.'s limitation on D's ability to cross-examine witness on prior thefts from Lowe's of which he was not convicted was not reversible error. Although prior misconduct is inadmissible to impeach a witness' character under Indiana Rule of Evidence 608(b), it may be admissible as a more particular attack on the witness' credibility as evidence of the witness' bias, i.e., his desire to curry favor with the State, & that their prior criminal activities gave him added incentive to cooperate with the State. Here, the witness had also been charged with theft from Lowe's, but witness had pled guilty to one count of theft while other thefts from Lowe's were dismissed pursuant to an agreement. D's theory at trial was that he was a ploy in the witness' theft scheme. Although the facts of the other thefts would be inadmissible under 608(b), the other thefts may be admissible to show bias. Because D was allowed to put into evidence the plea agreement, there was no reversible error. Held, judgment affirmed; Baker, J., concurring on basis that there should be another exception to Indiana Rule of Evidence 608(b)'s limitation on admission of specific acts of misconduct; when the State has offered a deal to a witness that results in avoidance of prosecution, the D should be able to explore the prior acts of misconduct in the dismissed charges.

TITLE: Bell v. State
INDEX NO.: O.6.c.
CITE: (9/18/95), Ind. App., 655 N.E.2d 129
SUBJECT: Impeachment - bias of witness; agreement with prosecution
HOLDING: D's interest in getting before jury any & all inducements witness receives in exchange for testifying is of utmost importance & outweighs any perceived harm to State in having potential penalties before jury. Watson, 507 N.E.2d 571; Jarrett, 498 N.E.2d 967. Ct. rejected State's argument that because confidential informant's plea agreement was culminated prior to D's trial & did not require him to testify against D, it is distinguishable from above cases. Witness's service as confidential informant, during which time he implicated D as a drug dealer, was rewarded with plea agreement. Therefore, for implicating D, he received reward. Jury should know full extent of reward informant received. Fact plea agreement did not require confidential informant to testify at D's trial is of no significance. Held, conviction reversed on other grounds.

RELATED CASES: Sigler, App., 733 N.E.2d 509 (Tr. Ct. erred by limiting extent to which D could cross-examine his accomplices about their plea agreements with State; there is no sufficient alternative to allowing criminal D to question felon-witness regarding specific number of years of imprisonment he or she has avoided by agreement with State); Ferguson, App., 670 N.E.2d 371 (evidence of "any understanding" as to consideration witness receives for testifying must be disclosed to jury); cf. Splunge, 641 N.E.2d 628 (Tr. Ct. properly refused to permit D to cross-examine accomplice concerning possible modification of her sentence, which had been imposed pursuant to plea agreement; accomplice had specifically testified she received no promises from State in exchange for her testimony, State was in no position at date to extend promise of lesser sentence, & remote possibility that accomplice would receive modification or clemency was highly speculative & did not reflect any arrangement made by State to procure her testimony).

TITLE: Delaware v. VanArsdall
INDEX NO.: O.6.c.
CITE: 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)
SUBJECT: Impeachment - interest / bias / prejudice - harmless error
HOLDING: D constitutionally entitled to fair trial - not perfect one. Certain constitutional errors may be "harmless" in terms of their effect on fact-finding process at trial. Chapman v. CA (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. Otherwise valid conviction should not be set aside if reviewing court may confidently say, based upon whole record, that constitutional error was harmless beyond a reasonable doubt. However, some constitutional errors - such as denying D assistance of counsel at trial, or compelling him/her to stand trial before trier of fact with financial stake in outcome - are so fundamental & pervasive that they require reversal without regard to facts or circumstances of particular case. Constitutionally improper denial of D's opportunity to impeach witness for bias, like other Confrontation Clause errors, is subject to harmless error analysis & does not require automatic reversal. Correct inquiry is whether, assuming damaging potential of CX is fully realized, reviewing court might nonetheless say that error was harmless beyond a reasonable doubt. Factors to be considered include importance of witness' testimony in prosecution's case, whether testimony was cumulative, presence or absence of evidence corroborating or contradicting testimony of witness on material points, extent of CX otherwise permitted & overall strength of prosecution's case. Held, case remanded to state S.Ct. for determination as to whether error was harmless. White CONCURS. Marshall & Stevens DISSENT WITH SEPARATE OPINIONS.

TITLE: Dodd v. State
INDEX NO.: O.6.c.
CITE: 993 P.2d 778 (Okla. Crim. App. 2000)
SUBJECT: Jailhouse Informers -- Special Discovery Requirements and Jury Instructions
HOLDING: On rehearing, Oklahoma Court of Criminal Appeals holds that when state plans to have jailhouse informer testify at trial, it must comply with special discovery scheme and jury must be given special instruction on reliability of jailhouse informers. At least 10 days before trial, state must disclose the following: 1)the complete criminal history of the informer; 2) any "deal, promise, inducement, or benefit that the offering party has made or may make in the future" to the informer; 3)specific statements the D is alleged to have made and the time, place, and manner of their making; 4)all other cases in which the informer testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informer received any deals, inducements, promises or benefits in exchange for or subsequent to that testimony or statement; 5)whether at any time the informer recanted that testimony or statement and, if so, a transcript or copy of such recantation; and 6)any other information relevant to the informer's credibility. If the informer testifies, the jury must be specially instructed on the credibility of informers, beginning with the following statement: "The testimony of an informer who provides evidence against a D must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the D is for you to determine." The instruction goes on to list five factors for the jurors to consider: 1)whether the witness has received anything in exchange for his/her testimony; 2)any other case in which the informer testified or offered statements, whether the statements were admitted, and whether the informer received any sort of benefit in exchange for the testimony or statements; 3)whether the informer has ever changed his or her testimony; 4)the informer's criminal history; and 5)any other evidence relevant to the informer's credibility.

TITLE: Dyson v. State
INDEX NO.: O.6.c.
CITE: (2nd Dist., 3-27-98), Ind. App., 692 N.E.2d 1374
SUBJECT: Impeachment - bias & prejudice
HOLDING: Tr. Ct. improperly excluded testimony regarding hostile statements made by complaining witness (CW) after incident involving battery. D introduced testimony not to prove fact of matter asserted, but to demonstrate that CW was biased & prejudiced against him pursuant to Ind.Evid. Rule 616. Exclusion of testimony did not require reversal of battery conviction because error was harmless & did not prejudice D. D argued that CW falsely testified that D struck him several times with open hand, & that this may have influenced jury to believe that D did not discipline his child in reasonable manner. However, whether D disciplined CW in reasonable manner was irrelevant because D was prohibited from disciplining CW under circumstances. Thus, even if CW's allegations of striking were not accurate, reversal was not required because Tr. Ct. could properly conclude that D touched CW in angry manner based upon testimony of several other witnesses. Held, conviction affirmed.

RELATED CASES: Wood, App., 804 N.E.2d 1182 (Tr. Ct. did not abuse its discretion in excluding evidence of victim's alleged bias, where probative value of excluded testimony was substantially outweighed by danger of unfair prejudice); Mitchell, App., 730 N.E.2d 197 (evidence that CW was party to CHINS proceeding may have been offered for purposes identified in IRE 616).

TITLE: Hendricks v. State
INDEX NO.: O.6.c.
CITE: (1st Dist. 5/31/90), Ind. App., 554 N.E.2d 1140
SUBJECT: Impeachment - interest/bias; confrontation
HOLDING: Tr. Ct. abridged D's confrontation rights by curtailing cross-examination (CX) of D's wife concerning child abuse investigations involving her, but error was harmless. D was charged with battery of his 4-week old son. At trial, D's wife testified that she rarely left child alone with D because she was afraid of him, & further testified to what she heard from kitchen on night of charged incident. D attempted to CX wife concerning welfare department investigations of child abuse by her involving her older son, but Tr. Ct. sustained relevancy objections. In Davis v. AK (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, U.S.S.Ct. recognized that impeachment is proper & important function of confrontation & CX rights. See also Delaware v. Van Arsdall (1986), 475 U.S. 673, & Olden v. Kentucky (1988), 109 S.Ct. 480. It is violation of confrontation rights to prevent D from engaging in otherwise proper CX designed to show bias & present to jury facts supporting inferences re reliability of witness. State here argues that witness may not be impeached by specific bad acts which have not been reduced to conviction, but it is clearthat state-imposed evidentiary rules must yield to weightier 6th & 14th Amend. rights of D. Here, D's 2 attempts to explore wife's own involvement in abuse of her children were completely foreclosed, although D was able to establish that wife was nearly exclusive caretaker of children & failed to discover son's injuries for almost full day. Held, D's confrontation rights were violated, but error was harmless in light of other evidence offered against D.

TITLE: Hossman v. State
INDEX NO.: O.6.c.
CITE: (8/24/84), Ind., 467 N.E.2d 416
SUBJECT: Impeachment - interest/bias/prejudice
HOLDING: 4th District erred in concluding that Tr. Ct. exceeded its discretion in limiting scope of D's CX of witness Dils. Opinion at 460 N.E.2d 975 ordered vacated. Here, D sought to show that Dils had drug user-supplier relationship with boyfriend/witness Crumpton (who turned state's evidence to testify against D in trial for conspiracy to commit robbery). D also sought to show Dils' fear that Crumpton would expose her role in murder of her ex-husband if she did not corroborate his testimony against D. Ind. S. Ct. finds "no, or at best remote, nexus connecting excluded evidence & conclusion of bias." Ct. finds it "unlikely" that Crumpton would incriminate himself by implicating her in murder. Assuming user-supplier relationship, Dils' testimony would not set Crumpton free (to continue to supply drugs) because of plea bargain on other charges. D has constitutitional right to CX to expose possible biases, prejudices or ulterior motives of witness related to issues/personalities in case. Davis v. AK (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347. Tr. Ct. has broad discretion to regulate such CX. Solomon 439 N.E.2d 570 (card at O.5.e); Clark 348 N.E.2d 27. Held, Tr. Ct. affirmed.

RELATED CASES: Perkins 483 N.E.2d 1379 (restriction of D's CX proper); Williams 480 N.E.2d 953 (Witn 367(1); CX re number of times witness visited D in jail admissible to show opportunity to fabricate alibi defense); Blankenship 462 N.E.2d 1311 (restriction of D's CX proper); Belcher 453 N.E.2d 214 (state's CX of D's witness re prior prostitution charge proper to show relationship/interest to D/pimp); Badelle 449 N.E.2d 1055 (state's CX of officer Highbaugh re suspension incidental to investigation of case was proper; liberal CX is allowed to disclose witness' bias, *citing* Hardin 414 N.E.2d 570).

TITLE: Ingram v. State
INDEX NO.: O.6.c.
CITE: (6/12/87), Ind., 508 N.E.2d 805
SUBJECT: Impeachment - bias; threats by witnesses
HOLDING: Tr. Ct. did not commit fundamental error by permitting testifying former co-D to be cross- examined concerning his conduct with regard to another witness. Evidence pertaining to threats or other attempts to influence witness is permissible on cross-examination since it reflects on credibility of witness. Hardin, 414 N.E.2d 570, 572. During D's second trial, acquitted co-D was called as defense witness & testified concerning his alibi during time crime was committed. On cross-examination, State was permitted to ask witness whether, on occasion after crime, he had thrown stick at or threatened State's witness. This impeachment questioning was not directed to prior bad act of co-D; instead, evidence went to whether co-D had intimidated witness. Held, no abuse of discretion, notwithstanding alleged inflammatory or prejudicial effects.

RELATED CASES: Peck, 563 N.E.2d 554 (evidence that witness had stated on prior occasions that she feared D's brother was probative of her fear of brother at time of trial, which bore on her credibility as alibi witness); Fox, 497 N.E.2d 221 (no error in State eliciting testimony that witness made prior inconsistent statement because his family had been threatened); Morgan, 419 N.E.2d 964 (fact that D's accomplice had beaten prosecution witness in retaliation for witness' testimony in case was relevant to accomplice's credibility).

TITLE: Janner v. State
INDEX NO.: O.6.c.
CITE: (4th Dist. 4/18/88), Ind. App., 521 N.E.2d 709
SUBJECT: Impeachment - interest/bias; right of confrontation
HOLDING: Tr. Ct. violated D's 6th Amend. right to confront witnesses when it refused to allow D to present evidence of state's main witness' bias & interest. D was charged with conspiracy to deal cocaine & maintaining common nuisance, as a result of driving her grandson & state's main witness to conduct drug transaction. Her conviction rested mainly on testimony of state's main witness. D sought to introduce evidence, both through cross-examination & direct testimony, that this witness had burglarized her home after the incidents for which she was charged. Witness pled guilty to burglary but charge was dismissed. D also attempted to present evidence that burglary was in retaliation for D's refusing to give witness ride on another occasion. D argues that such evidence shows self-interest & bias, & is proper evidence for impeachment. Tr. Ct. held that such evidence of burglary was inadmissible because witness had not been convicted. Ct. App. holds that this evidence should have been before jury, as well as fact that state dismissed burglary charge despite guilty plea, presumably in order to boost witness' credibility. D alleged she took trip merely as convenience to grandson & had no knowledge of drug transaction. State's witness testified as to conversation in car & offered opinion as to D's knowledge of illegal activity. His testimony was crucial to D's conviction & jury should have heard evidence bearing on his credibility. Held, reversed & remanded.

TITLE: Jarrett v. State
INDEX NO.: O.6.c.
CITE: (10/21/86), Ind., 498 N.E.2d 967
SUBJECT: Impeachment - possible penalty faced by co-D
HOLDING: Tr. Ct. erred in refusing to permit 2 co-Ds to be cross-examined regarding penalties they would have faced had they not entered into plea bargains & testified against D. Here, D contends possible penalties faced by witnesses were proper evidence necessary for jury's determination of weight/credibility. Although Ct. finds sentencing information "may not be relevant to jury's duty in criminal case," it does not perceive such information to present substantial risk of prejudice to state. "[S]ignificant harm results when jury is prevented from learning extent of benefit received by witness in exchange for his testimony." Newman 334 N.E.2d 684. Exposure of witness' motivation in testifying is proper/important function of constitutionally protected right of cross-exam. Davis v. AK (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 374; Greene v. McElroy (1959), 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377. Held, conviction reversed & remanded for new trial. Pivarnik, joined by Givan, DISSENTS, finding jury was informed as to interests of witnesses, since they were told that there had been an agreement with witness for leniency in exchange for testimony.

RELATED CASES: McCain, 948 N.E.2d 1202 (Ind. Ct. App 2011); Bullock, App., 903 N.E.2d 156; Jones, App., 749 N.E.2d 575 (Tr. Ct. abused its discretion by limiting D's cross-examination of his accomplice regarding sentence he could have received had he not testified against D); Sigler, App., 733 N.E.2d 509 (there is no sufficient alternative to allowing criminal D to question felon-witness regarding specific number of years of imprisonment he or she has avoided by agreement with State); Hamner, App., 553 N.E.2d 201; Samuels, App., 505 N.E.2d 120 (Witn 372(2); Tr. Ct. erred by limiting cross-examination re specific penalties).

TITLE: Jones v. State
INDEX NO.: O.6.c.
CITE: (9/11/84), Ind., 467 N.E.2d 1179
SUBJECT: Impeachment - bias against state because of prior convictions
HOLDING: Where state made no effort to show there was "reasonable degree of probability" that witness was biased against state because of prior convictions, it was error to allow prosecutor to question defense witness re prior convictions for failure to pay child support & escape (inadmissible under Ashton v. Anderson). See Gaston, App., 451 N.E.2d 360 (no nexus connecting arrest & conclusion of bias). Here, state asked no questions to determine whether witness was antagonistic toward state/prosecutor because of prior encounters. Ct. distinguishes Clark 348 N.E.2d 27. In Clark, defense witness was questioned re her father's conviction for possession of unlicensed pistol to determine if she bore hostility against state resulting from conviction. "It is doubtful rule from Clark could be utilized to permit disclosure of witness' own conviction, inasmuch as potential for improper prejudice would outweigh limited relevance." Held, reversed.

RELATED CASES: Williams 492 N.E.2d 28 (Witn 370(1); prosecutor's question re murder conviction of brother of D's alibi witness was proper, *citing* Clark).

TITLE: Kleinrichert v. State
INDEX NO.: O.6.c.
CITE: (3d Dist. 11/23/88), Ind. App., 530 N.E.2d 321
SUBJECT: In limine exclusion of interest/bias/prejudice evidence - per se error standard
HOLDING: Tr. Ct. committed per se error in excluding in limine evidence from which jury might infer bias or interest. D was convicted of possession of cocaine. Before trial, Tr. Ct. granted 2 motions in limine concerning tort claim notice filed by D & his alleged intention to sue 1 detective individually. At trial, this detective, who served as state's main witness, denied that he was biased against D or had any interest in seeing him convicted. During course of trial, D made 4 offers to prove evidence of lawsuit for purpose of showing bias, prejudice, & interest. Tr. Ct. barred all evidence of lawsuit. In Haeger 390 N.E.2d 291, Ind. Ct. App. adopted per se error standard of review when record reflects in limine curtailment of requested line of bias cross-examination. Here, there was conflict between testimony of informant & detective re whether D in fact possessed cocaine. Credibility of informant was impugned, while information relevant to credibility of detective never reached jury. In Pfefferkorn 413 N.E.2d 1088, per se error standard was applied to exclusion of evidence re lawsuit filed by relative of D, even though it had been dropped. Here, lawsuit was filed by D himself & was still pending, so that evidence of it was even more indicative of bias. Jury must be allowed to hear this evidence & assess credibility of witnesses. Held, conviction reversed.

TITLE: Koo v. State
INDEX NO.: O.6.c.
CITE: (9/22/94), Ind. App., 640 N.E.2d 95
SUBJECT: Impeachment - bias of witness; pending lawsuit against D
HOLDING: In rape prosecution, D, who was formerly doctor of victim, claimed Tr. Ct. erred by refusing to allow him to introduce testimony of victim's discussions with her attorney regarding settlement negotiations related to civil lawsuit & alleged settlement negotiation concerning rape charge. Although pendency of civil suit is admissible to show bias & prejudice, amount of damages does not bear upon such prejudice since prayer for damages is frequently exaggerated. Brooks, 291 N.E.2d 559. Where fact of pending lawsuit is before jury, additional knowledge of amount of money sought is unlikely to affect jury's verdict. Id. Here, victim testified she retained counsel to represent her in civil lawsuit against D & that she was seeking monetary damages. Held, no error.

RELATED CASES: Domangue, App., 654 N.E.2d 1 (if witness in criminal trial has financial motive for testifying in certain fashion, jury should hear about those matters as they are relevant evidence of credibility).

TITLE: Marshall v. State
INDEX NO.: O.6.c.
CITE: 346 Md. 186, 695 A.2d 184 (Md.Ct. App. 1997)
SUBJECT: Right to Ask Witness Re Plea Bargain in Unrelated Case
HOLDING: D's confrontation right under 6th Amendment and Maryland Constitution was violated by Tr. Ct.'s ruling that D could not cross-examine state's only eyewitness about his plea bargain in an unrelated case. Witness' plea bargain allowed him to plead to reduced charge in return for testifying at D's trial. Witness had not been sentenced yet when he testified. Jury was entitled to know terms of deal so it could decide for itself whether witness was biased or had motive to testify falsely.

TITLE: McCarthy v. State
INDEX NO.: O.6.c.
CITE: (6-28-01), Ind., 749 N.E.2d 528
SUBJECT: Cross-examination - harmless error; admission of 404(b) evidence
HOLDING: In child molesting prosecution, where D was teacher charged with molesting two students, it was error to deny D the opportunity to cross-examine complaining witness's (CW's) mother about having filed a Notice of Tort Claim against school. Denial of opportunity to impeach a witness for bias is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). State will be required to show beyond a reasonable doubt that error did not contribute to the jury's verdict. Error in this case was harmless, because D was allowed to cross- examine the mother about discrepancies between her testimony & that of her daughter, & about having helped her daughter prepare her trial testimony, effectively demonstrating her bias & implying that the accusations were fabricated. Held, transfer granted, judgment affirmed.

RELATED CASES: Brown, 770 N.E.2d 275 (erroneous exclusion of accomplice's testimony that he accidently struck victim in head & did not intend to kill her was not harmless).

TITLE: McIntyre v. State
INDEX NO.: O.6.c.
CITE: (2d Dist. 2/23/84), Ind. App., 460 N.E.2d 162
SUBJECT: Impeachment - interest/bias/prejudice
HOLDING: Tr. Ct. erred in refusing to permit D to CX child molesting victim (D's granddaughter) concerning fact she testified only after threatened with punishment for contempt. Tr. Ct.'s exercise of discretion in regulating scope of CX must be consistent with due process. Higginbotham, App., 427 N.E.2d 896; Haeger, App., 390 N.E.2d 239. D must be granted full, adequate & effective CX. Id. Any doubt re legitimacy of CX "must be resolved in favor of the questioner." Sears 282 N.E.2d 807; Higginbotham. "Exposure of a witness' motivation in testifying is a proper & important function of the constitutionally protect right of CX." Davis v. AK (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347. Threats, promises of leniency, duress, or coercion of any kind upon witness must be revealed to jury. See Newman 334 N.E.2d 684. Here, jury was entitled to know of witness' reluctance to testify & to draw its own conclusions about that reluctance. Held, conviction reversed.

RELATED CASES: McKinley, App., 465 N.E.2d 742 (see card at O.5.e; but see Hossman 467 N.E.2d 416, card at O.6.c); Bredemeier, App., 463 N.E.2d 1138 (Tr. Ct. erred in precluding CX of accomplice turned state's witness re his desire to avoid prison for fear he would be sexually molested there).

TITLE: Shanholt v. State
INDEX NO.: O.6.c.
CITE: (3d Dist. 4/27/83), Ind. App., 448 N.E.2d 308
SUBJECT: Cross-examination - interest/bias/prejudice; personal/homosexual relationship
HOLDING: Tr. Ct. did not err in overruling D's objection to cross-examination of Karen concerning whether she had a homosexual relationship with D. Here, D & Karen were charged with criminal confinement (removing D's minor children, of whom D's ex-husband had custody, from IN). State contends question was asked to demonstrate bias of Karen. A witness' bias, prejudice or ulterior motives are always relevant at trial (to discredit witness or affect weight of testimony). Pfefferkorn, App., 413 N.E.2d 1088. Evidence of bias is not collateral in nature, nor is it limited to scope of direct-exam. Hunter, App., 360 N.E.2d 588. On right to cross-examine to show bias/impair witness' credibility, see Guise, App., 359 N.E.2d 269; Duncanson, App., 391 N.E.2d 1157. Evidence of personal relationship can be indicative of bias. See Wireman 432 N.E.2d 1343; Palmer, App., 288 N.E.2d 739. Held, no error.

TITLE: Smith v. State
INDEX NO.: O.6.c.
CITE: (12-21-99), Ind., 721 N.E.2d 213
SUBJECT: Restriction on cross-examination of State witnesses - reversible error
HOLDING: Tr. Ct. erred by refusing to allow D to cross-examine State's key witness concerning pending criminal charges against him. Fundamental right to cross-examine witnesses is guaranteed by Sixth Amendment to U.S. Constitution & Article I, Section 13 of Indiana Constitution. Cutting off all questioning about event that jury might reasonably have found furnished witness motive for favoring prosecution in his testimony violates D's rights secured by Confrontation Clause. Delaware v. Van Arsdall, 475 U.S. 673 (1986). Here, D was permitted to question witness only about his release from jail after giving his statement about victim's murder, but he was not allowed to question witness about his pending charges. Witness was only testifying eyewitness to crime & his testimony, if credited, was critical to State's case. Pending charges that are basis of arrangement with witness are proper subject of cross-examination. Drollinger, 274 Ind. 5, 408 N.E.2d 1288 (1980). Although prosecution represented to Tr. Ct. that there was no "deal" with witness, record contained number of conflicting pieces of evidence on this point. D had constitutional right to confront witness & explore his bias, & refusal to permit him to identify pending charges or to inquire into witness's perceptions of arrangement that resulted in his release on his own recognizance violated that right. Because witness's testimony was essential to State's case, Ct. could not conclude that this restriction on exploring witness's bias was harmless beyond reasonable doubt. Held, conviction reversed & remanded for new trial; Shepard, C.J., concurring.

RELATED CASES: Collins, App., 835 N.E.2d 1010 (in addition to Tr. Ct. affording D ample opportunity to make an offer to prove, there was no indication whatsoever that a deal of leniency was offered to state's witness, nor that he had any expectation that such a deal would arise from his testimony); Nelson, App., 792 N.E.2d 588 (it is reversible error for Tr. Ct. to deny a party opportunity to explain substance, relevance & admissibility of excluded evidence with an offer of proof).

TITLE: Standifer v. State
INDEX NO.: O.6.c.
CITE: (11-10-99), Ind., 718 N.E.2d 1107
SUBJECT: Impeachment - bias; witness' status as parolee & informant
HOLDING: Tr. Ct. violated D's Sixth Amendment right to confrontation when it precluded him from cross-examining two of State's witnesses about their bias based on fact that one was confidential informant & other was on parole. Even where there is no evidence of deal between State & witness, extent of benefit offered to witness is relevant to jury's determination of weight & credibility of witness' testimony. Jarrett, 498 N.E.2d 967. Here, D was not permitted to cross-examine one of State's witnesses about witness' status as informant & his resulting bias in favor of State. D was also prevented from cross-examining another State's witness about being on parole, despite fact that amount of time remaining on sentence he had served for possession of drugs was arguably motivating factor in his cooperation with State that would affect jury's assessment of his credibility. However, even if D had been permitted to expose incentive of State's witnesses to cooperate with State & jury had been persuaded that their testimony was entirely lacking in credit, ample evidence was introduced to support convictions. Thus, D's denial of his right to confrontation was harmless error. Held, convictions affirmed.

RELATED CASES: Kirk, App., 797 N.E.2d 837 (D's offer of proof failed to produce evidence that witness had ulterior motive).

TITLE: Tucker v. State
INDEX NO.: O.6.c.
CITE: (1st Dist., 5-23-00), Ind. App., 728 N.E.2d 261
SUBJECT: Limiting cross examination on financial interest - no error
HOLDING: Tr. Ct. did not err in precluding D from questioning State's witness about whether or not he had reported income he earned as confidential informant to appropriate taxing authorities. Witness's credibility may be affected by financial considerations & thus, such considerations may be proper subject for cross-examination. Domangue, App., 654 N.E.2d 1. Ct. acknowledged that witness's failure to pay income taxes on money he earned as informant reflects on his credibility. However, there was ample evidence before jury from which it could assess witness's credibility & his bias in favor of police. To show reversible error in curtailment of cross examination, actual infringement of cross-examination must be shown. Lagenour, 268 Ind. 441, 376 N.E.2d 475 (1978). Distinguishing McCarthy, App., 726 N.E.2d 789, (reversed at 749 N.E.2d 528, see card at O.5.e), Ct. concluded that some bias cross-examination was allowed in this case, & jury had sufficient information from which to infer bias. Moreover, unlike McCarthy, in which witness potentially had direct financial stake in outcome of pending litigation, witness's alleged failure to pay income taxes was, at best, only peripherally related to D's case. D did not show that he was prejudiced by exclusion of evidence concerning whether witness had reported his income as confidential informant. Held, memorandum decision reaffirmed.

TITLE: Watson v. State
INDEX NO.: O.6.c.
CITE: (5/13/87), Ind., 507 N.E.2d 571
SUBJECT: Impeachment - right to specific inquiry re penalties avoided
HOLDING: Tr. Ct erred in refusing to permit defense counsel to cross-examine co-offender re potential sentences he was spared in exchange for his testimony. Here, state initially filed charges of murder & felony murder & sought to impose death penalty against 3 co-offenders. State subsequently withdrew charges against Griggs in exchange for his agreement to plead guilty to reduced charge of conspiracy to commit armed robbery, Class B felony, & his agreement to cooperate & testify against remaining co-offenders. At D's trial, Griggs disclosed on direct exam existence of plea agreement & reduction of charges from murder to conspiracy to commit armed robbery. He also revealed that state would be recommending 20-year sentence. On cross-exam, defense counsel elicited testimony re reduction of charges & withdrawal of death penalty request. Tr. Ct. refused to permit questions re length of possible sentences which Griggs would have faced on the 2 murder counts. State contends that because jury knew Griggs was avoiding death penalty, defense was sufficiently permitted to demonstrate Griggs' possible bias, prejudice, & motive to lie. Record reveals Griggs was not truly a death penalty candidate; therefore, disclosure that state withdrew death penalty request failed to tell story re Griggs' actual quid pro quo for testifying. Jarrett 498 N.E.2d 967. Ct. notes that because Griggs' sentence was undetermined at time of testimony, defense should be allowed to emphasize maximum punishment faced, & prosecutor should be permitted to conduct redirect exam re minimum penalties, including minimum potential imprisonment in event of good behavior. Held, conviction reversed & cause remanded for new trial. Givan, joined by Pivarnik, DISSENTS.

O. EVIDENCE

O.6. Impeachment

O.6.d. Ability to preceive/ remember

TITLE: DeMotte v. State
INDEX NO.: O.6.d.
CITE: (1st Dist. 6/28/90), Ind. App., 555 N.E.2d 1336
SUBJECT: Opinions attacking child's ability to accurately describe sexual encounter
HOLDING: Tr. Ct. erred in excluding testimony regarding alleged child molest victim's capacity to describe alleged molesting accurately. D was charged with child molest, & at trial attempted to question child's mother & stepmother about child's knowledge of sexual development & ability to describe sexual acts. D also attempted to question investigating officer about child's ability to describe alleged molesting, & to question school administrator about child's emotional & other problems. Tr. Ct. prevented each of these attempts. Whenever alleged child molest victim takes stand, capacity to accurately describe encounter with adult "which may involve touching, sexual stimulation, displays of affection & the like, is automatically in issue." Lawrence 464 N.E.2d 923. For this reason, opinions from experts as well as laypeople familiar with child, that child is not prone to fantasize or exaggerate, have been allowed. D argues that opinions of others attacking child's credibility should also be admissible. It is important for jury to have all facts & circumstances affecting credibility of witness, Drollinger 408 N.E.2d 1228 & witness credibility may be attacked by showing defect in capacity to observe, remember, or recount. Wells App., 397 N.E.2d 1250. In Henson 535 N.E.2d 1189, Ind. S. Ct. held that it would be fundamentally unfair to permit state to present evidence that alleged rape victim suffered from rape trauma syndrome but deny D opportunity to present evidence to contrary. Ct. App. finds similar abuse of discretion here. Held, reversed & remanded. Chezem, J., DISSENTS, finding error harmless.

TITLE: McKim v. State
INDEX NO.: O.6.d.
CITE: (4/19/85), Ind., 476 N.E.2d 503
SUBJECT: Impeachment - ability to perceive/remember; drug/alcohol usage
HOLDING: Tr. Ct. did not err in refusing to allow D to show incest/ rape/child molesting victim's heavy alcohol & drug usage. Witnesses cannot be impeached by specific acts of misconduct not reduced to conviction. Extent of victim's use of drugs/alcohol is pertinent only (1) to her ability to recall events on dates in question had she been using drugs/alcohol at that time, or (2) if she was on drugs at trial or (3) if drug/alcohol abuse was so extensive that her mind was impaired. Boles, 291 N.E.2d 357; Lusher, App., 390 N.E.2d 702. Here, victim admitted drinking 2 beers on date of rape & described beers' effect. Ct. finds no evidence that usage affected victim's ability to perceive, remember or testify. Held, no error.

RELATED CASES: Strunk, 44 N.E.1 (Ind. Ct. App 2015) (no evidence C.W.'s smoking of a single marijuana cigarette six to seven hours after the molestation impaired her perception, ability to remember, or ability to testify about the molestation); Williams, 681 N.E.2d 195; Denney, App., 524 N.E.2d 1301 (evidence of witness' prior drug use is relevant only to extent that 1) it affects witness' ability to accurately recall events on date in question; 2) witness is unable to relate facts at trial, or 3) drugs have significantly diminished witness' mental capacity).

O. EVIDENCE

O.6. Impeachment

O.6.e. Character evidence (Ind. Code 35-37-4-2)

TITLE: Bowles v. State
INDEX NO.: O.6.e.
CITE: (11-3-00), Ind., 737 N.E.2d 1150
SUBJECT: Character evidence - reputation for honesty in community
HOLDING: In child molesting prosecution, Tr. Ct. did not err in excluding evidence of complaining witness' (CWs') reputation for honesty in community. When defense witness was asked if she had ever discussed with other people CW's reputation for telling truth, witness stated: "I've talked, we've talked about it, a few of my friends has talked about it, you know." Upon further questioning, witness said that these friends knew CW, that they had lived in witness's community, & that witness had known them "for some time." Under limited circumstances, credibility of witness may be attacked by opinion or reputation evidence. Ind. Evidence Rule 608(a). Reputation must be general reputation, held by identifiable group of people who have adequate basis upon which to form opinion, & witness testifying to reputation must have sufficient contact with that community or society to qualify as knowledgeable of general reputation of person whose character is attacked or supported. Dynes v. Dynes, App., 637 N.E.2d 1321. Considering sparse information provided regarding nature of community, basis for reputation opinion, & extent of witness's contact with community, Tr. Ct. was well within its discretion in sustaining State's objection to reputation evidence based on lack of adequate foundation. Held, judgment affirmed.

TITLE: Chapman v. State
INDEX NO.: O.6.e.
CITE: (4th Dist. 10/11/84), Ind. App., 469 N.E.2d 50
SUBJECT: Impeachment - character evidence of victim; self-defense cases
HOLDING: Tr. Ct. did not err in excluding D's evidence of prior specific acts of violence of battery victim. Here, D presented evidence of self-defense, refuted by state's witnesses, that victim pulled a knife on D during first encounter & lunged toward D with knife during second encounter, forcing D to protect himself by knifing victim. D then called 3 witnesses, including victim, who testified re specific prior violent acts of victim, including 5 prior battery convictions. Tr. Ct. excluded additional proffered evidence of victim's violent acts. Character evidence admissible in homicide (Teague 379 N.E.2d 418) & battery (Bates 269 N.E.2d 749) cases where D claims self-defense. Evidence of victim's violent character is admissible to show: (1) D acted in reasonable fear; or (2) victim was initial aggressor. Types of proof are testimony re: (a) conduct reflecting on character; (b) witness' opinion re character based on observation; or (c) reputation. Purpose of D's offer of proof was to show victim was more-probably-than-not the aggressor. Ct. rejects state's argument that D had to show knowledge of victim's character. Annot., 1 ALR3d 571 (1965). Type of proof offered to show victim was aggressor is limited to reputation evidence. [Citations omitted.] Limitation reduces prejudice/collateral issues/unfair surprise. Tr. Ct. allowed D to present some evidence of specific acts of violence (which appellate Ct. would disallow). Excluded evidence was cumulative. Held, no error.

RELATED CASES: McCraney 447 N.E.2d 589 (decedent's criminal history is properly excluded where D fails to establish, he knew of it prior to homicide; here, there was no proof D even knew decedent).

TITLE: Commonwealth v. Morgan
INDEX NO.: O.6.e.
CITE: 559 Pa. 248, 739 A.2d 1033 (Pa. 1999)
SUBJECT: Character Witnesses May Not Be Asked About Unproved Crimes Alleged Against D
HOLDING: Pennsylvania Supreme Court holds that defense character witnesses may not be cross-examined about their knowledge of unproved allegations of specific instances of misconduct by the D. Here, prior to D's trial for molesting a young girl, state served notice that it had two witnesses prepared to testify in rebuttal that the D had sexually molested them twenty years ago. Over the D's objection, the Tr. Ct. ruled that if the D called witnesses to testify to his reputation for good moral character and chastity, they could be asked whether they were aware that "there are accusations in the community" that the D had previously committed acts similar to those charged. State pointed to line of cases holding that, while state cannot rebut evidence of D's good character with evidence of specific acts of misconduct, it can probe a witness' knowledge of such acts "to test the accuracy of his testimony and the standard by which he measures reputation." Majority here holds that there can be no meaningful distinction between these tactics in practice. "Asking character witnesses whether or not they have 'heard' allegations of a D's prior bad acts is akin to introducing extrinsic evidence of a D's specific acts of misconduct. It merely appears to be a way for the prosecutor to get in through the back door that which the law precludes him or her from getting in through the front." See also Wigmore on Evidence, Vol. III, Sec. 988, pp. 920-21.

TITLE: Cox v. State
INDEX NO.: O.6.e.
CITE: (5/19/86), Ind., 493 N.E.2d 151
SUBJECT: Character evidence - D
HOLDING: Tr. Ct. did not err in admitting comments D made re own character to police officer. D told officer he had lied thousands of times & had he not been greedy, he would have had it made for life. D's statements were admitted with portions of his admissions. D contends character evidence was inadmissible because he did not take the stand in his own defense & because evidence was immaterial. Ct. finds statements were portion of admission to officer. Statement which is res of confession is admissible as long as statement is germane. Statements provide context which explain D's motives & actions in assisting co-D in murder. Held, no error.

RELATED CASES: Swartz, App., 597 N.E.2d 977 (D opened door for admission of prior rape conviction by having wife testify as to his good character); Anderson 471 N.E.2d 291 (evidence that D, charged with felony murder, had received commendation for saving a life was properly excluded, *citing* McFarland 390 N.E.2d 989 & Vaughn 378 N.E.2d 859); Hensley 448 N.E.2d 665 (prior misdemeanor convictions were admissible during habitual proceeding to rebut D's character evidence; see card at E.9.c); Equia, App., 468 N.E.2d 559 (Crim L 378, 380; Witn 274(2); Tr. Ct. did not err in allowing state to cross-examine D's character witnesses re D's prior unrelated criminal convictions; where D chooses to place general character at issue by evidence of good character, state may refute evidence by offering evidence of D's bad character, including specific acts of prior misconduct & past crimes, *citing* Bond 403 N.E.2d 812 & Robertson 319 N.E.2d 833).

TITLE: Dynes v. Dynes
INDEX NO.: O.6.e.
CITE: (7/18/94), Ind. App., 637 N.E.2d 1321
SUBJECT: Character evidence - reputation
HOLDING: In dissolution case, Tr. Ct. erred in excluding offered evidence of mother's reputation for dishonesty at workplace. IRE 608(a) governs admission of reputation evidence for impeachment or support of witness. Neither IRE 608(a) nor Ind. Code 34-1-14-13 limits reputation evidence to reputation in community of residence. Ct. concluded that evidence of reputation for veracity should not necessarily be limited to that within person's community of residence but should include any community or society in which he or she has well-known or established reputation. That reputation must be general reputation, held by identifiable group of people who have adequate basis upon which to form opinion, & witness testifying to reputation must have sufficient contact with that community or society to qualify as knowledgeable of general reputation of person whose character is attacked or supported. Held, excluded evidence was reversible error. Hoffman, J. dissenting.

RELATED CASES: Parrish, 515 N.E.2d 516 (Tr. Ct. properly precluded D from impeaching victim's credibility by asking victim if he knew that he had been "branded a liar" by people where he lived, because aside from defense counsel's statement, there was no testimony concerning victim's general reputation in community for being dishonest).

TITLE: Gray v. State
INDEX NO.: O.6.e.
CITE: (12/9/86), Ind., 500 N.E.2d 1200
SUBJECT: Impeachment - character evidence of D; self-defense cases
HOLDING: Tr. Ct. erred in admitting evidence of pending battery charge against D which did not involve victim in this case. Here, state contends D put his reputation for good character into evidence by testifying that he stabbed victim in self-defense. State *cites* Jackson 366 N.E.2d 1186, which held that when D attempts to prove factual defense justifying actions, specific acts of prior conduct are admissible to rebut defense. In Jackson, D shot & killed foreman in workplace when rebuked by him. Defense witnesses testified Jackson was a hard worker who never did anything but his job. Proof of prior threats to foreman in different workplace was deemed admissible to rebut self-defense claim. Connection between incidents in Jackson is tenable, while incidents here have "no viable connection." Givan DISSENTS, arguing facts in Jackson & facts in present case are closely parallel. Held, reversed & remanded.

RELATED CASES: Berkley 501 N.E.2d 399 (Crim L 375, 378; Ct. distinguishes case from Gray; D's assertion of self-defense goes beyond charged defense; D related her experience with voluntary violent conduct & offered evidence that both shooting in present case & stabbing in earlier incident were justified to defend herself against customers who wanted violent sex; D's testimony established pattern of conduct, implying she was generally peaceful & engaged in violence only in voluntary cases or in cases of self-defense; here, state's rebuttal evidence, consisting of police officer who said D's reputation was "very bad, very violent" was properly admitted).

TITLE: Head v. State
INDEX NO.: O.6.e.
CITE: (12/14/82), Ind., 443 N.E.2d 44
SUBJECT: Character evidence - reputation
HOLDING: Personal knowledge of or experience with witness to be impeached is not necessary to the admission of evidence concerning his/her general reputation for veracity. Meyncke (1879), 68 Ind. 401. Here, police officer stated he had never spoken with Nunn (D's alibi witness), but Nunn's reputation was not one of truthfulness. Ct. distinguishes City of South Bend v. Turner (1904), 163 Ind. 194 (opinion of one person, rather than a distillation of the community opinion, may not be repeated secondhand). Held, no error.

TITLE: House v. State
INDEX NO.: O.6.e.
CITE: (9/30/2016), 61 N.E.3d 1230 (Ind. Ct. App 2016)
SUBJECT: Witness's past drug use irrelevant
HOLDING: In rape, kidnapping and criminal confinement prosecution, Tr. Ct. properly excluded evidence of complaining witness's prior drug usage. D and his girlfriend kidnapped and held complaining witness (C.W.) against her will at their trailer for nearly two months, and D repeatedly raped her. At trial, the State filed a motion in limine to prevent D from presenting evidence of C.W.'s prior drug or alcohol use. D did not object to the motion or try to introduce such evidence during her testimony, but recalled C.W. at the close of the defense case to make an offer of proof on her prior drug use.

On appeal, D argued the evidence should have been admitted as support for his claim that the victim stayed at the trailer voluntarily. D's waiver of the issue notwithstanding, Tr. Ct. did not abuse its discretion by excluding the evidence because it was not relevant as to whether C.W. was held against her will and repeatedly sexually assaulted. Court agreed with the State that admission of this evidence was an "attempt to smear the victim's character by labeling her as a drug addict who was willing to abandon her family and submit to degrading and humiliating sexual assaults and to be treated like an animal so long as she received methamphetamine." See Jenkins v. State, 729 N.E.2d 147 (Ind. 2000). Moreover, any error was harmless because C.W. testified about her drug use while in captivity and referred to her prior use. Evidence was overwhelming that C.W. did not stay at the trailer voluntarily and did not consent to the sexual assaults. Held, judgment affirmed.

TITLE: Manuel v. State
INDEX NO.: O.6.e.
CITE: (08-07-12), 971 N.E.2d 1262 (Ind. Ct. App 2012)
SUBJECT: Impeachment about C.W.'s prior recantation prohibited by Evid.R. 608(b)
HOLDING: In domestic battery prosecution, Tr. Ct. did not abuse its discretion when it denied D the opportunity to cross-examine complaining witness (C.W.) about a past domestic battery charge that was dropped after C.W. talked to the State. After eliciting this testimony, D asked C.W. whether she had filed a recantation admitting that the abuse had never happened. State objected because it did not know about the specifics of the incident. D argued it was relevant because it related to C.W.'s credibility as a witness. Under Indiana Evidence Rule 607, the credibility of a witness may be attacked by any party. However, pursuant to Evidence Rule 608(a), a party may only attack the credibility of a witness through evidence in the form of opinion or reputation. Evidence of C.W.'s recantation was precluded by Evidence Rule 608(b), which provides that evidence regarding specific incidences other than convictions is inadmissible. Held, judgment affirmed.

TITLE: Norton v. State
INDEX NO.: O.6.e.
CITE: (2nd Dist., 3-26-03), Ind. App., 785 N.E.2d 625
SUBJECT: Impeachment; reputation evidence - family as "community"
HOLDING: Tr. Ct. did not abuse its discretion in deciding that a family group did not amount to a substantial community of persons for purposes of Indiana Evidence Rule 608(a). D argued that his impeachment witness should have been allowed to testify concerning veracity of his brother, the State's witness, based on opinions formed from being in same family. Tr. Ct. disallowed evidence based on State's objection that reputation evidence for purposes of impeachment could not be based upon community of a "family." Nature of communities from which admissible reputation evidence may be drawn has received little discussion in Indiana case law, & specific issue of "family" as community has received no treatment. Court analyzed cases from other jurisdictions but decided that Tr. Ct. was in far better position to decide whether foundational requirements for admissibility of impeachment evidence had been met, while recognizing that there may be cases where community of one's family is deemed to be of sufficient size to provide requisite reliability for impeaching witness's testimony. Because Tr. Ct. is proper arbiter of such decisions & standard of review is deferential, it could not be said that Tr. Ct. erred in disallowing impeachment testimony. Held, judgment affirmed.

TITLE: Palmer v. State
INDEX NO.: O.6.e.
CITE: (5th Dist., 8-17-95), Ind. App., 654 N.E.2d 844
SUBJECT: Impeaching witness's credibility - alleged drug use
HOLDING: Tr. Ct. did not abuse its discretion in excluding evidence concerning police officer's drug use & related suspension from police force. Witness may not be impeached by specific acts of misconduct that have not resulted in criminal convictions. Ind. Evidence Rule 608(b). Drug use may not be used for impeachment unless evidence tends to show that: 1) witness was under influence of drugs either at time of trial or at time of occurrence testified to, or 2) witness's ability to perceive, remember & testify are substantially affected by drug usage. Terrell v. State (1987), Ind. App., 507 N.E.2d 633. Record did not indicate that exceptions were concerns in this case. Held, no error.

TITLE: Saunders v. State
INDEX NO.: O.6.e.
CITE: (5th Dist.; 06-13-06), Ind. App., 848 N.E.2d 1117
SUBJECT: Character evidence -- cannot impeach credibility with specific acts of misconduct
HOLDING: Tr. Ct. did not err in excluding evidence of a specific instance of conduct regarding eye-witness' truthfulness. Credibility of a witness may be attacked or supported by evidence in form of opinion or reputation for truthfulness; however, specific instances may not be inquired into or proven by extrinsic evidence. Ind.Evid. Rule 608(a), (b). That is, a witness may not be impeached by specific acts of misconduct that have not resulted in criminal convictions. Here, D wanted to present evidence that eye-witness' had used false Social Security number & was fired from her job, which has prevented her from getting any other jobs. This was a specific instance of conduct not reduced to conviction being used to impeach credibility of witness, & was, thus, inadmissible. Further, exclusion of the evidence did not violate D's Sixth Amendment right to confront witnesses. Held, conviction affirmed.

RELATED CASES: Jacobs, 22 N.E.3d 1286 (Ind. 2015) (Tr. Ct. properly excluded evidence of C.W.'s past untruthfulness).

TITLE: Sevits v. State
INDEX NO.: O.6.e.
CITE: (3rd Dist., 5-24-95), Ind. App., 651 N.E.2d 278
SUBJECT: Testimony regarding religious education
HOLDING: Tr. Ct. did not err in allowing State's witness to testify as to his religious education & training. Ct. noted that common law & Ind. Evidence Rule 610 indicates that evidence of belief or opinions of witness on matters of religion is not admissible for purpose of enhancing credibility or bolstering character. Lax v. State, Ind., 414 N.E.2d 555. D argued that testimony improperly bolstered witness's credibility & violated his fundamental right to fair trial. Ct. held that credibility was not enhanced in this case because testimony was not expression of witness's religious opinions & beliefs but was only recitation of his religious education. Moreover, testimony regarding prior training in interviewing & counseling was relevant to rebut implication that witness improperly coerced D's confession. D failed to show that testimony was so prejudicial that but for its admission, outcome of proceedings would have been different. Ballin v. State, Ind. App., 610 N.E.2d 846. Held, judgment affirmed, Garrard, J., concurring.

TITLE: United States v. Abair

INDEX NO.: O.6.e.

CITE: (3/19/2014), 746 F.3d 260 (7th Cir. 2014)

SUBJECT: Impeachment - insufficient basis to believe D's prior conduct was probative of her character for truthfulness

HOLDING: In federal prosecution for structuring transactions to evade reporting requirements (31 U.S.C. § 5324(a)(3)), Tr. Ct. erroneously applied Federal Rule of Evidence 608(b) by allowing the prosecutor to cross-examine D at length about alleged false statements on a tax return and student financial aid applications. Rule 608(b) limits the use of specific examples of a witness's prior conduct to support or undermine the witness's credibility. The rule bars extrinsic evidence of prior conduct but gives trial judges discretion to allow counsel to ask about it on cross-examination. Because "the possibilities of abuse are substantial," however, the conduct must be sufficiently relevant to truthfulness before it can be the subject of cross-examination. What questions are allowed remains subject to the overriding protection of Rule 403, which requires that their probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. See United States v. Seymour, 472 F.3d 969, 971 (7th Cir. 2007). [**NOTE:** Under Indiana Evidence Rule 608(b), witnesses may not be impeached with specific acts of misconduct that have not resulted in criminal convictions].

Here, Government lacked a good faith basis for believing that D lied on the tax and financial aid forms and, therefore, the district court erred by allowing the prosecutor to ask a series of accusatory and prejudicial questions about them under Rule 608(b). Court could not say that the error was harmless in a trial that hinged on D's credibility. Providing guidance on retrial, Court implied that forfeiture of the entire proceeds of D's home sale (over $67,000) was an unconstitutionally excessive fine. Held, conviction reversed and remanded for a new trial.

TITLE: United States v. Manske
INDEX NO.: O.6.e.
CITE: 186 F.3d 770 (7th Cir. 1999)
SUBJECT: Cross-Examination -- Threats Against Other Witnesses
HOLDING: Tr. Ct. erred in precluding D from cross-examining government witness about threats he made against other witnesses, and from cross-examining those witnesses regarding the threats and their impact. Because case essentially came down to testimony of two accomplice-witnesses versus the testimony of the D, so that credibility was seriously at issue and case lacked corroborating physical evidence, error required reversal.

O. EVIDENCE
O.6. Impeachment
O.6.f. Prior conviction

TITLE: Brown v. State
INDEX NO.: O.6.f.
CITE: (12-3-98), Ind., 703 N.E.2d 1010
SUBJECT: Impeachment - prior conviction in another jurisdiction
HOLDING: For purposes of Ind. Evidence Rule 609(a), which provides for admission of evidence of certain convictions for impeachment, evidence of prior conviction in another jurisdiction is not automatically admissible to impeach simply because other jurisdiction uses label for crime that is found in Rule 609(a)(1) list. If crime is not substantially equivalent to Ind. crime listed, it does not qualify under Rule 609(a)(1). Here, burglary for which D was convicted in Illinois involved entering automobile with intent to commit theft. D argued that "burglary" in Illinois would not have been "burglary" in Ind. & thus evidence of prior Illinois conviction was not admissible under Rule 609(a).

Ct. held that it was not error to admit this evidence because prior theft convictions are generally admissible for impeachment purposes as proof of crime involving dishonesty or false statement. I.R.E. 609(a)(2); Fletcher, 264 Ind. 132, 340 N.E.2d 771. In order to avoid presumption that theft is Rule 609(a)(2) crime, D must make ameliorating facts known to Tr. Ct. through pre-trial motion in limine supported by appropriate affidavits. Because D made no motion in limine or other offer with respect to Illinois conviction, he failed to rebut presumption & conviction was admissible for impeachment purposes. Held, judgment affirmed.

TITLE: Cason v. State
INDEX NO.: O.6.f.
CITE: (10/29/96), Ind., 672 N.E.2d 74
SUBJECT: Impeachment - prior conviction not admissible; assisting criminal
HOLDING: In appeal of murder conviction, D claimed that Tr. Ct. erred by refusing to permit him to impeach witness who identified him as perpetrator by informing jury of witness's conviction for assisting a criminal. However, this crime is not impeachable offense under I.R.E. 609(a). D claimed, however, that witness's conviction should be admissible because witness had originally been charged with robbery but pled guilty to lesser charge. Court concluded that what prosecutor might have proven had case been tried is matter of speculation. Tr. Ct. was not obligated to litigate that speculation & did not err by refusing D's effort to use conviction for impeachment purposes. Held, no error.

RELATED CASES: For other crimes which are not listed in IRE 609(a) and do not involve dishonesty or false statement, see Price, 665 N.E.2d 860 (child molestation conviction); Johnston, 517 N.E.2d 397 (drug offenses); Snead, 490 N.E.2d 761 (assault); Lewis, App., (malicious trespass); Belcher, 453 N.E.2d 214 (prostitution); Small, App., 632 N.E.2d 779 (resisting arrest).

TITLE: Chapman v. State

INDEX NO.: O.6.f

CITE: (1-31-20), Ind. Ct. App., 141 N.E.3d 881

SUBJECT: Impeachment using prior conviction -- time on unsupervised probation is not "confinement" for purposes of calculating IRE 609's 10-year time period

HOLDING: After Defendant testified at his May 30, 2019 sexual battery trial, the trial court allowed the State to impeach him using a prior conviction for the crime of false informing. Defendant was convicted of false informing on August 24, 2008, and was sentence to 180 days suspended with one year of unsupervised probation, which ended on September 1, 2009. The Court of Appeals held that the unambiguous language of Ind. Rule of Evidence 609(b) does not mention probation and the beginning point for the ten-year period of IRE 609 was when Defendant was convicted in 2008. Therefore, at the time of Defendant's testimony, the prior conviction was outside the ten-year limit. The Court further held that since the State did not provide reasonable written notice and the trial court did not engage in the balancing test, it was error to admit the evidence. Given that the evidence presented at trial was entirely testimonial and the case turned largely on the credibility of Defendant and C.W. and the State relied on the prior conviction during closing argument, the error was not harmless. The Court reversed the conviction and remanded for a new trial. Judge Crone concurred in result with a separate opinion.

TITLE: Davis v. State
INDEX NO.: O.6.f
CITE: (3rd Dist., 8-21-95), Ind. App., 654 N.E.2d 859
SUBJECT: Impeachment - prior conviction same as that for which D is on trial
HOLDING: Tr. Ct. did not err in refusing to delete reference to specific prior conviction offered by State to impeach testimony of D, where impeaching evidence was for same crime for which D was on trial. D argued that although impeaching evidence of same previous crimes is admissible under Ind. Evidence Rule 609, risk of prejudice under these circumstances outweighed probative value, even considering Tr. Ct.'s admonishment to jury. D contended that if impeaching evidence is to be admitted, reference to particular crime should be omitted & jury would be informed only that D was previously convicted of "felony." Ct. rejected D's argument because it would allow speculation that conviction of any "felony" ipso facto calls into question veracity of witness, & such inference is "exactly that which is prohibited" by Evid.R. 609. Further, stating only that D had been previously convicted of felony undermines admonishment to jury limiting such evidence to question of credibility, not propensity to commit crimes. Held, no error.

TITLE: Jenkins v. State
INDEX NO.: O.6.f.
CITE: (3/27/97), Ind. App., 677 N.E.2d 6244
SUBJECT: Impeachment - admissibility of criminal conviction
HOLDING: In carrying handgun w/o license & battery case, Tr. Ct. did not err by failing to undertake I.R.E. 403 balancing analysis before admitting D's prior robbery conviction. I.R.E. 609(a) states that for "purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is," inter alia, robbery. Noting that this rule differs from the federal counterpart, Court held that Ind. R. Evid. 609 is not subject to Tr. Ct.'s discretion. Held, convictions affirmed.

TITLE: Specht v. State
INDEX NO.: O.6.f.
CITE: (8-17-00), Ind., 734 N.E.2d 239
SUBJECT: Witness may be impeached with guilty plea not yet reduced to judgment
HOLDING: Tr. Ct. did not err by permitting State to impeach D with evidence of prior guilty plea to confinement that had not been reduced to conviction. Indiana Rule of Evidence 609(a) provides that proof that witness has been convicted of crime may be admitted for purpose of attacking that witness's credibility if crime involves dishonesty or if it is crime catalogued in 609(a)(1), which includes confinement. Prior to adoption of Indiana Rules of Evidence, Ct. held that guilty plea not yet reduced to judgment constitutes conviction for impeachment purposes. McDaniel, 268 Ind. 380, 375 N.E.2d 228 (1978). Rule 609(a) preserved, rather than replaced, Indiana caselaw regarding impeachment. Thus, D's motion in limine & subsequent objection to State's impeachment on this basis were properly denied & overruled. Held, judgment affirmed.

O. EVIDENCE

O.6. Impeachment

O.6.f.1. In general

TITLE: Fox v. State
INDEX NO.: O.6.f.1.
CITE: (9/6/86), Ind., 497 N.E.2d 221
SUBJECT: Impeachment - prior convictions; harmless error
HOLDING: Although Tr. Ct. erred in allowing testimony concerning penitentiary records & D's statement that he "wanted to turn himself in to his parole officer," Ct. finds error in admitting testimony harmless in light of substantially overwhelming evidence supporting D's robbery convictions. Here, officer testified he learned during investigation that one robber referred to the other as "Kid" or "Cad" during robbery. Officer testified he inquired at IN Reformatory & a record check revealed that D used nicknames. Evidence of prior offenses committed by D may not be introduced either to establish guilt of crime charged or to show D's propensity to commit crime. Malone 441 N.E.2d 1339. Such evidence lacks probative value & is neither relevant nor admissible. Ct. finds none of the exceptions allowing introduction of evidence of prior convictions applicable. However, victims of robbery testified they knew D & recognized his voice when he spoke during robbery. Held, harmless error; conviction affirmed.

TITLE: Giles v. State
INDEX NO.: O.6.f.1.
CITE: (5th Dist., 8-5-98), Ind. App., 699 N.E.2d 294
SUBJECT: Impeachment with conviction over 10 years old - failure to provide proper notice
HOLDING: It is error to permit impeaching of witness with conviction over ten years old when proponent of evidence has failed to provide adverse party with proper notice under Ind. Evidence Rule 609(b). Commentary to Evid.R. 609(b) recommends that required notice include: 1) date of conviction; 2) jurisdiction; 3) offense; & most importantly 4) specific facts & circumstances alleged to justify admission. Entire purpose of providing advance written notice of intent to use stale conviction is to allow adverse party fair opportunity to contest use of such evidence. Ct. rejected State's argument that, notwithstanding its failure to provide D with advance written notice, filing of habitual offender charge containing stale conviction sufficiently advised D of State's intent to impeach him with that conviction. Filing of habitual offender charge does not cause D to conclude that stale convictions will be used to impeach him. Thus, D did not receive sufficient advance notice of State's intent to impeach him with stale conviction, & error was not harmless. Held, conviction reversed & remanded.

RELATED CASES: Wales, App., 768 N.E.2d 513 (where D opens door to criminal history, State does not have to comply with notice requirement of Ind. Evidence Rule (IRE) 609(b); see full review at O.6.f.5).

TITLE: Hunt v. State
INDEX NO.: O.6.f.1.
CITE: (10/21/83), Ind., 455 N.E.2d 307
SUBJECT: Impeachment - prior conviction not on rap sheet
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial or alternative motion in limine based on prosecutor's impeachment use of prior conviction. Here, prosecutor told defense counsel he knew of no felony convictions reflected on D's FBI rap sheet. However, both attorneys had copy of prerelease interview in which D told interviewer he had a 1972 Chicago theft conviction. D objected to prosecutor's question, arguing overreaching. D contends his decision to testify was based on prosecutor's pretrial statement. Both attorneys had copy of interview. Theft conviction was properly available to impeach D. Held, no error.

TITLE: Nunn v. State
INDEX NO.: O.6.f.1.
CITE: (10-23-92), Ind., 601 N.E.2d 334
SUBJECT: Impeachment with pardoned conviction - adoption of F.R.Evid. 609(c)
HOLDING: Ct. adopted Federal Rule of Evidence 609(c) to determine when witness may be impeached with conviction for which there has been pardon. Rule 609(c) states: Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, & that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence. Federal rule protects purpose of pardon, to give fresh start by blocking out existence of guilt, by permitting impeachment with such conviction only in limited circumstances. Ct. found that in instant case witness had achieved pardon because he had led crime-free life since release, earned confidence & support from community, & wanted to be police officer. Therefore, Tr. Ct. did not err in refusing to permit impeachment with previous pardoned conviction.

RELATED CASES: Corbett - 179 N.E.3d (Ind. Ct. App. 2021) (Article 15 non-judicial punishment received while in the Navy is not a criminal conviction and cannot be used to impeach a witness under Evidence Rule 609)

TITLE: Whiteside v. State
INDEX NO.: O.6.f.1.
CITE: (5th Dist., 09-14-06), Ind. App., 853 N.E.2d 1021
SUBJECT: Impeachment of witness's conviction over 10 years old - termination of time period
HOLDING: Indiana Evidence Rule 609(b) states that evidence of a witness' conviction is not admissible if period of more than ten years has elapsed since date of release of witness unless Tr. Ct. determines, in interests of justice, that probative value of conviction, supported by specific facts & circumstances, substantially outweighs prejudicial effect. Addressing issue of first impression in Indiana, Court held that the date the witness testified, or the evidence is introduced is the most appropriate termination point for determining whether a conviction falls within the ten-year limit provided by Evidence Rule 609(b). Court based its holding on plain language of rule & its underlying policy considerations, i.e., to guard against the prejudicial impact that disclosure of a prior conviction has upon the jury. Because it is the jury which must evaluate the witness' credibility, the most appropriate time to conclude the ten-year period is the date the jury actually hears the witness testify that he had been convicted of a crime. Trindle v. Sonat Marine, Inc., 697 F.Supp. 879 (E.D. Pa. 1988).

In this case, Tr. Ct. erred in finding that witness's prior conviction fell inside the ten-year limit provided by Evidence Rule 609(b), & also abused its discretion in admitting the conviction because State failed to comply with the notice requirement of Rule 609(b). Because prior conviction was used to impeach witness rather than as substantive evidence of D's guilt, the violation of notice requirement was harmless. Court also noted that witness' credibility was a central issue at trial, & Tr. Ct. did not abuse its discretion in weighing the probative value of the prior conviction against its prejudicial impact as required by Rule 609(b) & finding that it was admissible. Held, judgment affirmed.

O. EVIDENCE

O.6. Impeachment

O.6.f.2. Ashton v. Anderson (Ind. Code 34-1-14-14)

TITLE: Adams v. State
INDEX NO.: O.6.f.2.
CITE: (3d Dist. 8/29/89), Ind. App., 542 N.E.2d 1362
SUBJECT: Impeachment - prior convictions (Cs); attempted Ashton crimes
HOLDING: Tr. Ct. erred in prohibiting D from using prior conviction for attempted rape to impeach witness. Under Ashton v. Anderson 279 N.E.2d 210, two types of convictions may be used to impeach: (1) certain "infamous" crimes which at common law would have rendered witness incompetent, & (2) crimes which reflect on witness' propensity for telling truth. Rape is among infamous crimes included in Ashton's first prong. However, state argues that conviction for attempted rape may not be used to impeach. Conviction for attempt requires that individual act with culpability required for commission of crime & engage in conduct that constitutes substantial step toward commission. Ind. Code 35-41-5-1(a). Ct. App. equates attempted rape with "frustrated" rape. See Washington 517 N.E.2d 77. Heinousness of offense is not lessened merely because its completion was prevented. If conviction for rape reflects upon character of witness, conviction for attempted rape reflects no less so. Held, Tr. Ct. erred in preventing impeachment, but error was harmless.

TITLE: Burkes v. State
INDEX NO.: O.6.f.2.
CITE: (3/8/83), Ind., 445 N.E.2d 983
SUBJECT: Impeachment - prior theft conviction/lesser included
HOLDING: Prior conviction for theft or a lesser included offense of theft is admissible for impeachment purposes, subject to exclusionary procedure provided in Fletcher 340 N.E.2d 774. Lewis, App., 299 N.E.2d 193 is overruled. Here, D contends 1970 joyriding conviction is not admissible under rule of Ashton v. Anderson 279 N.E.2d 210. Ct. adopts holding of Brown, App., 286 N.E.2d 201 (exercising unauthorized control over a motor vehicle is lesser included offense of theft when offense charged is theft of an automobile). Exclusionary provision in Fletcher applies to theft convictions which do not indicate witness' lack of veracity. Counsel should file motion in limine setting forth facts sufficient to provide Ct. opportunity to exclude any reference to such prior conviction. D neither followed procedure outlined in Fletcher nor specified why 1970 conviction for joyriding was inadmissible under Ashton. Held, no error.

RELATED CASES: Brown, 703 N.E.2d 1010 (D failed to rebut presumption that theft conviction in Illinois was admissible for impeachment purposes under I.R.E. 609(a)(2)); Winegar, App., 455 N.E.2d 398 (conversion is a lesser included of theft (Wells 441 N.E.2d 1366) & may be used to impeach).

TITLE: Hodge v. State
INDEX NO.: O.6.f.2.
CITE: (12/14/82), Ind., 442 N.E.2d 1006
SUBJECT: Impeachment - prior convictions (Cs); Ashton v. Anderson
HOLDING: A witness may not be impeached by proof of particular extraneous acts of misconduct which are not reduced to Cs. Chambers 392 N.E.2d 1156; Bryant 301 N.E.2d 179; Dunkle, App., 425 N.E.2d 185. General credibility of witness ordinarily may be attacked only by showing C for treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, perjury or other crime involving dishonesty & false statement. Daniels 408 N.E.2d 1244; Mitchell 398 N.E.2d 1254. Here, D contended Tr. Ct. erred in granting prosecutor's motion in limine to prohibit evidence concerning sexual attack upon fellow prisoner by prosecutions' star witness. Ct. finds witness was not even charged with alleged attack. Held, no error.

RELATED CASES: Price, 656 N.E.2d 860 (no error in excluding evidence of prior child molesting conviction of state's witness; child molest conviction based on act of intercourse is not functional equivalent to rape conviction); Miles, App., 591 N.E.2d 642 (it was reversible error to deny Ds right to impeach State's witness with 2 prior misdemeanor convictions for false informing because witness' prior convictions involved dishonesty & false statements); Carter 505 N.E.2d 798 (prostitution is not an impeachable offense); Sweet 498 N.E.2d 924 (entering to commit a felony is not admissible under Ashton v. Anderson); Bates 495 N.E.2d 176 (Witn 337(6); state should not have been allowed to impeach D by showing prior C for assisting a criminal; however, error was harmless); Dudley 480 N.E.2d 881 (Witn 337(6), 344(2); it was not improper to prohibit D from inquiring re one witness' conviction for not having a gun permit & another's conviction for drug dealing; neither fall within crimes set out in Ashton; inquiry re parole violation also was properly prohibited because it does not constitute a conviction & as such is inadmissible for purposes of impeachment, *citing* Jarvis 441 N.E.2d 1); Jones 467 N.E.2d 1179 (Tr. Ct. erred in allowing state to impeach defense witness by questioning him about prior Cs for failure to pay child support & for escape; such questioning is impermissible impeachment under Ashton v. Anderson); Green 470 N.E.2d 333 (Witn 345(4); CX of D re escape attempt was improper impeachment because D was not convicted of attempt; held, harmless error in light of eyewitness accounts that D shot & killed victim without provocation; Prentice DISSENTS without opinion); Eubank 456 N.E.2d 1012 (effect of insanity defense - see card at L.1.b.1); Lessig, App., 489 N.E.2d 978 (Ct. adds criminal confinement to list of "infamous crimes" found in Ashton v. Anderson; Ct. finds criminal confinement embodies 1972 crime of kidnapping - elements are extremely similar & same moral turpitude is involved); Winegar, App., 455 N.E.2d 398 (C for check deception may be used to impeach under Ashton v. Anderson, *citing* McDaniel 375 N.E.2d 228).

O. EVIDENCE

O.6. Impeachment

O.6.f.3. Opening the door

TITLE: Green v. State
INDEX NO.: O.6.f.3.
CITE: (7/14/83), Ind., 451 N.E.2d 41
SUBJECT: Impeachment - prior convictions; door not opened
HOLDING: Tr. Ct. erred in overruling D's objection to prosecutor's cross-examination concerning prior convictions where evidence was not otherwise relevant or admissible. D's tangential reference to his/ her criminal history does not allow prosecutor to explore details of that criminal history if such details are irrelevant to context in which history was revealed. Here, on direct, D testified that he was scared because he was on parole & that he knew not to give police statement because this wasn't his first arrest. State contends D opened door to inquiry about his criminal history. Error is not reversible because potential for prejudice was accomplished by D's mere mention of prior crimes; prosecutor's questioning did not increase prejudice. Held, conviction affirmed.

RELATED CASES: Jones 467 N.E.2d 1179 (held, defense question "were you [in jail] when . . ." did not open door to use of witness' prior convictions for impeachment).

TITLE: Hensley v. State
INDEX NO.: O.6.f.3.
CITE: (5/10/83), Ind., 448 N.E.2d 665
SUBJECT: Impeachment - D opens door during habitual offender trial
HOLDING: Tr. Ct. did not err in allowing state to cross-examine D regarding prior non-felony convictions during habitual portion of trial where D admitted 2 prior felony convictions, but stated he would not be able to provide for his children if imprisoned. Here, D alleged admission of prior non-felony convictions for burglary & criminal conversion on cross-exam severely prejudiced him. Ct. holds once D opens door, state may offer evidence of specific misconduct to rebut evidence presented by D. Bond 403 N.E.2d 812; Lineback 296 N.E.2d 788. D offered testimony that he supported his family & should be shown leniency because of their dependency on him. Prior non-felony convictions were admitted to rebut D's inference that he was a dependable family man. Held, no error.

TITLE: McKinney v. State
INDEX NO.: O.6.f.3.
CITE: (8/29/90), Ind., 558 N.E.2d 829
SUBJECT: Impeachment - opening door to otherwise inadmissible prior convictions
HOLDING: In attempted murder case, Tr. Ct. did not commit reversible error in permitting State to cross- examine D about convictions for other crimes. During direct examination, defense attorney elicited testimony from D as to whether he committed each listed Ashton offense. On cross, State asked D whether he had ever been convicted of any crimes. Over D's objection, Tr. Ct. permitted State's question finding that D had opened door by asking specific questions on specific crimes thus leading jury to possibly conclude that he had never been convicted of any crime. Relying on Hickman, 515 N.E.2d 511, Court found that D opened door to cross-examination about whether he had committed any other crimes by asking D on direct examination whether he had committed specific crimes. "We will not permit Ashton to serve as a shield behind which a D may present false or misleading evidence." Held, convictions affirmed.

TITLE: Roth v. State
INDEX NO.: O.6.f.3.
CITE: (4th Dist. 2/19/90), Ind. App., 550 N.E.2d 104
SUBJECT: Impeachment - non-Ashton offenses; opening door
HOLDING: D did not open door to impeachment by prior convictions by testifying that he did not think he was crazy & that he had never been treated for mental illness. D was charged with sexual battery & criminal deviate conduct. Victim (V) testified that D entered her apartment while she was asleep & remained for several hours. According to V, she feigned interest in D & he eventually left voluntarily after making a date for the following evening. V detailed D's actions while in her apartment & said that at times he acted really "crazy." On direct exam (DX), D's counsel asked him whether he thought he was crazy, & whether he had ever been treated for any kind of mental illness. D responded in negative. On CX, prosecutor asked D to define crazy, & ultimately, over D's timely objection, questioned D re prior convictions for disorderly conduct & battery. On appeal, D argues these prior convictions should not have been placed before jury, & state responds that D opened door when he defined "crazy" & said that he could not recall acting crazy. In Ashton v. Anderson, Ind. S. Ct. limited convictions for which witness may be impeached, although Ashton protection can be waived by DX question which invites answer containing evidence of any criminal conviction. If question on DX is precise & narrowly worded, door can be opened only by answer which tenders evidence of otherwise excluded criminal convictions. Fultz, App., 439 N.E.2d 659. Such evidence must leave trier of fact with false or misleading impression of facts related. Quarles 493 N.E.2d 1247. Questions on DX were merely an attempt to refute V's testimony D had acted crazy, & D did not discuss or even allude to prior convictions, nor did he mislead jury, or put character in issue. Erroneous admission of priors was not harmless, since evidence was conflicting on all points throughout trial. Held, reversed & remanded for new trial.

TITLE: Russell v. State
INDEX NO.: O.6.f.3.
CITE: (06/28/91), Ind., 577 N.E.2d 567
SUBJECT: Character evidence to impeach D - opening the door
HOLDING: Where D introduced evidence that he had caused landlady no problems as tenant, & that employer had never seen him carrying a knife, evidence tended to depict him as non-violent, & therefore "opened the door" to questioning from prosecutor as to a prior misdemeanor battery conviction. This was true even though such crime would normally be inadmissible for impeachment purposes as a prior crime. Additionally, there was no error in admitting evidence of specific factual basis of prior conviction. Because prior specific acts of misconduct not resulting in conviction are admissible, there is no reason to preclude them just because there has been a conviction. Held, reversed on other grounds, see Russell at O.4.c.2.

TITLE: Rutledge v. State
INDEX NO.: O.6.f.3.
CITE: (3d Dist. 8/24/83), Ind. App., 452 N.E.2d 1039
SUBJECT: Impeachment - prior convictions; D opens door
HOLDING: Where D opened door to questioning about his entire adult criminal record, Tr. Ct. did not err in allowing state to ask D about his conversion conviction (misdemeanor). Here, defense counsel asked D if he had been convicted of a crime since age 18. D said yes. Counsel asked: "Were you convicted of . . . burglary?'" D answered yes. On cross, state questioned D about prior conviction for conversion. Counsel's objection was overruled. A question on direct exam whether witness had any prior criminal convictions will open door to entire criminal record regardless of its admissibility under Ashton v. Anderson. Baker 372 N.E.2d 1174; Fultz, App., 439 N.E.2d 659. Held, no error.

RELATED CASES: Wilson, App., 521 N.E.2d 363 (where child molest D was asked on direct whether he had ever been "accused of doing anything like this before," D opened door to admission of prior convictions for conversion & drug dealing); Brown 504 N.E.2d 557 (Witn 349; where state introduced evidence of prior conviction of its informant on direct examination, Tr. Ct. properly prohibited D from cross-examining witness re extraneous acts not reduced to conviction, *citing* Hodge 442 N.E.2d 1006 & Ashton v. Anderson 279 N.E.2d 210); Allen 495 N.E.2d 180 (Witn 350; D opened door by testifying he had only 2 convictions; state properly cross-examined D re other convictions concealed by his direct testimony); Davis 481 N.E.2d 387 (Witn 277(5); D opened door during presentation of self-defense case); Smith 474 N.E.2d 973 (D opened door; held, impeachment with prior expunged conviction not error); Hauger 405 N.E.2d 526 (Crim L 376; where D responded no to defense counsel's question whether D had ever been convicted of any impeachable crimes, D placed character in issue; Tr. Ct. properly allowed prosecutor to present evidence of bad character by asking him if he had been convicted of assault of a police officer, theft & escape; Ashton v. Anderson 279 N.E.2d 210 does not apply where D introduces evidence of his good character); Hopper, App., 489 N.E.2d 1209 (Crim L 556; where D put prior sodomy conviction into evidence, jury was not required to limit consideration of evidence to impeachment of D's credibility; therefore D's instruction that such evidence could not be used for any purpose other than bearing on his credibility as a witness was properly refused).

TITLE: Wilson v. State
INDEX NO.: O.6.f.3
CITE: (10/18/2013), 997 N.E.2d 38 (Ind. Ct. App 2013)
SUBJECT: Admission of D's nicknames did not create connotation of criminality
HOLDING: Admitting evidence of D's nicknames was not an abuse of discretion. None of D's nicknames carried any implication of wrongdoing. The use of the nicknames did not create a "connotation of criminality sufficient to thwart the fairness of a trial." See Edgecomb v. State, 673 N.E.2d 1185, 1194-95 (Ind. 1996); McAbee v. State, 770 N.E.2d 802, 805 (Ind. 2002).

RELATED CASES: Harrison, 32 N.E.3d 240 (Ind. Ct. App 2015) (nickname was relevant to proving D's identity and “BamBam” has no apparent implication of criminality).

O. EVIDENCE

O.6. Impeachment

O.6.f.4. Juvenile record

TITLE: Martin v. State
INDEX NO.: O.6.f.4.
CITE: (10-19-00), Ind., 736 N.E.2d 1213
SUBJECT: Impeachment - juvenile matters
HOLDING: Tr. Ct. did not err by excluding juvenile record of State witness. Evidence of juvenile adjudications is generally not admissible under Indiana Rule of Evidence 609(d), unless Ct. determines in criminal case that offense would be admissible to attack credibility of adult & Ct. is satisfied that admission in evidence is necessary for fair determination of issue of guilt or innocence. Relying on Davis v. Alaska, 415 U.S. 308 (1974), D argued that Tr. Ct. should have admitted witness's juvenile record to afford D opportunity to uncover witness's potential bias & prejudice, & to challenge his credibility given that he was adjudicated delinquent for crime of dishonesty. However, unlike D in Davis who explained how witness's juvenile adjudication would be used to impeach witness, D did not propose evidence on basis that it tended to demonstrate that witness was testifying in exchange for favorable treatment by State. Further, unlike Davis, witness's testimony did not provide sole & crucial link in State's case against D & witness did not provide deceptive testimony regarding his juvenile adjudication or encounters with law-enforcement officials. Where, as here, party seeks to impeach witness with evidence of prior juvenile delinquency findings, general challenge to witness's character, without more, is not enough. Engle, 506 N.E.2d 3 (Ind. 1987). Jury had ample evidence with which to assess & weigh witness's credibility. Further attack on witness's general credibility by merely disclosing his juvenile adjudication for possession of stolen property was unnecessary for fair determination of D's guilt or innocence. Held, judgment affirmed.

TITLE: Newman v. State
INDEX NO.: O.6.f.4.
CITE: (4th Dist., 11-17-99), Ind. App., 719 N.E.2d 832
SUBJECT: Impeachment - juvenile record; when admissible
HOLDING: Juvenile adjudications are only admissible for impeachment of witness when D opens door to credibility of witness or adjudication falls within exception set forth in Ind.R.Evid. 609(d). Evidence of juvenile adjudications is generally not admissible under this rule. Ct. may, however, in criminal case allow evidence of juvenile adjudication of witness other than accused if conviction of offense would be admissible to attack credibility of adult & Ct. is satisfied that admission in evidence is necessary for fair determination of issue of guilt or innocence. Ind.R.Evid. 609(d). In addition, when witness offers evidence of his own character, he opens door to subject of his character for that trait placed in issue. Brown, 577 N.E.2d 221, cert. den'd, 506 U.S. 833 (1992). Here, witness' juvenile adjudications did not fall within exception in Ind.R.Evid. 609(d) because judge did not make finding that their admission into evidence was necessary for fair determination of issue of guilt or innocence of D. Also, witness did not place his character into evidence by claiming that he did not know that car in which he & D were traveling was stolen. Witness did not claim that he had never stolen car or been involved in prior criminal activity, & there was no possibility of prejudice to State because witness' statements about car were elicited by State during cross. Because juvenile adjudications are generally inadmissible to impeach credibility of witness, & witness's testimony failed to fall into any exception to this rule, Tr. Ct. improperly admitted evidence of witness' juvenile adjudication for purposes of impeaching his character; however, error was harmless because there was substantial independent basis supporting D's conviction. Held, conviction affirmed.

TITLE: Perkins v. State
INDEX NO.: O.6.f.4.
CITE: (10/25/85), Ind., 483 N.E.2d 1379
SUBJECT: Impeachment - juvenile matters
HOLDING: Tr. Ct. did not err in granting state's motion in limine prohibiting inquiry into juvenile record of prosecution witness. Disposition of juvenile matter does not constitute a criminal conviction. Pallett 381 N.E.2d 452. Juvenile records are not admissible at trial for purposes of impeachment. Hoskins 375 N.E.2d 191. Held, no error.

RELATED CASES: Cf. Davis v. Alaska, 94 S.Ct. 1105 (D entitled to impeach State's witness by showing witness was on probation following Juv.Ct. delinquency adjudication); Lahr App., 640 N.E.2d 756 (no error in prohibiting D from impeaching informant through cross-examination regarding informant's juvenile record; it was never claimed that informant had no criminal record & facts revealed he was extensively questioned about adult criminal convictions); Engle 506 N.E.2d 3; it was proper to prohibit D from impeaching accomplice with juvenile adjudication, *citing* Ind. Code 31-6-3-5(b) & Shelby 281 N.E.2d 885; Ct. distinguishes Choctaw 387 N.E.2d 1305, in which witness was juvenile was waived to adult Ct. & convicted of theft); Roland 501 N.E.2d 1034; although it was error to allow reference to defense witness' juvenile adjudication based on theft, it was not prejudicial to D); Terrell App., 507 N.E.2d 633; D's attorney opened door to admission of juvenile adjudication for impeachment purposes when he told jury in opening statement that "this man has no record;" under such circumstances it was not error to permit state to reveal D's juvenile record).

O. EVIDENCE

O.6. Impeachment

O.6.f.5. Staleness

TITLE: Dowdy v. State
INDEX NO.: O.6.f.5.
CITE: (4th Dist., 10-30-96), Ind. App., 672 N.E.2d 948
SUBJECT: Impeachment with conviction over 10 years old
HOLDING: Tr. Ct. did not err in finding that D's 1982 robbery conviction would be admissible for impeachment purposes if D testified. Ind. Evidence Rule 609(b) is biased against admitting convictions of more than ten years unless Tr. Ct. determines, in interest of justice, that probative value of conviction substantially outweighs its prejudicial effect. Further, party seeking to overcome Rule 609(b) presumption of exclusion must support argument for probative value with specific facts & circumstances upon which Tr. Ct. may base finding of admissibility. Following factors are useful in balancing aged conviction's probative value against risk of unfair prejudice: 1) impeachment value of prior crime; 2) point in time of conviction & witness' subsequent history; 3) similarity between past crime & charged crime; 4) importance of D's testimony; & 5) centrality of credibility issue. United States v. Castor, 937 F.2d 293 (7th Cir. 1991).

Here, because D was charged with two counts of robbery, impeachment value of his prior conviction was very significant. D had several additional arrests & convictions for theft & robbery. Further, there was some similarity between 1982 conviction & charged crimes. Both D's testimony & that of other witnesses would have been central to issue of credibility. Based on these facts, Tr. Ct. properly found that probative value of 1982 conviction substantially outweighed its prejudicial effect. Held, no error; Riley, J., dissenting.

TITLE: Robinson v. State
INDEX NO.: O.6.f.5.
CITE: (4/7/83), Ind., 446 N.E.2d 1287
SUBJECT: Impeachment - prior conviction; staleness
HOLDING: Denial of D's motion in limine to prohibit prosecutor from using prior conviction (30 years ago) to impeach D if he took the stand did not deny D his right to present evidence. Here, D was charged with child molesting. D contends his prior rape & sodomy conviction was too remote to be relevant. D urges Ct. to adopt 10-year rule of Fed. R. Evid. 609. IN S.Ct. refused to adopt federal rule in Cox 419 N.E.2d 1279. Importance to be given lapse of time since D's prior conviction is question for jury to determine when considering weight of evidence & credibility of witnesses. Hall, App., 339 N.E.2d 802. Rape is a crime that may be used for impeachment purposes. Ashton v. Anderson 279 N.E.2d 210. Held, no error. DISSENT by DeBruler would find error in denial of motion in limine. Tr. Ct. found conviction "so old & stale & remote" that it could not be used to prove depraved sexual instinct. DeBruler contends prior conviction was also remote for purposes of impeachment. "There is more to thirty years of a person's life than simply the lapse of time."

RELATED CASES: Mitchell, App., 690 N.E.2d 1200 (in order to exclude from evidence stale convictions, D must object on grounds of staleness).

TITLE: Scalissi v. State
INDEX NO.: O.6.f.5.
CITE: (12-14-01), Ind., 759 N.E.2d 618
SUBJECT: Impeachment - erroneous admission of D's prior convictions over ten years old
HOLDING: Although State's use of D's prior theft convictions to impeach his testimony violated ten-year restriction of Indiana Evidence Rule 609, error did not require reversal because it had insubstantial impact on jury & did not affect substantial rights of D. Tr. Ct. permitted State to impeach D's testimony that he "was finished stealing money from people" with D's prior convictions for theft ranging from 1970 to 1984. Rule 609(b), unlike Rule 403, is a rule that presumes exclusion of convictions more than ten years old. As such, party seeking to admit such convictions must support argument for probative value with specific facts & circumstances upon which Tr. Ct. may base finding of admissibility. In addition, Tr. Ct. must balance probative value against prejudicial effect of old convictions, & risk of prejudice is greater when conviction is that of party. Following factors are useful in balancing probative value against risk of unfair prejudice: 1) impeachment value of prior crime; 2) point in time of conviction & witness' subsequent history; 3) similarity between past crime & charged crime; 4) importance of D's testimony; & 5) centrality of credibility issue. U.S. v. Castor, 937 F.2d 293 (7th Cir. 1991). In this case, Ct. failed to assess whether probative value of these remote convictions substantially outweighed their prejudicial effect. Thus, State did not effectively rebut exclusionary presumption of Rule 609. However, in light of all evidence, Ct. concluded that D's rights were not substantially affected by erroneous admission of prior convictions. Even if prior convictions had not been admitted, jury would have had substantial impeachment evidence before it to cast doubt on credibility of D's testimony. Held, judgment affirmed.

RELATED CASES: Hall, App., 769 N.E.2d 259 (Tr. Ct. engaged in requisite balancing test & concluded that series of witness's crimes of dishonesty demonstrated that witness had engaged in pattern of conduct probative of credibility; held, no abuse of discretion in admitting prior crimes of State's hostile witness).

TITLE: Schwestak v. State
INDEX NO.: O.6.f.5.
CITE: (12-23-96), Ind., 674 N.E.2d 962
SUBJECT: Impeachment - admission of witness' prior conviction over ten years old
HOLDING: Tr. Ct. did not abuse discretion in refusing to permit D to impeach prosecution witness with evidence of witness' burglary conviction that was more than ten years old. Indiana Evidence Rule 609(b) states that evidence of witness' conviction is not admissible if period of more than ten years has elapsed since date of release of witness unless Tr. Ct. determines, in interests of justice, that probative value of conviction, supported by specific facts & circumstances, substantially outweighs prejudicial effect. Standard of review of Tr. Ct.'s decision to exclude evidence under Indiana Evid. R. 609(b) is abuse of discretion. United States v. Reed, 2 F.3d 1441 (7th Cir. 1993), cert. denied 510 U.S. 1079 (1994).

Here, D asserted that witness' testimony was very important to State's case but offered no other reason why probative value of conviction was sufficiently high to overcome rule that stale convictions are not admissible. Ct. found that particular witness' testimony was not dispositive, since State offered ample other evidence establishing D's guilt. Following Reed, Ct. held that Tr. Ct. did not abuse its discretion in declining to allow admission of witness' prior conviction. Held, conviction affirmed.

TITLE: Wales v. State

INDEX NO.: O.6.f.5.

CITE: (5-28-02), Ind. App., 768 N.E.2d 513

SUBJECT: Impeachment by prior convictions over ten years old - proper where D opens door even if State did not give notice

HOLDING: Where D opens door to criminal history, State does not have to comply with notice requirement of Ind. Evidence Rule (IRE) 609(b). Here, D's direct testimony left jury with false & incomplete impression that criminal history was attributable to drug use. Also, defense counsel asked broad, general questions about criminal history as opposed to limiting questioning to specific conviction. D relied heavily on Giles v. State, 699 N.E.2d 294 (Ind. Ct. App. 1998), which held it was error to permit impeachment of witness with conviction over ten years old when proponent of evidence has failed to provide adverse party with proper notice under IRE 609(b). However, Giles did not open door to criminal history & S.Ct. has implicitly held that IRE 609(b)'s procedural requirement that Tr. Ct. engage in balancing process is moot where D opens door to impeachment evidence. Scalissi v. State, 759 N.E.2d 618 (Ind. 2001). Therefore, because D opened door by presenting misleading view of criminal past on direct examination, Tr. Ct. did not abuse its discretion by allowing State to impeach D with evidence of robbery conviction over ten years old, even though State failed to provide notice. Held, judgment affirmed.

RELATED CASES: Wales, App., 774 N.E.2d 116 (on rehearing, Ct. reaffirmed original opinion & rejected D's argument that evidence was inadmissible under IRE 403; balancing test of 609(b) inverts 403 test).

O. EVIDENCE

O.6. Impeachment

O.6.f.6. Underlying facts

TITLE: Eckstein v. State
INDEX NO.: O.6.f.6.
CITE: (8/2/88), Ind., 526 N.E.2d 693
SUBJECT: Impeachment - prior convictions; extent of questioning
HOLDING: D claimed Tr. Ct. erred in permitting State to inquire into specific details of D's past criminal record. After D testified at trial, State on cross-examination inquired about nature of burglary convictions. It is true that unless D opens door as to details of prior crimes, it is improper for State to delve into such details beyond fact of prior convictions. However, in present case, so-called detail merely went to name of person owning burglarized premises & location. In light of overwhelming evidence of guilt, error was harmless. Held, conviction affirmed.

RELATED CASES: Hobbs, 548 N.E.2d 164 (Tr. Ct. properly precluded D's questions about details of witness' convictions after witness had testified on direct examination as to extent of his criminal history); King, 531 N.E.2d 1154 (D was not entitled to have State's impeachment of him by prior rape conviction limited to evidence that D had been convicted of "infamous" crime, rather than specifically revealing to jury that he had prior rape conviction).

TITLE: Hansford v. State
INDEX NO.: O.6.f.6.
CITE: (4/1/86), Ind., 490 N.E.2d 1083
SUBJECT: Prior convictions - specific details not explorable
HOLDING: Tr. Ct. did not err in restricting defense counsel's efforts to explore details of witness' prior convictions. Witness may be questioned only re whether he/she has been convicted of particular crime. Skaggs, 293 N.E.2d 781. Generally, details of prior convictions for crimes of dishonesty/false statement may not be explored. King, 468 N.E.2d 226. Held, no error.

RELATED CASES: Baker, 505 N.E.2d 49 (although it was improper to permit questioning re details of armed robbery conviction, *citing* Gill, 467 N.E.2d 724, error was harmless); Quarles, 493 N.E.2d 1247 (Crim L 396(1); D's attorney opened door to inquiry re details of prior battery conviction when he asked D if he "got into a fight or something?" & D responded "yes" when in fact D shot a person; evidence relied upon to open door must leave trier of fact with false/misleading impression of facts [Gilliam, 383 N.E.2d 297]; Ct. finds counsel's inquiry had such effect); Gill, 467 N.E.2d 724 (introduction of evidence that D was armed with gun in prior attempted robbery conviction had no permissibly relevant purpose to D's trial for armed rape; however, improper admission was harmless because of overwhelming evidence of guilt).

TITLE: Newland v. State

INDEX NO.: O.6.f.6.

CITE: (6/19/19), Ind. Ct. App., 126 N.E.3d 928

SUBJECT: Proper limitation of cross examination regarding specific details of witness' prior conviction

HOLDING: In burglary prosecution, trial court did not abuse its discretion by preventing Defendant from cross-examining a witness on the specific facts and circumstances surrounding the witness' prior theft conviction pursuant to Indiana Evidence Rule 609. State merely questioned witness whether he had been convicted of theft, to which witness responded affirmatively. The State did not inquire into the particulars of the conviction, so trial court properly limited Defendant's cross-examination.

Court also rejected Defendant's argument that the particulars surrounding witness' theft conviction would fall into the exceptions found in Evid.R. 404(b)(2) such as motive, plan or identity. Defendant's strategy was to place before jury details of witness' previous conviction for the sole purpose of creating the "forbidden inference," namely, prior wrongful conduct in similar circumstances suggesting present guilt.

TITLE: Nunn v. State
INDEX NO.: O.6.f.6.
CITE: (10/23/92), Ind., 601 N.E.2d 334
SUBJECT: Pardons -- using conviction for which pardon has been granted to impeach witness
HOLDING: On appeal of murder conviction, D argued that it was improper for Tr. Ct. to preclude defense from using evidence of prior convictions to impeach State witness, even though there was pardon for crime. Ct. held that purpose of pardon is to give person new start by blocking out existence of guilt. When pardoned conviction is used to impeach person, purpose for granting pardon may be diminished. Even though Federal Rule of Evidence 609(c) protects purpose of pardon by permitting impeachment by pardoned conviction, it does so in only limited circumstances. Here, pardon granted in favor of witness stated that he had led crime-free life since his release from probation, he had earned confidence & support from his peers in community, & that pardon was requested so that he could become full-time police officer. Ct. held that Tr. Ct. properly refused to permit impeachment by pardoned conviction in this case. Held, remanded with instructions on other grounds; Givan, J., dissenting.

O. EVIDENCE

O.7. Expert witnesses

TITLE: Angeles v. State
INDEX NO.: O.7.
CITE: (2nd Dist., 6-16-01), Ind. App., 751 N.E.2d 790
SUBJECT: Qualifying foreign language translators
HOLDING: Under Indiana Evidence Rule 604, interpreters are subject to provisions of rules relating to qualification of expert & administration of oath or affirmation to make true translation. To qualify as expert, interpreter must have specialized knowledge in language or particular form of communication sufficient to assist trier of fact to understand evidence. Both D's rights & judicial system would be better served if Tr. Cts. have guidelines to employ when appointing translators. First, Tr. Ct. should swear in translator using oath provided at Ind. Code § 34- 45-1-5. Next, Ct. should consider several factors when determining whether interpreter has necessary qualifications. Ct. suggested that Tr.Cts. ask following questions to potential interpreters to evaluate interpreter's qualifications. 1) Do you have any particular training or credentials as interpreter? 2) What is your native language? 3) How did you learn English? 4) How did you learn [the foreign language]? 5) What was the highest grade you completed in school? 6) Have you spent any time in the foreign country? 7) Did you formally study either language in school? To what extent? 8) How many times have you interpreted in Ct.? 9) Have you interpreted for this type of hearing or trial before? 10) Are you a potential witness in this case? 11) Do you know or work for any of the parties? 12) Do you have any other potential conflicts of interest? 13) Have you had an opportunity to speak with the non-English speaking person informally? Were there any particular communication problems? 14) Are you familiar with the dialect or idiomatic peculiarities of the witnesses? Although not exhaustive list, after considering these types of questions, Tr. Ct. will be better able to determine whether or not interpreter is properly qualified to translate. Held, judgment affirmed.

TITLE: Blinn v. State
INDEX NO.: O.7.
CITE: (2/18/97), Ind. App., 677 N.E.2d 51
SUBJECT: Expert witness - credibility
HOLDING: In OWI prosecution, D claimed Tr. Ct. committed reversible error by admitting expert testimony that conflicted with Indiana case law regarding conversion of serum alcohol content to whole blood content. He argued that expert testimony was not based upon reliable scientific principles. Ct. *cited* Shuman, App., 489 N.E.2d 126 for proposition that "legislature had intended for a conversion to be done when it allowed blood alcohol content to be measured from samples of other bodily fluids,"& that any conflicts as to how alcohol content in measured fluid relates to whole blood alcohol content are to be resolved by trier of fact after presentation of evidence & cross examination of experts. Here, D was free to cross-examine State's expert & present his own evidence regarding conversion process, including requesting that Tr. Ct. take judicial notice of published authorities. Held, no error in admitting expert testimony. Sullivan, J., dissenting with opinion.

TITLE: Carter v. State
INDEX NO.: O.7.
CITE: (3-3-99), Ind., 706 N.E.2d 552
SUBJECT: Expert testimony & scientific evidence in probation revocation proceedings
HOLDING: Tr. Ct. did not err in admitting urinalysis evidence during probation revocation proceeding, notwithstanding claim that State failed to qualify lab technician as expert & urinalysis equipment as reliable. In probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability. Cox, 706 N.E.2d 547. This includes expert testimony & scientific evidence.

S.Ct. rejected Ct. App.' conclusion that lab technician did not qualify as expert because he could not explain scientific basis for test. At hearing, technician testified that he had been responsible for operation of urinalysis equipment for more than five years & tested more than ten thousand samples. Technician further testified that he had received all training necessary to become operator of urinalysis machine used in D's case. Moreover, he demonstrated that he possessed expertise in use of equipment, testifying as to how urinalysis machine worked, how it was operated, how often it was tested, substances it tested, & how results of such tests were interpreted. Regardless of whether these credentials are sufficient to qualify technician as expert under either Frye test or Rules of Evidence, Ct. found them adequate for consideration by Tr. Ct. under evidentiary standards applicable to probation revocation hearings.

As for reliability of urinalysis equipment, Ct. noted that urinalysis technology is hardly novel & has become conventional means of drug-testing, results of which have been deemed reliable in Ind. Cts. Penrod, App., 611 N.E.2d 653. Held, transfer granted, Ct. App.' decision at 685 N.E.2d 1112 vacated, revocation of D's probation affirmed.

RELATED CASES: Mogg, App., 918 N.E.2d 750 (State proved that technology behind the SCRAM bracelet that monitors for alcohol consumption was sufficiently reliable for the resulting data to be admissible in a probation revocation proceeding; court considered Daubert factors); C.S., App., 817 N.E.2d 1279 (Ct. rejected juvenile's claim that his confrontation rights to cross-examine his accuser were violated because the testing information was presented by a probation officer without knowledge of the testing procedures employed); Black, App., 794 N.E.2d 561 (Tr. Ct. erroneously excluded an independent urinalysis from evidence in D's probation revocation hearing; see full review at F.1.e.2.c).

TITLE: Farmer v. State
INDEX NO.: O.7.
CITE: (5th Dist., 07-09-09), 908 N.E.2d 1192 (Ind. Ct. App. 2009)
SUBJECT: Expert testimony - witnesses should not be referred to as "experts"
HOLDING: Tr. Ct. abused its discretion in allowing State to refer to its witnesses as experts, but error was harmless. Neither counsel nor Tr. Ct. should refer to witnesses as "experts" in the presence of the jury. Campbell v. Shelton, 727 N.E.2d 495, 500 (Ind. Ct. App 2000). Here, the prosecutor tendered his witness as expert in the presence of the jury. Although Tr. Ct. and State should not have referred to the witnesses as experts, the jury was instructed that they should judge the testimony of the expert witness in the same manner as you judge the testimony of any other witness and that they were the exclusive judges of the evidence, which may be either witness testimony or exhibits. Thus, this error did not rise to the level of reversible error. Moreover, any error resulting from the State calling a lab analyst who testified as to another analyst's review of and opinion that fibers on duct tape found in D's possession were similar to the fibers of the victim's sweater was harmless. Although the fiber evidence linked D to the crimes, it paled in comparison to the other evidence of D's guilt, which included the victim's identification of D, D's confession to his friend and D's statements to the police. Also, police found the victim's stolen items in D's vehicle and home. Held, judgment affirmed.

RELATED CASES: Tate, 161 N.E.3d 1225 (Ind. Ct. App. 2021) (Farmer "said only that the trial judge should not call witnesses “experts” in front of the jury lest the court seem to bolster their testimony. Farmer does not address the situation where, as here, the State asked a witness about her history testifying as an expert witness. And we are aware of no rule prohibiting such testimony.").

TITLE: Hall v. State
INDEX NO.: O.7.
CITE: (2nd Dist., 9-30-03), Ind. App., 796 N.E.2d 388
SUBJECT: Erroneous exclusion of expert testimony - reliance on reports prepared by others
HOLDING: In murder prosecution, Tr. Ct. erred in excluding testimony of D's medical expert. Tr. Ct. excluded expert's testimony concerning his theory of the cause of victim's death, because expert: 1) did not see victim's computerized tomography scan (CT scan), but only radiology report of CT scan; 2) neither attended nor saw victim's autopsy; 3) does not conduct autopsies himself; & 4) failed to consider, or at least adequately explain, why other factors were not the cause of victim's death. On appeal, State conceded that reviewing radiology report of CT scan is more helpful to a physician than reviewing CT scan itself & that an expert witness need not attend autopsy to form opinion as to cause of person's death. However, State argued that fact that expert did not see victim & does not do autopsies rendered his opinion speculative.

Ct. held that fact that a qualified physician, who does not conduct autopsies, relied on reports prepared by others rather than inspecting victim himself should be of no importance in determination to exclude offered testimony of expert. As for Tr. Ct.'s determination that expert's testimony did not adequately explain why other factors were not cause of death, the very purpose of expert's testimony was to illustrate that cause of death theorized by State was incorrect because his theory, allegedly, represented actual cause of death. Although Tr. Ct.'s factors may be a valid ground for discrediting expert's testimony on cross-examination, using them to exclude expert's testimony amounted to an abuse of discretion. However, in light of substantial evidence of guilt, error excluding expert's theory of victim's death did not interfere with D's substantial rights. Held, convictions affirmed; Kirsch, J., concurring.

TITLE: Jervis v. State
INDEX NO.: O.7.
CITE: (5/12/97), Ind., 679 N.E.2d 875
SUBJECT: Expert witnesses - credibility
HOLDING: D claimed error in admission of testimony about contents of oral swab taken from strangled victim's mouth. Two lab technicians who analyzed swab testified as to its contents. At D's first trial, first technician stated that she "believed" swab contained 3 sperm; second technician "felt comfortable saying" he had found "one sperm head," but that "[t]his specimen definitely had few sperm present" even though D could not produce sperm due to vasectomy. After first trial, technicians viewed sample under more powerful microscope and testified at second trial that substance was in fact not sperm. Court noted that because technicians had plausible explanation for apparent discrepancy, Tr. Ct. did not abuse its discretion in admitting their testimony and physical evidence related to it. "This does not appear to be a matter of 'scientific principles' governed by IRE 702(b). Rather, it is a matter of the observations of persons with specialized knowledge." Credibility of explanation was jury question rather than viable contention on appeal. Held, no error.

RELATED CASES: Turner, 953 N.E.2d 1039 (Ind. 2011) (because Daubert factors are only helpful and not controlling in Indiana, failure of expert's opinion to meet some of these factors may go to weight of evidence rather than to admissibility; here, lack of formal testing and the inability to pin point other research on firearms opinion, all inform the fact finder's judgment on weighing this evidence, but does not render the evidence inadmissible); Smith, 702 N.E.2d 668 (vast majority of questions concerning manner in which PCR process, DQA, PM, DIS80 tests or product rule calculations were conducted in particular case go to weight of evidence, not its admissibility).

TITLE: Mariscal v. State
INDEX NO.: O.7.
CITE: (11/24/97), Ind. App., 687 N.E.2d 378
SUBJECT: Expert Witnesses - Qualifications of Interpreters
HOLDING: Tr. Ct. did not err in failing to qualify interpreter as expert, because D failed to object to appointment of interpreter & counsel's affirmative consent to appointment of interpreter waived issue of his suitability. I.R.E. 604 provides that "interpreter is subject to provisions of these rules relating to qualification as expert & the administration of an oath or affirmation to make a true translation." To qualify as expert, interpreter must have "specialized knowledge" in language or particular form of communication sufficient to assist trier of fact to understand evidence. I.R.E. 604 only applies when interpreter is used to assist trier of fact; it does not apply where interpreter is used to translate court proceedings to party. Held, no error.

RELATED CASES: Baltimore, App., 878 N.E.2d 253 (use of deaf victim's sign language interpreter to testify about her communication difficulties was not fundamental error because she clearly stated she was impartial & not an advocate at trial); Ozuna, App., 703 N.E.2d 1093 (although interpreter had independent meeting with prosecutor & state's witness before trial, interpreter was not interested in outcome of trial & properly served as court-appointed interpreter during trial).

TITLE: Otte v. State
INDEX NO.: O.7.
CITE: (05-17-12), 967 N.E.2d 540 (Ind. Ct. App 2012)
SUBJECT: Domestic violence expert testimony admissible
HOLDING: In residential entry and battery prosecution, Tr. Ct. did not abuse its discretion in allowing domestic violence expert to testify about propensity of domestic abuse victims to recant. At trial, defense counsel asked complaining witness (C.W.) on cross examination about domestic violence allegations she had made against D then recanted. C.W. admitted having claimed three months after making the allegations that she had made them up after D began dating another woman. C.W. testified that her true basis for recanting was that she had not wanted to go to trial. The State then introduced testimony from Yvonne Creekbaum, a domestic violence expert. She testified that victims of domestic violence routinely recant their stories. Creekbaum's testimony need not have been based upon demonstrably reliable scientific principles because her status as an expert witness was due to her specialized knowledge about domestic violence victims.

Moreover, Creekbaum's testimony was not vouching testimony under Indiana Evidence Rule 704(b) because she never directly referred to the truthfulness of C.W.'s testimony. The reactions and behaviors of domestic violence victims are not commonly understood by laypersons. Court has endorsed the use of expert testimony about domestic abuse/battered woman syndrome to explain witness recantation. Odom v. State, 711 N.E.2d 71 (Ind. Ct. App 1999). Testimony regarding a victim's propensity to recant in this context provides jury with information outside its experience, permitting it to assess credibility based upon a more complete understanding of all potential factors at issue. Held, judgment affirmed; Vaidik, J., concurring, believes that Creekbaum's testimony was admissible under Rule 702 as syndrome evidence to help the jury understand why C.W. recanted.

RELATED CASES: Carter, 31 N.E.3d 17 (Ind. Ct. App 2015) (in child molesting prosecution, no error in admitting forensic interviewer's broad, generalized testimony concerning dynamics of child abuse, the disclosure process and when and why a child may recant his disclosure of abuse).

TITLE: Smith v. State
INDEX NO.: O.7.
CITE: (6-13-01), Ind. App., 751 N.E.2d 280
SUBJECT: Police officer's training & experience - foundation for field sobriety test results.
HOLDING: Tr. Ct. did not abuse its discretion when it admitted police officer's testimony regarding field sobriety tests. D argued that State failed to demonstrate scientific basis for proposition that field sobriety test results are reliable indicators of intoxication. Ct. concluded that investigating officer's training & experience is only evidentiary foundation required for admission of field sobriety tests. Tests at issue do not involve any complex scientific process or principles. Results are reported as officer's observations about D's ability to perform simple tasks. Held, judgment affirmed.

TITLE: State v. Campbell
INDEX NO.: O.7.
CITE: 2002 Ohio 1143 (Ohio Ct. App. 2002)
SUBJECT: Expert Testimony - Based on Victim's Account
HOLDING: An arson expert's opinion as to cause of fire, which was based on account from victim of fire, should have been excluded. D's apartment burned, and his girlfriend was seriously injured. D told police fire started while he was out running errands, and probably started because of an overloaded electrical circuit or because his girlfriend fell asleep while smoking. Based on physical evidence, arson expert ruled out electrical fire and concluded the fire was an "open flame" fire likely started by match or candle. He pinpointed origin of fire near couch where girlfriend was found, and said that burn patterns did not indicate that flammable liquid was used. Later, after D's girlfriend recovered consciousness and was able to talk to police, she told them that D had poured lighter fluid over her and set her on fire. At trial, arson expert testified that origin of fire was the area of the couch, and that the cause of the fire was D's pouring lighter fluid on girlfriend and igniting it. Appellate Court reasons that only source for expert's opinion testimony at trial was interview with girlfriend. Because no physical evidence supported use of lighter fluid, expert's opinion was based on expert's underlying belief that girlfriend was telling the truth. Jury had before it all available evidence concerning cause of fire, and did not need expert's assistance. Further, arson expert was no more qualified than average juror to ascertain whether girlfriend's account was truthful and consistent with physical evidence about which he testified. His testimony should have been excluded. Held, conviction reversed.

TITLE: State v. Fortin

INDEX NO.: O.7.

CITE: 162 N.J. 517, 745 A.2d 509 (N.J. 2000)

SUBJECT: Expert "Linkage Analysis" Tying Charged Crimes to Past Acts Insufficiently Reliable for Admission

HOLDING: Expert testimony, based on "linkage analysis," that an assault to which murder D had pled guilty and charged capital offense probably had same perpetrator was insufficiently reliable for admission as scientific testimony. In reaching its conclusion, majority considered differences between two attacks, fact that linkage analysis as a field was based on study of serial killers, while there was no evidence that D was a serial killer, similarities between linkage analysis and "profiling" of rapists and murderers, which as a field is uneven, and fact that only the witness and his close associates practice linkage analysis, so that there are no peers to test his theories or duplicate his results. Nevertheless, majority held that witness could testify as to similarities between crimes for purposes of determining whether prior act was admissible as "signature" crime.

TITLE: State v. Gersin
INDEX NO.: O.7.
CITE: 76 OhioSt.3d 491; 668 N.E.2d 486 (Ohio 1996)
SUBJECT: Expert Testimony on Interview Protocols for Child Sex Abuse Victims
HOLDING: Expert testimony regarding proper protocols for interviewing alleged victims of child sexual abuse is admissible under Ohio's R.Ev. 702. Most jurors lack knowledge of accepted practices in interviewing child victims, particular child sexual abuse victims, or of the underlying reasons for their use. Such testimony would assist jurors in making educated determination as to the reliability of allegations, while leaving the ultimate issue of the child's veracity to the jury.

TITLE: State v. Sloan
INDEX NO.: O.7.
CITE: 912 S.W.2d 592 (Mo.Ct. App. 1995)
SUBJECT: Expert Testimony Criticizing Child-Questioning Techniques
HOLDING: Expert on child interviewing should have been allowed to testify regarding interview techniques used with 6-year-old complaining witness in child molest case. Expert was prepared to testify that use of two interviewers, and more important, presence of child's mother, created atmosphere which tainted answers, because child that age would tend to respond with answers she believes would be least likely to get her in trouble. Further, 78% of questions were leading.

TITLE: United States v. Cohen
INDEX NO.: O.7.
CITE: 510 F.3d 1114 (9th Cir. 2007)
SUBJECT: Evidence of narcissistic personality disorder available to disprove intent
HOLDING: Ninth Circuit Court of Appeals held a psychiatrist's opinion that D had a narcissistic personality disorder that could explain how he could have believed he was not obligated to obey the tax laws should have been admitted at trial to rebut the government's proof that he had the requisite intent to aid others in filing false returns Court explained that the testimony would not have run afoul of Rule 704(b) because, even had the jury accepted the diagnosis, it still would have had to determine what impact that condition might have had on D's ability to form the requisite intent to evade the tax laws. Court distinguished another tax case in which it held that testimony about D's gambling addiction was inadmissible. It explained that a narcissistic personality disorder can cause a person to continue to believe something to be true despite overwhelming evidence of its patent absurdity. By contrast, it noted the absence of evidence in the other case that an addiction to gambling could cause someone to believe that a false tax return was true.

TITLE: United States v. Ganier
INDEX NO.: O.7.
CITE: 648 F.3d 920 (6th Cir. 2006)
SUBJECT: Computer testimony was expert testimony; Evidence Rule 702
HOLDING: The Sixth Circuit U.S. Court of Appeals held that a government witness's proposed testimony from reports generated by forensic software that a D had searched e-mail records using search terms relevant to a grand jury investigation of his activities is expert testimony that must clear the hurdles set forth for such testimony by the federal rules of evidence. Although the software used by the witness is available to the public, the Court decided that a lay person would not be able to formulate the kinds of conclusions formed by the witness. The Court held the testimony constitutes "scientific, technical, or other specialized knowledge" within the scope of the federal rule defining expert testimony, Fed. R. Evid. 702. The Court noted that the reports generated by the forensic software display a heading, a string of words and symbols, a date and time, and a list of words, and that the witness will testify that the reports reveal three different types of searches performed with particular search terms at particular times. "Such an interpretation would require [the witness] to apply a knowledge and familiarity with computers and the particular forensic software well beyond that of the average layperson. . . . Software programs such as Microsoft Word and Outlook may be as commonly used as home medical thermometers, but the forensic tests [the witness] ran are more akin to specialized medical tests run by physicians." The Court acknowledged that it has in the past allowed witnesses to apply specialized knowledge while giving lay testimony. However, it added, a 2000 amendment to Fed. R. Evid. 701 clarified that lay opinions or inferences cannot be based on "scientific, technical, or other specialized knowledge within the scope of Rule 702." Further, even before the amendment, the Court generally did not allow witnesses who performed after-the-fact investigations to apply specialized knowledge in giving lay testimony. Thus, in this case, the proposed testimony may be offered only pursuant to Rule 702.

TITLE: U.S. v. Hall
INDEX NO.: O.7.
CITE: 93 F.3d 1337 (7th Cir. 1996)
SUBJECT: Expert Testimony on Disorder Prompting False Confession
HOLDING: Mental health expert's testimony regarding personality disorder which renders individuals pathologically eager to say what they think interrogators want to hear should have been allowed in case that turned on confession. Just because portion of expert's testimony will overlap a bit with common sense does not mean that testimony will not be "helpful" to jury for purposes of R.Ev. 702. Mental health fields have created special problems for courts because it can be difficult to distinguish between testimony that reflects genuine expertise and knowledge, on the one hand, and "fancy phrases for common sense," on the other. In this case, testimony would have informed jurors of things they might not know -- that experts have identified a "false confession" phenomenon and that there are ways to tell whether it is present in a particular case.

TITLE: U.S. v. Jordan
INDEX NO.: O.7.
CITE: 924 F.Supp. 443 (W.D.N.Y. 1996)
SUBJECT: Eyewitness Identification -- Expert Testimony
HOLDING: Testimony of expert in field of memory and perception, regarding reliability and accuracy of eyewitness identification, should be admitted in robbery case that hinges on bank teller's identification of perpetrator. After Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), it is clear that admissibility of scientific expert testimony is governed by R.Ev. 702. As explained in Daubert, such testimony is admissible if it is based upon "scientific knowledge" and will "assist the trier of fact to understand or determine a fact in issue." Proposed testimony here satisfies both prongs.

TITLE: United States v. Sandoval-Mendoza
INDEX NO.: O.7.
CITE: 472 F.3d 645 (9th Cir. 2006)
SUBJECT: Jury should have heard expert opinion linking brain tumor, entrapment
HOLDING: The Ninth Circuit U.S. Court of Appeals held that two medical experts should have been permitted to testify in a drug conspiracy trial in support of D's theory that a large brain tumor made him especially vulnerable to entrapment by government informants. The testimony offered relevant and reliable opinions that would have assisted the jury in weighing the entrapment defense. Doctors diagnosed D with depression in 1992, with his condition leading D to worry about providing for his family after his death. He discussed the problem with his sister's boyfriend, who introduced him to another individual. The two told D they made $5,000 to $10,000 a week selling drugs and suggested he sell as well to help support his family. The two were both paid government informants who were being given breaks in their own criminal cases for identifying other drug dealers. At trial, D sought to introduce expert testimony from a neurologist and neuropsychologist that his brain tumor increased his suggestibilty to the informants' inducements. Neither doctor could identify a study specifically linking such brain damage with susceptibility to inducement to commit crimes, but said it commonly caused "disinhibition." At a Daubert hearing, the State countered with two of its own witnessses, who acknowledged that D had an extremely large brain tumor but questioned whether it could cause increased susceptibility to influence. Tr. Ct. found that D did not conclusively prove that tumor increased his susceptibility to inducement or caused a lack of inhibition to sell drugs. Tr. Ct. also ruled that the danger of confusing the issues outweighed the probative value of the experts' testimony. Court ruled that under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Tr. Ct. must act as a gatekeeper and not a fact finder. "When credible, qualified experts disagree, a criminal D is entitled to have the jury, not the judge, decide whether the government has proved its case." Medical knowledge is often uncertain. Thus, expert medical testimony does not need to be conclusive, but only has to have a reliable scientific basis. D's experts were well qualified and their opinion sufficiently reliable to be useful to the jury.

TITLE: Watkins v. State
INDEX NO.: O.7.
CITE: (1st Dist. 05/21/91), Ind. App., 571 N.E.2d 1262
SUBJECT: Credibility of expert testimony
HOLDING: Where D does not challenge expert's qualifications, but instead attacks credibility of his testimony, issue goes to sufficiency of testimony to support verdict, not admissibility of testimony, & even when testimony is questionable, where there is corroborative evidence to support opinion, verdict will not be overturned. Pediatrician who examined victim testified that medical findings were not normal for child of that age & were compatible with repeated abuse or trauma. D did not challenge expert's qualifications but contended that his opinion did not have scientific or medical basis. On appeal D offered article from legal publication questioning such conclusions, & while Ct. App. found article raised some interesting questions about weaknesses of expert medical testimony in child molest cases, considered with other evidence, it was sufficient to support conviction. Held, convictions on Counts I & II affirmed.

Note 1: Conviction on Count I reversed on transfer on other grounds, see Watkins 575 N.E.2d 624, at K.3.e.3.

Note 2: The article which the Ct. considered was Medical Examination for Sexual Abuse, Have We Been Misled? by Lee Coleman in the Champion, Nov. 1989, Vol. XIII, No. 9, 5-12.

O. EVIDENCE

O.7. Expert witnesses

O.7.a. Foundation requirements

TITLE: Billips v. Commonwealth
INDEX NO.: O.7.a.
CITE: 652 S.E.2d 99 (Va. 2007)
SUBJECT: Standards for scientific evidence also apply to sentencing
HOLDING: Virginia Supreme Court held the same standard that governs the admission of expert testimony on scientific evidence at trial also governs the admissibility of such testimony at sentencing. The sex offender in the present case challenged the admissibility at his sentencing hearing of expert testimony regarding his risk of reoffending that was based on plethysmograph testing. Court stressed that, even at sentencing hearings, there exists a risk that judges, jurors, and lawyers "may gravitate toward uncritical acceptance of any pronouncement that appears to be 'scientific'". The standard adopted for trial by Virginia differs somewhat from the standards described in Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993), but Court determined the same standards applied at trial should apply at sentencing.

TITLE: Burnett v. State
INDEX NO.: O.7.a.
CITE: (4th Dist., 9-28-04), Ind. App., 815 N.E.2d 201
SUBJECT: Expert witness - fingerprints
HOLDING: In kidnapping & robbery prosecution, State's fingerprint witness qualified as an expert under Ind.Evid.R. 702(a), & D waived challenge to the reliability of the ACE-V fingerprint identification methodology under Evid. Rule 702(b) & Daubert because he did not specifically raise the issue at trial or ask for a specific ruling by the Tr. Ct. on that ground. A single partial, latent fingerprint was the only evidence used to place D in a car used in the crimes. The victim had identified someone else as the perpetrator in a photo array & her subsequent in-Ct. identification was disallowed because police identified D to her in the photo array as a primary suspect after her mis-identification. D challenged a police investigator as an expert because: (1) he was not certified as a latent fingerprint examiner because he had not read certain books or been in the field long enough to sit for the examination; (2) when testifying as an expert at a prior trial he concluded that no fingerprints were found; & (3) the examiner could not answer certain questions about the ACE-V methodology. Specifically, the defense pointed to the fact that the officer did not know if the ACE-V method was used by the FBI or what its error rate was. Ct. noted that it would not substitute its judgment for Tr. Ct.'s even if "serious doubts" existed whether an officer qualified as an expert. Kubsch v. State, 784 N.E.2d 905 (Ind.2003). Tr. Ct. identified two characteristics that qualified witness as an expert: his practical experience as a senior crime scene manager & his more recent training in fingerprint identification. Ct. also noted doubts raised by any particular knowledge of ACE-V methodology went to the weight of the evidence & not to its admissibility.

Further, Ct. found that a challenge to the reliability of the ACE-V method was waived for failure to specifically raise it at trial. Although defense counsel noted that "it doesn't pass the [Daubert] test" in a longer statement before the Tr. Ct., the Tr. Ct. only determined that the witness was qualified to give expert testimony & not the method's reliability & defense "counsel did not ask for clarification" nor for a specific ruling. Beyond waiver, Ct. found the witness's testimony sufficiently established the method's reliability as he mentioned it being taught at two schools outside the state showing a general acceptance within the relevant field of study. Further, federal Cts. in Indiana have found ACE-V reliable. See U.S. v. Havvard, 117 F.Supp.2d 848 (S.D. Ind. 2000) aff'd 260 F.3d 597 (7th Cir. 2001). The Tr. Ct. could have taken judicial notice of these decisions. Finally, this identification evidence provided sufficient evidence to prove kidnapping & robbery, as the victim's testimony established all the elements of the crime & the fingerprint evidence established D as the perpetrator. Held, judgment affirmed.

TITLE: Buzzard v. State
INDEX NO.: O.7.a.
CITE: (3rd Dist., 7-29-96), Ind. App., 669 N.E.2d 996
SUBJECT: Expert's profile testimony on pedophiles - reversible error
HOLDING: Admission of expert opinion testimony regarding profiles exhibited by pedophiles constituted abuse of discretion. Psychologist defined "pedophilia" broadly & speculated that single pedophile could molest between 5 & 800 children in his lifetime. Psychologist's testimony involved scientific models rather than examination of parties involved in this case. During closing argument, prosecutor exacerbated problem by arguing that D fit squarely within expert's definition of pedophile, drawing upon testimony regarding recidivism of molesters. Prosecutor stated that only way to prevent harm to numerous future victims was to return guilty verdict against D.

Citing Ind.Evid.R. 702, Ct. held that expert's testimony had little relevance to whether D committed acts for which he was charged & should have been excluded under Ind.Evid.R. 403. Held, reversed & remanded for new trial.

RELATED CASES: Myers, App, 887 N.E.2d 170 (pathologist's opinion that victim was raped prior to being shot was inadmissible under Rule 403 because there was no physical evidence to support the conclusion); U.S. v. Doe, 149 F.3d 634 (7th Cir. 1998) (profile evidence concerning practices of Nigerian drug traffickers was not impermissible character evidence)

TITLE: Carnahan v. State
INDEX NO.: O.7.a.
CITE: (2nd Dist., 6-26-97), Ind. App., 681 N.E.2d 1164
SUBJECT: Battered Women's Syndrome (BWS) testimony admissible
HOLDING: Tr. Ct. did not abuse discretion in admitting expert testimony regarding BWS, particularly involving cycle of violence & reasons battered women do not leave their husbands, to explain why complaining witness (CW) recanted her earlier allegation of abuse. This evidence, if accepted by jury, could show that at time CW testified, she was in stage of reconciliation with D or was apprehensive about leaving him. Thus, BWS evidence made her prior allegations of abuse more credible & was directly relevant to CW's credibility which was an issue at trial. Ct. rejected D's argument that expert's testimony regarding BWS was irrelevant because there were no facts presented prior to her testimony which would suggest that CW was a battered woman. Proper foundation was laid for expert's testimony where State offered CW's testimony that she had previously stayed at battered women's shelter, & police reports & photos documenting abuse & injuries. Ct. also found that expert testimony was not substantially misleading under Ind. Evidence Rule 403. BWS evidence was offered for limited purpose of attacking CW's credibility, not to show that D battered CW. Held, judgment affirmed; Sullivan, J., concurring.

Note: Concurring opinion points out danger of misuse & misinterpretation of BWS evidence as having tendency to be used to conclude that because alleged victim fits profile of battered woman, it is more likely than not that she was victim of battery with reference to charged crime.

RELATED CASES: Odom, App., 711 N.E.2d 71 (fact that victim testified as to why she recanted statement prior to trial did not make expert testimony on same subject irrelevant).

TITLE: Clark v. State
INDEX NO.: O.7.a.
CITE: (3/31/2014), 6 N.E.3d 992 (Ind. Ct. App 2014)
SUBJECT: Admissibility of officer's opinion re: identity of marijuana
HOLDING: In possession of marijuana prosecution, Tr. Ct. did not abuse its discretion in allowing police detectives to testify as to their opinion the substance recovered from D's pocket was marijuana. The sample of marijuana seized was not analyzed apparently because the sample was too small. Pursuant to Indiana Evidence Rule 702(a), State laid a sufficient foundation for the admissibility of both detectives' testimony, as both indicated that they had been police officers for several years, had taken numerous drug recognition classes and were familiar with both the appearance and odor of marijuana.

Although detective's testimony was sufficient to establish the substance was marijuana, Court noted that there was other circumstantial evidence supporting a finding that D possessed illegal drugs. Held, conviction affirmed; Mathias, J., concurring in result, believes it is unnecessary to address D's evidentiary arguments on the merits because he failed to preserve the issue for appeal, but is concerned about opinion testimony regarding "the identity of chemicals and drugs that are not as readily identifiable." Pyle, J., filed a concurring opinion urging executive branch to reconsider Indiana State Police laboratory's policy setting a minimum quantity of substance for analysis, noting that "this type of administrative decision impacts prosecutors, defense counsel, judges, jurors, and Ds."

TITLE: Hastings v. State
INDEX NO.: O.7.a.
CITE: (6/21/2016), 58 N.E.3d 919 (Ind. Ct. App 2015)
SUBJECT: D's expert testimony erroneously excluded
HOLDING: In operating while intoxicated prosecution, Tr. Ct. erred in excluding testimony of D's proffered expert witness. Expert would have testified regarding the specific chemical breath test used on D, the effects of alcohol on the human body and how alcohol is absorbed and metabolized by the body. The subject matter of expert's testimony--pharmacokinetics--was beyond the knowledge of the average person, and he had sufficient knowledge and expertise in this area that would have been helpful to the jury pursuant to Indiana Evidence Rule 702(a). Court was unable to conclude that the exclusion of expert's testimony did not have any impact on the jury's verdict. Held, conviction reversed and remanded for new trial

TITLE: Johnston v. State
INDEX NO.: O.7.a.
CITE: (1/20/2017), 69 N.E.3d 507 (Ind. Ct. App 2017)
SUBJECT: Police officer qualified as social media records expert
HOLDING: In stalking prosecution, trial court did not err in qualifying police officer as an expert in forensic analysis of social media records and digital trails, and in admitting officer's opinion regarding the statistical probability of multiple Facebook accounts belonging to people other than Defendant.

Officer testified that there were multiple Facebook accounts believed to be Defendant's aliases because they were all associated with Internet cookies attached to the same device and used the same IP address. He further testified that the likelihood of multiple people using the same device and same IP address to contact complaining witness (C.W.) with similar messages was less than "being struck by lightning while hitting the lotto and being bitten by a polar bear at the same time."

Court rejected Defendant's argument that officer was not qualified as an expert witness because he works in "a field of study which is highly technical and therefore susceptible to misunderstanding, confusion, and error" and because he did not have the requisite training in statistics to form a valid opinion about the probability of an event.

The State did not present officer as an expert in statistics, but instead as an expert in analysis of Facebook records and digital trails. Further, officer testified that he had been trained and done extensive work analyzing social media accounts, so admitting him as an expert witness was not an abuse of discretion.

The officer's "polar bear" analogy about statistical probability did not constitute fundamental error because trial court did not rely on the officer's statement and Defendant failed to present any evidence demonstrating prejudice. Held, judgment affirmed.

TITLE: Kumho Tire Co. v. Carmichael

INDEX NO.: O.7.a.

CITE: 526 U.S. 137; 119 S.Ct. 1167; 143 L.Ed.2d 238 (1999)

SUBJECT: Expert Testimony -- Non-Scientific Evidence

HOLDING: Tr. Ct. must perform "gatekeeper" function described in Daubert v. Merrel Dow Pharmaceuticals, 509 U.S. 589 (1993), to ensure relevance & reliability of non-scientific as well as scientific expert testimony. Here, the testimony in question came from an engineer, & was not "scientific" in character. The majority writes that F.R.E. 702 refers to "scientific, technical, or other specialized knowledge," as potential subject matters for expert testimony, & does not distinguish between them. Daubert referred only to scientific testimony because that was the type of testimony before the Court. There is no valid reason for distinguishing between the scientific & non-scientific subject areas of expert testimony. Daubert's gatekeeping requirement was based in part on the rationale that F.R.E. 702 & 703 gives expert witnesses testimonial latitude unavailable to other types of witnesses, on the "assumption that the expert's opinion will have a reliable basis in the knowledge & experience of his discipline." Id., at 592. The rules grant this latitude to all experts, not just scientific ones. Further, there is no clear line dividing scientific from technical & other specialized knowledge, & it would prove hard to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between them. Finally, whether an expert's testimony is based upon scientific, technical, or other specialized knowledge, it will often rest upon experience & knowledge significantly foreign to that of most jurors. A second issue is the Tr. Ct.'s consideration of the 4 factors set out in Daubert in making its determination about the reliability of non-scientific expert testimony. The Daubert inquiry is a flexible one & does not constitute a "definitive checklist or test." Id., at 594. Tr. Ct. should consider specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony before it.

RELATED CASES: Carter, 766 N.E.2d 377 (Kumho Tire is not binding on Indiana state practice).

TITLE: Lyons v. State
INDEX NO.: O.7.a.
CITE: (10/11/2012), 976 N.E.2d 137 (Ind. Ct. App 2012)
SUBJECT: Opinion testimony - expert with "specialized knowledge"
HOLDING: Admission of child psychologist's testimony about various characteristics, mannerisms and behaviors that are common among child molest victims was not fundamental error. On appeal, D argued it was fundamental error to permit such opinion testimony that was based on psychological studies when no basis for reliability was established. But psychologist's testimony involved specialized knowledge, not "scientific testimony" governed by requirements of Indiana Evidence Rule 702(b). Indiana Supreme Court has determined that the "specialized knowledge" set forth in Ind. Evidence Rule 702(a) is not necessarily scientific knowledge, and it need not be proven reliable by means of "scientific principles." Malinksi v. State, 794 N.E.2d 1071 (Ind. 2003). Rather, such evidence is governed only by the requirements of Rule 702(a), and any weaknesses or problems in the testimony go only to the weight of the testimony, not to its admissibility, and should be exposed through cross-examination and the presentation of contrary evidence. Turner v. State, 953 N.E.2d 1039 (Ind. 2011).

Here, child psychologist has specialized knowledge in the area of child sexual abuse that goes beyond the knowledge generally held by lay observers. She did not testify that there was any recognized syndrome or profile of child sexual abuse victims, much less that complaining witness (C.W.) in this case fit such a profile and had therefore been abused. In fact, psychologist did not specifically testify about C.W. Moreover, State did not present psychologist's testimony to prove--even by implication or inference--that C.W. had been molested. Instead, State properly offered witness's testimony because C.W.'s credibility had been called into question. D was free to cross-examine witness regarding the studies upon which she relied and to emphasize for the jury that these studies may have been only valid for treatment purposes and thus not intended to be used for diagnostic purposes or as reliable tools for assessing whether abuse actually occurred. Held, judgment affirmed.

TITLE: Meisberger v. State
INDEX NO.: O.7.a.
CITE: (1st Dist., 09-26-94), Ind. App., 640 N.E.2d 716
SUBJECT: Expert's identification of victim's body
HOLDING: It was not error to allow deputy coroner, dentist, to testify that comparison of dental x-rays led him to believe body he examined was that of victim. Dental records belonged to other dentist & were never admitted in evidence. Expert testified that he had sufficient expertise to make comparison, & that dental records were normally found reliable & were relied on & used by persons in his profession. D objected that no foundation was offered to permit admission of x-rays & that inadequate foundation was offered for expert's testimony, but Ct. noted D did not raise question as to actual accuracy of identification. Absent question as to accuracy of identification, it was competent for expert to rely on hearsay information as to identity & offer his opinion. Ordinarily expert can rely on reports of other expert & offer opinion based on those reports, & documents do not need to be admitted in evidence. Hearsay evidence relied on by expert in his practice may be admitted & relied on as legitimate accumulation of expert's knowledge, & when factual content of medical report is admitted with findings of witness performing autopsy, testimony reflecting that content isn't hearsay. Failure to admit x-rays did not deprive D of meaningful cross-exam, because he could examine them & cross-exam testifying expert as to his opinion. Ct. also noted there was considerable additional evidence as to identity of victim & found no error in admitting expert's testimony. Held, conviction affirmed.

TITLE: Roach v. State
INDEX NO.: O.7.a.
CITE: (6-19-98), Ind., 695 N.E.2d 934
SUBJECT: Exclusion of expert testimony - insufficient offer of proof
HOLDING: In murder prosecution, Tr. Ct. did not abuse discretion in excluding expert's testimony about D's state of mind during & after incident. D wished to present this evidence to help explain actions that he took & inconsistent statements that he gave to police. Although "a close call," Tr. Ct. did not abuse discretion in determining that D did not satisfy requirements of Indiana Evidence Rule 702 for admitting expert testimony. Considering that substance of D's offer to prove dealt with why frightened individual might act & speak irrationally, Tr. Ct. may have felt that this evidence was within jury's understanding &, thus, expert witness would not assist jury as is required by Rule 702. On appeal, D asked Ct. to review Tr. Ct.'s decision on grounds that expert should have been permitted to testify about effects of concussion on D. Because Tr. Ct. was not made aware via offer to prove that substance of evidence included testimony concerning concussion, Ct. could not address this issue on its merits & issue was waived. Held, no error.

TITLE: Schaefer v. State

INDEX NO.: O.7.a.

CITE: (5th Dist., 5-23-01), Ind. App., 750 N.E.2d 787

SUBJECT: Ineffective assistance of counsel (IAC) - failure to object to expert opinion evidence in medical records

HOLDING: In appeal of child molesting prosecution, D established that he received IAC due to trial counsel's failure to properly object to admissibility of expert opinion evidence contained in medical records. No live testimony was presented regarding records. At trial, defense counsel objected to admission of records on basis of prejudice due to surprise, & that statements made to doctors & nurses did not fall within hearsay exception regarding statements for purposes of medical diagnosis & treatment. Had nurses & doctors testified at trial about complaining witness's (CW's) statements to them, that testimony would have been cumulative of CW's testimony. However, medical records also contained opinions regarding nature of CW's physical condition & likely cause of that condition. For medical opinions & diagnoses to be admitted into evidence, they must meet requirements for expert opinions set forth in Indiana Evidence Rule 702. Schloot v. Guinevere Real Estate Corp., 697 N.E.2d 1273 (Ind. Ct. App 1998). Here, no such foundation was laid for expert opinion evidence contained in medical records, & expressions of opinion within medical records are not admissible under business records exception because their accuracy cannot be evaluated without safeguard of cross-examination of person offering opinion. Id. Admission of medical records transformed criminal trial where guilt or innocence turned on whose story jury believed into one where scales were unfairly weighed against D. Result of proceeding, therefore, was rendered fundamentally unfair. Held, conviction reversed & remanded for new trial.

TITLE: State v. Copeland
INDEX NO.: O.7.a.
CITE: 226 S.W.3d 287 (Tenn. 2007)
SUBJECT: Expert testimony - reliability of eyewitness identifications
HOLDING: Tennessee Supreme Court abandoned prior caselaw and announced that expert testimony on the reliability of eyewitness identification testimony is eligible for admission in criminal trials. In State v. Coley, 32 S.W.3d 831 (Tenn. 2000), Court declared that "generalized and unparticularized expert testimony concerning the reliability of eyewitness testimony, which is not specific to the witness whose testimony is in question, does not substantially assist the trier of fact." This placed Tennessee among the minority of state courts that had considered the issue. Court overruled *Coley*. "Times have changed" since Coley was decided, Court noted. While there were only limited studies supporting expert opinions on the subject at that time, today there is "an extensive amount of behavioral science research in this area," Court said, including "literally hundreds of articles in scholarly, legal, and scientific journals on the subject of eyewitness testimony." These studies have demonstrated the inherent weaknesses of eyewitness testimony and, further, the fact that jurors are, for the most part, unaware of those weaknesses.

TITLE: State v. Farr-Lenzini
INDEX NO.: O.7.a.
CITE: 970 P.2d 313 (Was.Ct. App. 1999)
SUBJECT: Officer's Opinion Testimony as to Driver's State of Mind
HOLDING: Officer should not have been allowed to give opinion testimony concerning state of mind of driver charged with attempting to elude him. After describing how D drove 4 1/2 miles at speeds of up to 100 mph and ran a red light after he had activated siren and red light, officer was asked by prosecutor whether he had an opinion "as to what the D's driving pattern exhibited to [him]." He testified that D's driving pattern exhibited to him that she "was attempting to get away from me and knew I was back there and refusing to stop." Court of Appeals holds that officer should not have been allowed to offer this testimony, either as expert opinion, pursuant to R.E. 702, or as lay opinion pursuant to R.E. 701. R.E. 702 was not satisfied, because there was no evidence that officer had specialized training or experience necessary to distinguish between distracted speeding driver and eluding driver. Further, requirement that such testimony be helpful to the fact-finder was not met. Determining whether a driver is attempting to elude a police officer is not beyond the understanding of the ordinary lay person. Admission as lay opinion would have required substantial factual basis, which was lacking here.

TITLE: State v. Fortin
INDEX NO.: O.7.a.
CITE: 189 N.J. 579, 917 A.2d 746 (N.J. 2007)
SUBJECT: "Signature" crime evidence needs qualified expert
HOLDING: New Jersey Supreme Court held evidence that a violent crime with which a D is charged bears the same unique "signature" as a similar offense of which he has previously been convicted may not be admitted at trial unless it is supported by testimony of a qualified expert witness and a database of cases on which the expert based his conclusion as to the crimes' close similarity. Court also held that evidence derived from an FBI database of violent crimes is not admissible to prove a signature crime.

Case has a significant appellate history with a previous interlocutory appeal and then a reversal after the first trial where an expert witness testified that he had never seen, read, or heard of two crimes that had the same characteristics as these. In that appeal, Court cited the lack of a compilation of some of the cases the witness was familiar with from which the witness could demonstrate that D's modus operandi was unique, specifically looking for an illustration of the frequency of sexual assaults in which biting the faces and breasts of a victim were distinctive.

With D facing his second trial, State again sought to introduce signature-crime evidence, but not through the testimony of an expert profiler. Prosecutors argued they could create a sufficient foundation for the signature-crime evidence either through expert bite-comparison testimony, or without any expert testimony at all, through search results from the FBI's Violent Criminal Apprehension Program (ViCAP) database, which turned up only additional crime containing the features of the crimes attributed to D.

In interlocutory appeal, Court held that signature-crimes evidence is outside the ordinary experience and knowledge of jurors and, therefore, requires the assistance of expert testimony to explain the unique aspects of the two sexual assaults that would permit the jury to conclude that both crimes are the handiwork of the same person. Court would not allow State to get away with seeking to prove signature crimes without providing D with a database of cases supporting the expert testimony. In first appeal, Court said a reliable database is required to afford the defense a fair opportunity to test the experts' methods and credibility on cross-examination. Court now added that state evidentiary rules provide for pretrial disclosure of "the underlying facts or data" that support an expert's opinion. Court also stressed that Tr. Ct. must instruct the jury that injuries suffered by the victims other than the bites are not uncommon in a sexual assault and must not be considered as signature-crime evidence.

Court also held that evidence gleaned from the FBI's ViCAP database is not admissible to prove a signature crime or to support the expert witness's opinions. Among other problems, the database represents a very small fraction of the number of violent sexual assaults that have been reported since its inception in 1984. A partial dissent was entered to the decision.

TITLE: State v. Vue
INDEX NO.: O.7.a.
CITE: 606 N.W.2d 719 (Minn. 2000)
SUBJECT: Expert Testimony Linking Ethnicity to Domestic Violence
HOLDING: Expert testimony that members of particular ethnic group have a culture that condones domestic violence and discourages reporting of it is inherently prejudicial and may not be admitted in criminal trial. D here was charged with raping woman to whom he was married at time of alleged offense. Even if testimony was needed to explain complainant's reluctance and delay in reporting rape, testimony here went beyond such explanation, extending to generalized statements about male domination and widespread domestic abuse. While some of expert's testimony was relevant to complainant's reluctance to come forward, its probative value was based on idea that D belonged to "guilty class," while complainant belonged to "victim class." Testimony boiled down to assertion that D was more likely to have raped victim because of his ethnicity, and as such was impermissible.

TITLE: Summers v. State
INDEX NO.: O.7.a.
CITE: (1st Dist. 7/31/86), Ind. App., 495 N.E.2d 799
SUBJECT: Expert witness - foundation requirements
HOLDING: Tr. Ct. did not err in allowing police officer to give opinion that D was driving truck at time it was hit by train. Here, Ct. observes modern trend is away from strict application of rule excluding expert testimony on subjects within common knowledge of jurors. To qualify as an expert, (1) subject matter must be related to some scientific field beyond knowledge of average lay person, & (2) witness must show sufficient skill in that area so that opinion probably will aid trier of fact in its search for truth. Grimes 450 N.E.2d 512. Ct. *cites* Fed. R. Evid. 702 & 3 Weinstein's Evidence, Section 702(02) (1985) to support trend of recent cases to focus more attention on knowledge & skill of expert & whether expert's opinion will be helpful to trier of fact than on knowledge of jury. See also McCormick on Evidence, at 33 (3d ed. 1984). Ct. concludes expert's opinion that D was driver, based on position in which bodies were found after accident, was properly admitted. Held, conviction affirmed.

TITLE: Taylor v. State
INDEX NO.: O.7.a.
CITE: (5/4/2018), 101 N.E.3d 865 (Ind. Ct. App 2018)
SUBJECT: No error in admitting cell phone data-recovery evidence
HOLDING: In burglary and robbery prosecution, Tr. Ct. properly admitted evidence related to detective's examination of D's cell phone. After police found Co-D's cellphone at the scene, they seized D's phone and determined multiple calls and texts had been exchanged between the two men. Detective used a "Chip-Off" forensic technique to remove the memory chip from D's phone and retrieve the data, but the discovered texts "were not highly revealing." At trial, D unsuccessfully moved to exclude evidence related to the detective's examination of his phone, arguing that the "Chip-Off" investigation method failed to meet the standard for expert scientific testimony under Indiana Evidence Rule 702 and was not established as reliable. Court disagreed, holding that detective's testimony was not "scientific" in nature, but rather "technical" or "specialized knowledge." The processes by which the detective can recover data from cell phones is more akin to engineering than science. See State v. Pratt, 128 A.3d 883 (Vt. 2015).

Court also vacated D's criminal confinement convictions because his confinement of victims was no more extensive than necessary to carry out the robbery. There was no evidence of any separate or significant length of confinement after the robbery was completed, and this was not a protracted incident. Held, judgment affirmed in part and vacated in part to carry out the robbery. There was no evidence of any separate or significant length of confinement after the robbery was completed, and this was not a protracted incident. Held, judgment affirmed in part and vacated in part.

TITLE: U.S. v. Hines
INDEX NO.: O.7.a.
CITE: 55 F.Supp.2d 62 (D. Mass 1999)
SUBJECT: Post-Kumho Expert Testimony -- Handwriting Analysis & Eye-Witness Identification
HOLDING: Applying standards of Daubert and Kumho to handwriting analysis and eye- witness identification testimony, U.S. District Court for District of Massachusetts makes following determinations: (1) handwriting analysis testimony which points out similarities and differences between D's exemplar and note are admissible but analyst's conclusions are not, because ability to draw these conclusions has not been subjected to empirical testing; (2) eye-witness ID expert testimony is admissible because it will give jurors additional information with which it can make more informed decision, and because expert is not testifying to prediction or conclusion regarding accuracy of eye-witness ID in this case.

TITLE: U.S. v. Vallejo
INDEX NO.: O.7.a.
CITE: 237 F.3d 1008 (9th Cir. 2001)
SUBJECT: Expert Testimony -- Special Ed Student's Language Problems
HOLDING: A D whose testimony about what he said during interrogation differed in key ways from the interrogator's recollection should have been allowed to present expert testimony on his difficulties with language. The D was special education student with a long-standing, severe language disorder; he spoke both Spanish and English, but had difficulties with English while under stress. The D was arrested while driving car carrying marijuana. He testified that someone approached him and offered him $15 to drive the car over the U.S./Mexico border. A customs agent testified that the D had told him that a friend had refused to drive the car because he thought it contained drugs, but the D denied saying this. A psychologist from his school should have been allowed to testify, based on his school records, as to the nature of his language difficulties. The issue was beyond the common knowledge of jurors, and the psychologist's testimony could have assisted the jury in assessing whether the discrepancies in the two accounts of the interrogation were the result of the D's language problem.

TITLE: Vega v. State
INDEX NO.: O.7.a.
CITE: (4th Dist., 10-17-95), Ind. App., 656 N.E.2d 497
SUBJECT: Refusal to allow expert testimony - no error
HOLDING: Tr. Ct. did not err in refusing to allow expert to testify, where it determined that testimony would not have been of assistance to jury in understanding evidence or in making its final determination. Expert was psychology professor specializing in study of human memory & would have testified on various factors affecting person's memory. Under Ind. Rule of Evidence 702, expert testimony is admissible if witness is qualified, testimony rests upon reliable scientific principles, & testimony will assist trier of fact to understand evidence or to determine fact in issue. Based on experts statements, Tr. Ct. concluded that expert could not predict whether memory of state's witness was accurate. On appeal, D argued that expert would have assisted jury by debunking commonly held beliefs about memory, & that expert would have shown that memories from stressful or shocking situations are prone to be significantly less accurate. At trial, however, offer of proof mixed theories of memory with assertions of expert's inability to make accurate assessment of witness's memory. Ct. noted that there was no attempt to show how theories could be used to assist jury. Further, D extensively cross-examined State's witness on accuracy of her memory. Held, no error.

TITLE: Weisheit v. State
INDEX NO.: O.7.a.
CITE: (2/18/2015), 26 N.E.3d 3 (Ind. 2015)
SUBJECT: Future dangerousness expert properly excluded
HOLDING: At capital murder trial, defense sought to present testimony from an expert in prison administration and inmate classification that Weisheit could be housed safely in prison for the rest of his life. Expert had 40 years of corrections experience, including a term as Commissioner of Indiana's DOC. In preparation for trial, he reviewed Weisheit's jail records and interviewed Weisheit the night before trial. State objected to the expert's testimony, arguing that based on his limited interaction with Weisheit, the defense had not laid a proper foundation for expert to testify as to his prediction of Weisheit's future behavior. State also argued that his testimony was not supported with scientific studies or a course of study. Tr. Ct. ruled that the expert could testify as to Indiana's classification system in general and his knowledge about Weisheit's housing and classification up to the time of the penalty phase, but could not testify about his future ability to adjust to prison life. After making an offer of proof, the defense chose not to call the expert for this limited purpose.

The Ind. S.Ct. notes that evidence regarding a capital D's past prison adjustment leading up to the penalty phase must be admitted. Skipper v. South Carolina, 476 U.S. 1 (1986). Here, Weisheit sought to put on testimony predicting his future behavior, from an expert who had knowledge and experience in classifying prison inmates, but no apparent expertise in predicting an individual's future behavior. Tr. Ct. did not abuse its discretion in excluding this testimony as too speculative. Court further noted that their opinion might be different had Weisheit made a more detailed offer of proof regarding the expert's proposed testimony.

O. EVIDENCE

O.7. Expert witnesses

O.7.a.1. Area of expertise

TITLE: Albright v. State
INDEX NO.: O.7.a.1.
CITE: 4th Dist. 12/23/86), Ind. App., 501 N.E.2d 488
SUBJECT: Expert witness - sex therapist/contemporary community standards
HOLDING: D's expert witness was not qualified to express opinion on issue of contemporary community standards. Two requisites for admission of expert testimony are: (1) subject matter must be beyond understanding of lay person to access evidence presented & draw informed conclusion; (2) witness must have sufficient skill/knowledge in field to aid trier of fact in search for truth. Martin v. Roberts 464 N.E.2d 896. Here, Ct. finds D "clearly established" that Mooney was expert in sexual dysfunction/sexual therapy & Tr. Ct. did permit her testimony on issues of scientific & educational value of both sexually explicit material in general & of specific films/magazines which D was accused of selling. However, Ct. finds work with 60 persons from community with severe sexual problems does not qualify witness to express opinions about entire community's attitudes towards sexually explicit material. Counsel failed to show Mooney had training, education, or experience in identifying contemporary community standards. D's offer to prove failed to show how sexual dysfunction is related to tolerance of sexually explicit material or how attitudes of persons with sexual dysfunction towards sexually explicit materials are related to general community's attitudes towards sexually explicit material. Held, no error in Tr. Ct.'s refusal to permit Mooney to testify re contemporary community standards; conviction affirmed.

RELATED CASES: Wahl, 148 N.E.3d 1071 (Ind. Ct. App. 2020) (in involuntary manslaughter prosecution where supervision of a 20-month-old child in an in-home daycare was at issue, Tr. Ct. did not abuse discretion in excluding Ds' expert physician because the expert had limited education and professional experience as to in-home daycare for children under three years of age. Thus, the doctor's testimony would not have assisted the jury in understanding the evidence or determine a fact in issue, i.e., whether Ds provided adequate supervision to the toddler prior to his death).

TITLE: Hare v. State
INDEX NO.: O.7.a.1.
CITE: (8/22/84), Ind., 467 N.E.2d 7
SUBJECT: Expert witness - opinion as to street value of drugs
HOLDING: Tr. Ct. did not err in allowing police officer to testify as to street value ($50.00) of drugs found in D's possession. Gooden, App., 401 N.E.2d 93. Here, D was charged with armed robbery of drug store (drugs & money taken). Officer qualified as expert in this field (employed in narcotics division 4 years; received special education offered in drug enforcement administration). Held, no error.

RELATED CASES: White, App., 630 N.E.2d 215 (Ct. rejected D's argument that State failed to lay proper foundation that officer possessed special knowledge in firearms that would assist jury & that his practical experience was insufficient to qualify him as expert).

TITLE: McGrew v. State
INDEX NO.: O.7.a.1.
CITE: (1997), Ind., 682 N.E.2d 1289
SUBJECT: Expert testimony - microscopic hair analysis
HOLDING: Ind. Ev. Rule 702(b) provides that expert scientific testimony is admissible only if Ct. is satisfied that scientific principles upon which expert testimony rests are reliable. When analyzing Ind. Ev. Rule 702(b), U.S. S.Ct. decision in Daubert, 113 S.Ct. 2786 (1993) is helpful, but not controlling. Possible means by which reliability may be established include judicial notice or sufficient foundation to convince Tr. Ct. that relevant scientific principles are reliable. Steward, 652 N.E.2d 490. Tr. Ct.'s decision as to reliability under Ind.Ev. Rule 702(b) will be reviewed for abuse of discretion. Jervis, 679 N.E.2d 875. Inherent in any reliability analysis is understanding that, as scientific principles become more advanced & complex, foundation required to establish reliability will necessarily become more advanced & complex as well. Converse of this rule is just as applicable, as demonstrated by Tr. Ct.'s conclusion in this case. Here, immediately prior to police analyst's testimony during trial, D challenged admissibility of hair comparison analysis under Ind.Ev. Rule 702(b). Analyst testified that hair comparison he performed was comparison of physical characteristics, as seen under microscope. Tr. Ct. concluded that microscopic hair analysis is not traditional scientific evaluation, but instead simply a person's observations under microscope. Ct. held that Tr. Ct. did not abuse its discretion in admitting evidence, & in concluding that evidence at issue was more a matter of observations of persons with specialized knowledge than a matter of scientific principles governed by Ind.Evidence Rule 702(b). Jervis. Held, transfer granted, Tr. Ct. affirmed; Ct. App.'s opinion on this issue at 673 N.E.2d 787 vacated. Note: In footnote, citing Daubert, Ct. noted that reliability assessment permits, but does not require, inquiry of general acceptance in relevant scientific community as means by which reliability can be established.

RELATED CASES: Malinski, 794 N.E.2d 1071 (no error in allowing pathologist to testify regarding his opinion of victim's medical condition & degree of willingness in various photographs of her in bondage); Carter, 766 N.E.2d 377 (no error in finding bite mark evidence to be sufficiently reliable for admission into evidence; bite mark method of identification does not involve "scientific principles" governed by Ind. Evid. Rule 702(b), but rather it is simply a matter of comparison of physical evidence); West, 755 N.E.2d 173 (no abuse of discretion in admitting testimony regarding footwear examination & pry marks); Burkett, App., 691 N.E.2d 1241 (Tr. Ct. did not err by holding field test to detect marijuana was reliable under Ind.R.Evid. 702(b).

TITLE: Simmons v. State
INDEX NO.: O.7.a.1.
CITE: (3/2/87), Ind., 504 N.E.2d 575
SUBJECT: Expert witnesses - Rape Trauma Syndrome (RTS)
HOLDING: Tr. Ct. did not err in allowing state's witnesses to testify re RTS. Here, first witness (Kempner) testified as certified social worker, specializing in studies concerning sexual assaults. Second witness (Turnbloom) testified as to credentials in counseling & psychology & to 2 years training at I.U.'s school of social work, specializing for 3 years in cases of rape, domestic violence & child sexual abuse. Kempner testified victim's failure to remember being at particular location was not unusual for rape victim & was consistent with RTS. Turnbloom testified concerning 3 types of rapists, stating that based on events described by victim to police, individual who raped victim was "power rapist," thus, victim could have felt under threat/power of D (who told her he would not kill her if she told police fabricated story which he made up) even after night of rape, explaining her original statement to police (D's fabrication). Ct. rejects D's contention that witnesses vouched for victim's credibility. Expert witness may give opinion in order to aid jury/trier of fact. Witnesses were properly qualified. Witnesses described victim's behavior as consistent with behavior pattern often seen, much as police officer in Blackmon 455 N.E.2d 586 testified re behavior of burglars under certain circumstances. In related issue, Ct. finds no abuse of discretion in allowing victim's father & sister to testify that after rape, victim became afraid to go outside by herself, stayed home more often & even feared for other family members who went out alone. Evidence re victim's behavior & fears were relevant/probative of fact she had been raped. Held, no errors.

RELATED CASES: Hatcher 510 N.E.2d 184 (Tr. Ct. did not err in allowing family therapist to testify as expert re effects of sexual abuse). But see Ross 516 N.E.2d 61 (card at O.7.b) (unless type of rape is in issue, such as question re D's sanity or victim's state of mind, expert testimony categorizing alleged rape invades province of jury & is irrelevant & highly inflammatory); Henson 535 N.E.2d 1189 (Crim L 483; Rape 47; D may offer expert testimony on rape trauma syndrome to show that rape did not occur)

TITLE: Steward v. State
INDEX NO.: O.7.a.1.
CITE: (6-23-95), 652 N.E.2d 490 (Ind.)
SUBJECT: "Child sexual abuse syndrome" evidence - admissibility
HOLDING: Child sexual abuse syndrome evidence is presently not scientifically reliable enough to permit expert to offer directly "an unreserved conclusion that child in question has been abused," or indirectly "to imply the occurrence of abuse," granting transfer of Ct. App. decision at 643 N.E.2d 143. However, if defense calls child's credibility into question or presents evidence that child's post-abuse behavior was inconsistent with claim of abuse, use of proper expert testimony may be appropriate if evidence assists factfinder in understanding child's responses to abuse, & requirements of both Ind. Evidence Rule 702(b) & Rule 403 balancing test are satisfied. If child recants prior allegation of abuse or credibility of child is called into question, testimony regarding sexual abuse syndrome will be admissible under Rule 702(b) if based upon reliable scientific principles. Reliability may be established either by judicial notice or by proponent of scientific testimony providing sufficient foundation to convince Tr. Ct. that relevant scientific principles are reliable. Exclusion of such evidence is authorized by Ind.Evidence Rule 403 if substantially more prejudicial than probative. Admissibility will also be determined under Ind. Rules of Evidence defining "relevant evidence," Rule 401; declaring its general admissibility, Rule 402; & prohibiting opinions concerning witness truthfulness, Rue 704(b). U.S. S.Ct. decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 113 S.Ct. 2786, notes importance of valid scientific connection to pertinent inquiry as precondition to admissibility. Held, transfer granted, Ct. App. summarily affirmed, cause remanded for new trial; Sullivan, J., dissenting. Note: Decision encompasses not only child sexual abuse accommodation syndrome, but also similar descriptions of "typical" behavior profiles or patterns, referred to generally as "syndrome evidence."

RELATED CASES: Lyons, 976 N.E.2d 137 (Ind. Ct. App 2012) (State did not present psychologist's testimony to prove--even by implication or inference--that C.W. had been molested; instead, State properly offered witness's testimony because C.W.'s credibility had been called into question); Fleener, 656 N.E.2d 1140 (Tr. Ct. erred in admitting expert testimony regarding child sexual abuse syndrome evidence, where there was no foundational showing of reliability under Ind.Evidence Rule 702(b)).

TITLE: Ward v. State

INDEX NO.: O.7.a.1.

CITE: (02-06-23), 203 N.E.3d 524, (Ind. Ct. App.)

SUBJECT: Claim of bolstering testimony by assault nurse examiner waived for failure to preserve issue in trial court

HOLDING: In child molesting/solicitation prosecution, Defendant filed a motion in limine to prohibit any testimony stating the behavior of the complaining witness (C.W.) resulted from sexual abuse. At a pretrial conference, the deputy prosecutor said he intended to call a sexual assault nurse examiner who was not involved with examining C.W. but knew of common behaviors of victims of child molestation. The trial court granted Defendant's motion in limine and trial counsel orally agreed that it did not include the nurse examiner's testimony. The jury found Defendant guilty as charged, but the trial court sentenced him only on the Class A felony child molesting conviction due to double jeopardy concerns. Defendant argued on appeal that the trial court committed reversible error in admitting evidence of C.W.'s post-disclosure behavior and certain skilled witness testimony. Initially noting that Defendant waived that argument by not objecting to the contested testimony at trial, the Court of Appeals also found Defendant invited any error when his counsel agreed that the nurse examiner's testimony was not excluded via the motion in limine. Defendant also argued the following prosecutorial misconduct deprived him of a fair trial: prosecutor seeking the admission of the challenged evidence, commenting in the presence of the jury on defense counsel's objections, and referring to the nurse examiner as an "expert." But Court did not find any of the State's actions rose to prosecutorial misconduct. Vaidik, J., concurring in part and in result, wrote separately to address Defendant's claim that the trial court erred in permitting the assault nurse examiner to testify. Relying on Steward v. State, 652 N.E.2d 490 (Ind. 1995), Judge Vaidik would find the admission this testimony inadmissible because it was not being used to rehabilitate a specific attack on C.W.'s behavior but to bolster her testimony by suggesting her self-harming behavior was typical of child molestation victims, which is prohibited. However, notwithstanding the erroneous admission of this evidence, Defendant not only waived the error by failing to object but invited the error by agreeing the State could use the evidence in this manner.

TITLE: Whedon v. State

INDEX NO.: O.7.a.1.

CITE: (2nd Dist., 02-06-09), 900 N.E.2d 498, sum. aff'd., 905 N.E.2d 408 (Ind. 2009) (Ind. Ct. App. 2009)

SUBJECT: Exclusion of expert testimony re: incentivized witnesses and wrongful convictions

HOLDING: Post-conviction court did not err in excluding an expert witness's testimony during post-conviction hearing about incentivized witnesses and wrongful convictions. Witness had conducted studies on wrongful convictions involving "snitches" and is Executive Director of Center on Wrongful Convictions at Northwestern University School of Law. D argued that this witness's testimony is relevant to her allegation of newly discovered evidence that the inmate witnesses concocted testimony that D made incriminating statements about murder in hopes of receiving favorable treatment from State on their own sentences. Court held that subject of "incentivized testimony" is not a "scientific, technical or other specialized" area in which an expert must guide the trier of fact pursuant to Ind. Evidence Rule 702(a). Rather, it falls squarely within fact-finder's common sense that a witness's credibility might be affected based on fact the witness is serving a sentence and whether that witness is receiving favorable treatment from State for testifying. Thus, it did not assist the trier of fact as required by Rule 702(a) and was properly excluded. In addition, Rule 702(b) prohibits witnesses from testifying to opinions concerning whether a witness has testified truthfully. Simply put, "[c]redibility is not a proper subject for expert testimony." U.S. v. Benson, 941 F.2d 598, 604 (7th Cir. 1991). Held, judgment affirmed.

O. EVIDENCE

O.7. Expert witnesses

O.7.a.2. Qualification of expert

TITLE: Green v. State
INDEX NO.: O.7.a.2.
CITE: (12/16/2016), 65 N.E.3d 620 (Ind. Ct. App 2016)
SUBJECT: Psychologist not qualified to testify about PTSD
HOLDING: There was no abuse of discretion in not allowing D's psychologist to testify because the psychologist was not qualified. D murdered her husband by shooting him five times with a five-shot, .38-caliber revolver, then reloading and shooting him five more times, leaving five bullets lodged in the victim's head and five in his torso. D filed notices regarding two affirmative defenses, insanity, and effects of battery, and thus hired a psychologist to evaluate her. Before trial, D withdrew the affirmative defenses but still sought to introduce the psychologist's evaluation, particularly her findings that D suffered from PTSD. Not allowing the psychologist to testify was not an abuse of discretion because her evaluation of D did not assess for malingering. Also, the psychologist was not licensed, and her methodlogy and diagnosis of PTSD was not done according to standards recognized by the scientific community. Held, judgment affirmed.

TITLE: Hanson v. State
INDEX NO.: O.7.a.2.
CITE: (4th Dist., 1-12-99), Ind. App., 704 N.E.2d 152
SUBJECT: Police officer qualified to testify as expert & skilled witness
HOLDING: Tr. Ct. did not abuse discretion in finding sufficient foundation for police officer to testify as expert witness in field of firearms manufacturer & serial numbers. Ind. Evidence Rule 702 states that individual may be qualified as expert by knowledge, skill, experience, training, or education, & may testify in form of opinion where specialized knowledge will assist trier of fact to understand evidence or determine fact in issue. Here, officer testified that: 1) he was certified firearms instructor & certified range instructor; 2) he was trained in identification of different makes & models of firearms; & 3) he had handled over one thousand weapons, including weapon involved in this prosecution. Thus, officer was qualified to testify as expert witness that serial number on handgun found in D's closet had been filed off & obliterated. Ct. noted that officer could also qualify as "skilled witness" whose testimony may be helpful to trier of fact, because his testimony was rationally based on officer's perception & helped to determine fact in issue as to whether serial numbers had been obliterated. Ind. Evidence Rule 701. Held, no error.

RELATED CASES: Wilburn, 177 N.E.3d 805 (Ind. Ct. App. 2021) (officer's opinion testimony as to the significance of infrared photographs and video was properly admitted assisting the jury as to a significant issue of fact-- that the clothing appeared a different color under infrared photography); A.J.R., 3 N.E.3d 1000 (Ind. Ct. App 2014) (juvenile was not denied fair hearing where State did not notify Juvenile that officer, who was on witness list, would testify as a skilled witness).

TITLE: Hughes v. State
INDEX NO.: O.7.a.2.
CITE: (1st Dist. 6/8/87), Ind. App., 508 N.E.2d 1289
SUBJECT: Who may perform autopsies
HOLDING: Although D waived issue by failing to raise it at trial, Ct. finds admission of testimony by doctor who performed autopsy was proper. Here, D contends doctor was not qualified to testify because he was a first-year resident in pathology & had performed only 200 autopsies. Ind. Code 36-2-14-6(d) requires that autopsies performed either by certified pathologists or licensed doctors supervised by certified pathologists. Autopsy in this case was conducted in KY. D has not directed Ct. to similar KY statutes. Even so, at autopsy, doctor was supervised by certified pathologist. Held, no abuse of discretion.

TITLE: Jenkins v. State
INDEX NO.: O.7.a.2.
CITE: (12/20/93), Ind., 627 N.E.2d 789
SUBJECT: Expert witnesses - qualifications
HOLDING: D claimed Tr. Ct. erred by allowing officer to testify as expert witness in area of analysis of tire marks left in gravel. Specifically, D challenged officer's qualifications. A witness need demonstrate no precise quantum of knowledge in order to testify as expert. White, 547 N.E.2d 831. Showing of sufficient skill, knowledge, or experience in field is all that is required to allow Tr. Ct. to find that witness' opinion or inference will aid trier of fact in search for truth. Id. Tr. Ct. has broad discretion in determining qualifications of expert witness, and reversal is warranted only for abuse of that discretion. Id. Here, D's objection to officer's expert testimony did not preserve challenge to testimony, where D did not object to officer's previous testimony that he observed tire marks which appeared to be result of speeding vehicle on gravel, & he did not object to subsequent witnesses testifying to characteristics of tire marks in gravel. Held, convictions affirmed.

TITLE: Moody v. State
INDEX NO.: O.7.a.2.
CITE: (5/9/83), Ind., 448 N.E.2d 660
SUBJECT: Expert witness (EW) - qualification
HOLDING: Tr. Ct. did not err in permitting State's witness to testify as ballistics expert. EW testified he received ballistics training from IN & WI State Police & 7 different manufacturers & sellers of firearms/ammunition. "An expert witness is one who by reason of education or special experience has knowledge respecting a subject matter about which persons having no particular training are incapable of forming an accurate opinion or making a correct deduction." Balfour 427 N.E.2d 1091. Ruling that witness is qualified to testify as expert is reviewable only for abuse of discretion, Epps 369 N.E.2d 404, & no abuse was shown.

RELATED CASES: Pinkins, App., 799 N.E.2d 1079 (while Tr. Ct. erred in qualifying street department worker as expert witness regarding testimony of how automobile glass breaks in car, this testimony was cumulative of two other witnesses to whom the defense failed to object); Turner, App., 720 N.E.2d 440 (nurse who was trained to examine children for abuse in emergency room was qualified to testify that victim's injuries were indicative of child molest); Ross, App., 665 N.E.2d 599 (State's DNA witness was properly qualified as expert in field of DNA testing); Martin, App., 636 N.E.2d 1268 (dentist properly qualified to give expert opinion as to victim's identity through dental x-rays); Grinstead, 684 N.E.2d 482; Fox 506 N.E.2d 1090 (although witness' expertise in area of blood spatters was limited (witness' first trial, study consisted of 1-2 week short course), no abuse of discretion found; limited experience goes to weight rather than admissibility); Norris 498 N.E.2d 1203 (Not error to exclude testimony of D's expert who would have interpreted results of psychological tests given to murder victim (by someone else) 6 years earlier; expert had never met victim); Baxle 480 N.E.2d 561 (No error in allowing general physician to testify re D's mental condition at time of alleged crimes, where witness testified half his consultation cases involved emotional/mental problems, *citing* Cody 290 N.E.2d 38; Ct. finds sufficient basis from which Tr. judge could conclude witness' expertise could assist jury); Hill, 470 N.E.2d 1332 (forensic serologist with Ind. State Police properly qualified as EW); Klopfenstein, App., 439 N.E.2d 1181 (No precise quantum of knowledge required if W shows sufficient acquaintance with subject to qualify to give opinion, *citing* Reid 372 N.E.2d 1149; here, Ct. finds forensic chemist employed by Indpls PD who had testified in over 100 cases qualified as expert).

TITLE: Ross v. State
INDEX NO.: O.7.a.2.
CITE: (5/13/96), Ind. App., 665 N.E.2d 599
SUBJECT: Expert witness - qualifications
HOLDING: In rape case, D claimed State's DNA witness was not properly qualified as expert. D did not object to expert's qualifications, and therefore, waived any error. Waiver notwithstanding, Court held that expert was eminently qualified to testify as expert in field of DNA testing under IRE 702, which provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Absent abuse of discretion, Tr. Ct.'s determination that witness is qualified to testify as expert and render expert opinion will be affirmed. Matter of Adoption of L.C., 650 N.E.2d 726. Here, witness was qualified as expert on DNA identification where witness was forensic scientist specializing in forensic serology & DNA analysis & supervising police crime lab, had several degrees & had attended FBI training sessions in DNA analysis, published several academic articles, taught course in subject & served as expert witness in over 300 cases. Held, no error.

TITLE: Schmid v. State
INDEX NO.: O.7.a.2.
CITE: (2nd Dist., 3-2-04), Ind. App., 804 N.E.2d 174
SUBJECT: Expert witness - qualifications; sufficient foundation
HOLDING: In murder prosecution, Tr. Ct. did not err by admitting testimony of State's expert witness, notwithstanding D's argument that there was not a sufficient foundation for admission of expert's testimony on issue of sanity. D argued that state psychiatrist's ability did not rise to "the level of knowledge, skill, experience, training or education needed" to render expert opinion pursuant to Ind. Rule of Evid. 702(a). Specifically, D highlighted expert's testimony that "psychiatry is a very inexact science if I could call it a science" & "frankly common sense is really probably the best approach to psychiatry anyhow ...[taking] facts that are known & then try & come up with an educated guess. ..." This expert was the only one of four experts (two Ct.- appointed) to find that D was sane during the entire course of murder. His testimony as well as certain other facts in the record & the jury's right to determine sanity even if it contradicts expert testimony were relied on by the Ct. to find that sufficient evidence of sanity existed to support the jury's guilty but mentally ill finding. Tr. Ct. could admit expert's testimony as he was speaking of psychiatry in general & did not aver that he alone made educated guesses. Held, judgment affirmed.

TITLE: T.H. v. Ind. Dept. of Child Svcs.
INDEX NO.: O.7.a.2.
CITE: (5/30/2013), 989 N.E.2d 355 (Ind. Ct. App. 2013)
SUBJECT: Licensed Clinical Social Worker Can Testify as Expert Under Ind. Ev. Rule 702
HOLDING: Although Ind. Code 25-23.6-4-6- prohibits a licensed clinical social worker from providing expert testimony, Ind. Ev. Rule 702 contains no wocial-worker exclusion, and rule takes precedence over statute. To the extent that Velazquez v. State, 944/35, can be read to hold otherwise, Ct. App. here disagrees. Here, licensed clinical social worker and board certified diplomate with master's degree and 25 years of experience conducting parenting assessments was properly qualified as an expert. Her testimony would clearly aid finder of fact in understanding results of Child Abuse Potential Inventory (CAPI) results and how they reflect on Mother's parenting abilities. No abuse of discretion in admitting testimony. Further, witness testified that CAPI was developed in 1977, is accepted and widely used in the psychiatric community, and has been the subject of peer-review studies.

O. EVIDENCE

O.7. Expert witnesses

O.7.a.3. Basis of opinion

TITLE: Chatman v. State

INDEX NO.: O.7.a.3.

CITE: (12/22/2022), Ind. Ct. App., 201 N.E.3d 241

SUBJECT: Nurse practitioner's testimony about what other medical professionals told her was not inadmissible hearsay

HOLDING: In a trial for aggravated battery, the trial court did not commit reversible error in admitting a nurse practitioner's testimony that the child victim was in or near a state of shock when he arrived at the hospital; had scored the lowest possible score on the Glasgow Coma Scale; and his MRI indicated that he had suffered hypoxic brain injuries from lack of oxygen. Because the testimony was based on what other medical professionals had told her, the trial court abused its discretion when it found the testimony admissible under Evidence Rule 803(4), allowing a statement "made by a person seeking medical diagnosis or treatment." The nurse practitioner's testimony did not recount statements by the child victim about his own medical condition. The Court of Appeals instead found the testimony admissible under Rule 703, which provides: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." The nurse's testimony about the information she had acquired from others did not concern the "ultimate fact in issue," which would have made the testimony inadmissible. Rather, based on the information she acquired from others, she testified about her own independent opinion on that ultimate fact in issue: that the child's injuries were most consistent with abuse. The expert opinion as to the cause of the child's injuries was based upon evidence of the type reasonably relied upon by experts in the medical field—histories provided by emergency first responders, medical records, and testing. Therefore, it was admissible. Held: judgment affirmed.

TITLE: Johnson v. State
INDEX NO.: O.7.a.3.
CITE: (2nd Dist., 9-22-98), Ind. App., 699 N.E.2d 746
SUBJECT: Expert witness & hypothetical question - no error
HOLDING: Tr. Ct. did not abuse its discretion in permitting expert witness to answer hypothetical question. D argued that it was improper for State's forensic serologist to posit whether it was consistent to not detect seminal fluid on oral swabs taken after incident if perpetrator did not ejaculate in victim's mouth. Expert witness may express her opinion regarding hypothetical question if following foundational prerequisites are satisfied: 1) expert's ability to give such opinion must be established through testimony showing she has requisite knowledge, skill, education or experience on which to base opinion; & 2) there must be proper evidentiary foundation supporting facts that are included in hypothetical question. Henson, 535 N.E.2d 1189.

Here, serologist testified that she had been employed with crime lab for thirteen years, & that her employment consisted of study, identification, & analysis of blood & other biological fluids, which would include seminal fluid staining. Based upon this background experience with serological matter, Tr. Ct. could properly conclude that serologist was qualified to answer hypothetical. Further, Tr. Ct. did not err in concluding that facts contained in hypothetical had been introduced into evidence & witness could render her opinion in relation to such facts. Held, judgment affirmed.

RELATED CASES: Schmidt, App., 816 N.E.2d 925 (had D intended to elicit his expert's opinion regarding his level of intoxication through hypothetical questions, the facts included in hypothetical questions would have had to have been admitted into evidence).

TITLE: Odom v. State
INDEX NO.: O.7.a.3.
CITE: 711 N.E.2d 71 (Ind. Ct. App. 1999)
SUBJECT: Expert testimony - credibility of domestic violence victim; hypothetical question
HOLDING: Although expert testimony explaining why victim recanted is usually admissible, expert testimony must also be based upon some fact presented in hypothetical or some reasonable inference drawn therefrom. Expert's suggestion that victim might have recanted because she had learned to forgive her assailant was not based on hypothetical because there was no evidence that D had apologized to victim or that victim had forgiven him. Although testimony dealing with learned forgiveness was erroneously admitted, error was harmless because jury was presented with several other reasons by expert testimony & victim for victim's recantation. Held, judgment affirmed.

Note: Because D failed to argue that expert's testimony improperly bolstered victim's testimony, Ct. did not address this issue.

TITLE: People v. Colon
INDEX NO.: O.7.a.3.
CITE: 667 N.Y.S.2d 692, 238 A.2d 18 (N.Y.App.Div. 1997)
SUBJECT: Expert Testimony About Drug Sales on Street -- No Foundation
HOLDING: Expert testimony on structure and operation of street-level drug conspiracies, offered to show why D had no drugs or marked money on person at time of arrest shortly after alleged sale to undercover officer, was inadmissible absent evidence that such conspiracy actually existed. Opinion testimony must be based on facts in evidence, and here that would mean evidence of conspiracy. There was no evidence that D acted in concert with anyone, an inference that he was cannot be supported merely by failure to find drugs or marked bill on him. State argues that absence of drugs or money would have led to jury confusion that made expert testimony necessary. Jury may well have concluded that failure to find drugs and money on D was due to misidentification by undercover officer, but there is no factual basis for characterizing this conclusion as confusion. Expert testimony here may well have prejudiced D by making it unlikely that jury would believe claim of misidentification, however valid it might be.

TITLE: Ruiz v. State

INDEX NO.: O.7.a.3.

CITE: (05-14-10), Ind. Ct. App, 926 N.E.2d 532

SUBJECT: Exclusion of expert testimony - false confessions; no factual basis where expert had not met with D

HOLDING: Tr. Ct. did not abuse its discretion by excluding D's expert on false confessions. Indiana Evidence Rule 702 allows for expert witness testimony if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine fact in issue. Here, D wanted to present expert testimony by a licensed clinical psychologist on false or coerced confessions. At the time of the hearing on the admissibility of his testimony, the Doctor had not yet conducted any testing of D, but if his testimony were to be admissible, the Doctor would have to examine D to determine if he had any personality traits that would make him susceptible to police influence and whether the police interrogation was psychologically coercive. Tr. Ct. excluded the Doctor because his testimony would not assist the trier of fact to understand scientific, technical or specialized evidence and it would be likely to cause unfair prejudice, to confuse the issues and to mislead the jury. Although excluding testimony because it may create unfair prejudice, confuse the issue or mislead the jury is generally valid, it cannot justify the exclusion when D's trial was to the bench because harm arising from evidentiary error is lessened if not totally annulled when the trial is by the court sitting without a jury. Nevertheless, the Doctor's testimony would have been speculative at best because he had never interviewed D. As the Doctor did not assess D for traits that might make him vulnerable or susceptible to police influence, and did not review the police techniques used in D's interrogation, his proffered opinion testimony is speculative and not based on the records of the case. Thus, D has not demonstrated that he was prejudiced by its exclusion. Held, judgment affirmed.

TITLE: Schmidt v. State
INDEX NO.: O.7.a.3.
CITE: (5th Dist., 10-28-04), Ind. App., 816 N.E.2d 925
SUBJECT: Expert witness - statements of D & medical record as basis of opinion
HOLDING: In operating while intoxicated prosecution, Tr. Ct. properly precluded D's toxicology expert from testifying regarding D's level of intoxication based on information D had told him before trial. D had not testified, nor did he place those facts into evidence. Indiana Evidence Rule 703 provides that experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field. Cts. have shown considerable reluctance to find reasonable reliance on information not prepared by persons with specialized training, such as statements by a party or lay witnesses or data prepared in anticipation of litigation. E.g., Weaver v. State, 627 N.E.2d 1311 (Ind. Ct. App 1994). Thus, Tr. Ct. did not abuse its discretion when it excluded expert's testimony unless & until D testified.

D also wanted expert toxicologist & witness certified to conduct field sobriety tests (FSTs) to testify that D had suffered from hearing loss & vertigo, which may have affected his performance on FSTs. Following Faulkner v. Markkay of Indiana, Inc., 663 N.E.2d 798 (Ind. Ct. App 1996), Ct. concluded that Tr. Ct. did not abuse its discretion when it ruled that neither witness could give opinions regarding D's medical diagnoses based on D's one-page medical record. Neither witness had same education, training, or experience as physician who prepared the one- page medical record, & thus could not testify regarding inadmissible out-of-Ct. statements prepared by that physician. If defense witnesses had been allowed to testify based on the medical record, neither was capable of being cross-examined regarding medical diagnoses in record & D would have been permitted to place his medical history into evidence without having his diagnoses challenged on cross-examination. Held, judgment affirmed; Sullivan, J., dissenting on this issue & would reverse & remand for new trial.

TITLE: State v. Connor
INDEX NO.: O.7.a.3.
CITE: 156 N.H. 544, 937 A.2d 928 (N.H. 2007)
SUBJECT: Fingerprint peer-reviewer's testimony required
HOLDING: New Hampshire Supreme Court held evidence of a fingerprint match must be supported not only by the evidence technician who made the comparison but also by the technician who performed the verification phase of the standard ACE-V fingerprint comparison methodology. At trial, D objected when the technician who testified to the fingerprint match stated that another technician formed the same opinion during the verification phase of the fingerprint analysis. Court rejected prosecution's contention that the testimony was not offered for the truth of the matter asserted. Court emphasized that the witness's colleague was not simply checking the procedure used by the witness but was affirming the witness's identification by undertaking an independent analysis. The testimony was not admissible under the hearsay exception for facts relating to the basis for an expert opinion under N.H. R. Evid. 703 because the witness's opinion was not based on the colleague's verification of that opinion. The colleague's opinion "was simply a necessary prerequisite to the release of [the witness's] already formed opinion."

TITLE: Ashby v. State
INDEX NO.: O.7.a.3.
CITE: (12/12/85), Ind., 486 N.E.2d 469
SUBJECT: Expert witness - basis of opinion; use of hypothetical questions (HypoQ)
HOLDING: Tr. Ct. did not err in overruling D's objection to prosecution's questioning of experts re sanity. Here, D objected, arguing that when witness has no firsthand knowledge of incident, opinion must be elicited by asking HypoQ. Ct. finds HypoQ is not necessary where opinion of psychiatric expert was based on personal examination of D along with available medically related reports/records. Brown 390 N.E.2d 1000. Held, no error.

RELATED CASES: Heald 492 N.E.2d 671 (Crim L 483, 485(2); Tr. Ct. did not err in sustaining state's objection that D's HypoQ #1 did not require expert to give opinion within reasonable medical certainty, or to HypoQ #2 which asked expert to give opinion re D's mental processes at time she was striking victim; Dickson, joined by Shepard, DISSENTS explaining why he would allow both HypoQs).

TITLE: Bergmann v. State
INDEX NO.: O.7.a.3.
CITE: (4th Dist. 12/26/85), Ind. App., 486 N.E.2d 653
SUBJECT: Expert opinion - reasonable medical certainty
HOLDING: Tr. Ct. did not err in allowing physician to give opinion as to likelihood that Ds' daughter would have died had she been treated in a timely fashion. Here, Ds represented themselves in trial for reckless homicide & neglect of a dependent, & objected to physician's opinion, calling it "speculation." Physician testified that early treatment of bacterial meningitis provides 90-95% survival rate. The reasonable medical certainty test of Palace Bar, Inc. v. Fearnot 381 N.E.2d 858 was modified in Noblesville Casting Division of TRW, Inc. v. Prince 438 N.E.2d 722. Plurality opinion in Noblesville Casting articulated foundational requirements of expert witnesses & circumstances in which they may give opinion. Although expert's opinion resulting from speculation in a vacuum is nonprobative & inadmissible, expert need not speak with absolute certainty in giving opinion. Held, convictions affirmed.

TITLE: Orr v. State
INDEX NO.: O.7.a.3.
CITE: (2d Dist. 12/27/84), Ind. App., 472 N.E.2d 627
SUBJECT: Expert opinion - basis of opinion
HOLDING: Tr. Ct. did not err in admitting blood test results (DWI resulting in death). Here, D challenges accuracy of testing procedures used by lab technician (Carey). Carey employed gas chromatograph (GC) which requires control sample of pure blood injected with known amounts of alcohol. Carey testified she smelled control sample for alcohol, injected alcohol into control & then proceeded to test control & sample of D's blood (.19%). D's expert, Dr. Walter Frajola, testified Carey's test was unreliable because her "sniff test" was inadequate. Frajola testified control must be tested for alcohol prior to injection, or GC test will not be accurate. Conflicting opinions between experts re validity of testing procedures is best handled through cross-examination. Martin v. Roberts 46 N.E.2d 896 (analysis of dune buggy accident); Jones 425 N.E.2d 128 (neutron activation analysis to establish similarity of bullets); Reid 372 N.E.2d 1149 (trace metal detector test). Variations from testing procedure will render test results inadmissible only if procedure necessarily controls reliability of test results. IN & MI Electric Co. v. Pounds, App., 426 N.E.2d 45. Held, no error. Sullivan DISSENTS, distinguishing cases cited by majority. State did not prove reliability of test procedure, thus test results should not have been admitted.

TITLE: Wilbur v. State
INDEX NO.: O.7.a.3.
CITE: (3/5/84), Ind., 460 N.E.2d 142
SUBJECT: Expert witnesses - basis of opinion; medical reports
HOLDING: Tr. Ct. did not err in allowing forensic pathologist who performed autopsy to testify re medical reports of treating physicians. Here, D contends testimony which referred directly to content of medical reports of treating physicians was inadmissible as hearsay and did not qualify for admission as public documents. Ct. does not reach public records issue. Testimony was admissible because it showed basis of pathologist's medical conclusions. Medical reports are routinely relied upon by forensic pathologists in forming opinions re cause of death. When presented to trier of fact by such persons at trial "in this form & manner & for this purpose," testimony reflecting contents of medical reports is not hearsay. Smith, 285 N.E.2d 275. Held, no error.

RELATED CASES: Ackerman, 51 N.E.3d 171 (Ind. 2016) (surrogate pathologist's testmony about information contained in autopsy report did not violate D's confrontation rights; see full review at J.9); Weaver, App., 627 N.E.2d 1311 (Tr. Ct. properly precluded expert from testifying until after D had testified, because his opinion was based on statements from D. Briney v. Williams, App. 691, 242 N.E.2d 132); Bixler, 471 N.E.2d 1093 (expert may rely on hearsay in forming opinion when expert uses other experts and authoritative sources of information like treaties to aid him/her in arriving at opinion; held, no error in allowing pathologist to testify that he had consulted orthopedic surgeon, who had helped him reach opinion); Sills,463 N.E.2d 228 (Crim. L 431; although EEG, diagnostic evaluation & psychological and intelligence tests should not have been admitted directly into evidence, citing Smith, 285 N.E.2d 275, Ct. finds it was not error to do so; DISSENT by Prentice contends Weedman, 416 N.E.2d 1268, Flewallen, 368 N.E.2d 239 and Smith established that medical records containing observations/interpretations/diagnosis/opinions of one unavailable for CX are not admissible directly into evidence).

O. EVIDENCE

O.7. Expert witnesses

O.7.b. Opinion on ultimate issue

TITLE: Alvarez-Madrigal v. State

INDEX NO.: O.7.b.

CITE: (3/13/2017), 71 N.E.3d 887 (Ind. Ct. App 2017)

SUBJECT: Pediatrician's testimony regarding statistical evidence about the possibility a witness is lying did not constitute vouching

HOLDING: In child molesting prosecution, pediatrician's testimony that less than two to three children out of 1,000 make up claims of sexual abuse did not constitute impermissible vouching testimony under Indiana Evidence Rule 704(b). Witness was explaining that a lack of physical abuse is not indicative that a child is fabricating the abuse. Court concluded that witness's testimony was not a statement as to complaining witness's (C.W.'s) credibility or an opinion regarding the truth of the allegations against Defendant. It was not an opinion about, or related to, whether C.W. had been coached, and it did not concern whether C.W. was a truthful person in general. Robey v. State, 7 N.E.3d 371, 380 (Ind. Ct. App 2014). Further, even if the testimony constituted improper vouching, substantial independent evidence of guilt supported Defendant's convictions. Held, judgment affirmed; Barnes, J., concurring to express his belief that Defendant's objection to pediatrician's testimony as "speculation" and "not relevant" did not adequately preserve his vouching claim on appeal. Although pediatician's testimomy was erroneous as in Sampson v. State, 38 N.E.3d 985 (Ind. 2015) and Hamilton v. State, 43 N.E.3d 628 (Ind. Ct. App. 2015), it did not constitute fundamental error.

TITLE: Bradford v. State
INDEX NO: O.7.b.
CITE: (01-27-12), 960 N.E.2d 871 (Ind. Ct. App 2012)
SUBJECT: Vouching - CPS investigator's substantiation of charges
HOLDING: Tr. Ct. committed reversible error by allowing CPS investigator to testify that, after her investigation, she substantiated the child's accusations of sexual abuse against D. Witnesses may not testify 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. Ind. Rule of Evidence 704(b).

Here, D was charged with class C felony child molestation based on the testimony of the alleged victim (A.T.) and her brother who claims to have seen the molestation. A CPS investigator testified to the process and interviewing methods she used to investigate the allegations of abuse made against D. At the end of her testimony, over objection, she testified that "I substantiated sexual abuse, meaning our office feels that there was enough evidence to conclude that sexual abuse occurred." Although the CPS investigator's testimony that she substantiated that abuse had occurred may have been persuasive, she did not directly vouch for the truthfulness of A.T.'s testimony by saying she believed the child. However, the CPS investigator's testimony that she substantiated the abuse allegations did provide her opinion as to the truth or falsity of the allegations and investigation. Thus, the testimony was improper and invaded the province of the jury in violation of Rule 704(b). The error was not harmless in that, during closing, the State made multiple references to the DCS substantiation of abuse and used such to argue that A.T. was not lying about the child molestation allegations against D. Despite the corroborating testimony of A.T.'s brother, the erroneously admitted opinion likely had a prejudicial impact upon the jury. Held, judgment reversed.

RELATED CASES: Hamilton, 43 N.E.3d 628 (Ind. Ct. App 2015) aff'd on rehearing, 49 N.E.3d 554, (admitting forensic interviewer's testimony that neither complaining witness showed any indicators of being coached was impermissible vouching testimony); Bean, 15 N.E.3d 12 (Ind. Ct. App 2014) (as in Bradford, DCS investigator testified that after interviewing C.W., he substantiated the allegation, thereby violating Indiana Evidence Rule 704(b)); Heinzman, 970 N.E.2d 214 (Ind. Ct. App 2012) (Tr. Ct. did not abuse discretion allowing DCS investigator to testify that she substantiated the allegations where DCS investigator also explained that this means CPS simply has a "reason to believe" that the report of inappropriate touching "may have some factual foundation," but this does not mean that the allegations were "absolutely true.").

TITLE: Byrd v. State
INDEX NO.: O.7.b.
CITE: (1st Dist. 10/07/91), Ind. App., 579 N.E.2d 457
SUBJECT: Admissibility of psychiatric testimony on memory loss
HOLDING: It was error for Tr. Ct. to exclude expert psychiatric testimony regarding D's memory loss. While memory loss is not usually an issue & was not raised as defense at trial, D attempted to use it to explain why he couldn't remember what happened on night victim was murdered. Ct. also noted that State missed few opportunities to attack D's credibility by questioning validity of his claimed memory loss. Ct. therefore found memory loss was related to issue of credibility, & that while expert's testimony tended to show D's testimony was credible, it didn't amount to direct testimony as to his credibility & should have been admitted. Held, reversed & remanded for new trial. On transfer, Ind. S.Ct. reversed Ct. App. on other grounds, but not on this issue. See Byrd 593 N.E.2d 1183 at O.7.b.

TITLE: Byrd v. State
INDEX NO.: O.7.b.
CITE: (06/18/92), Ind., 593 N.E.2d 1183
SUBJECT: Expert testimony concerning consistency of D's character with formulation of intent
HOLDING: Tr. Ct. did not err in excluding expert's testimony that D's Minnesota Multiphasic Personality Inventory (MMPI) profile was inconsistent with committing intentional murder, reversing Ct. App. decision at 579 N.E.2d 457, on this issue only. Ind. follows general rule that evidence of D's character is not admissible to prove he acted in accord therewith on particular occasion. While D may initiate introduction of his good character through reputation, such evidence is generally admitted through lay testimony of those who knew his reputation prior to instant offense. Here, character evidence was offered through expert who based his opinion on D's behavior after offense & MMPI test results. Such evidence "comes cloaked with an `aura of scientific reliability' that certain individuals are or are not predisposed to commit a particular crime." Generally, D's intent to commit crime is not proper subject for experts, but is question of fact for jury, Reichard (1987), Ind., 510 N.E.2d 163. Such testimony is appropriate, however, when it concerns matters not within common knowledge of jury, & it's admissibility is subject to review only for abuse of discretion. While MMPI-based testimony has been admitted in Ind. on issue of D's potential for rehabilitation, there is no suggestion that MMPI is accurate indicator of whether D committed offense. Ct. held that D can present evidence of his good character only for particular traits relevant to acts charged. Because expert's testimony was about character in general, it did not constitute evidence of D's character for particular trait. Held, remanded for retrial on other issue. See Byrd 579 N.E.2d 457 at O.7.b.

TITLE: DeVaney v. State
INDEX NO.: O.7.b.
CITE: (11/10/72), Ind., 288 N.E.2d 732
SUBJECT: Expert witnesses - opinion on ultimate issues
HOLDING: D claimed that it was error to permit State's expert witness on accident reconstruction to testify as to ultimate fact at issue. Prior case law indicated that opinions as to ultimate fact in issue are to be excluded. See Stroud, 273 N.E.2d 842; Ellis, 250 N.E.2d 364; Baker, 195 N.E.2d 91. Supreme court overruled these cases, finding that argument that opinion of ultimate issue usurps function of jury is simply not valid. "When opinion is given, witness has no such intent & could not accomplish this feat even if he wanted to for the simple reason that the jury is free to reject the opinion and accept some other view." Held, opinion by expert witness upon ultimate fact in issue was not excludable.

NOTE: IRE 704(a) provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." IRE 704(b), qualifying IRE 704(a), provides that "[w]itnesses may not testify to opinions concerning intent, guilt or innocence in a criminal case; the truth or falsity or allegations; whether a witness has testified truthfully; or legal conclusions."

TITLE: Farris v. State
INDEX NO.: O.7.b.
CITE: (4th Dist., 11-22-04), Ind. App., 818 N.E.2d 63
SUBJECT: Exclusion of identification expert testimony - no error
HOLDING: Tr. Ct. properly excluded eyewitness identification expert's testimony regarding truthfulness of witness's testimony under Indiana Evidence Rule 704(b). Rule provides that witnesses may not testify to opinions concerning whether a witness has testified truthfully. During D's offer to prove, expert testified to various psychological phenomena that might cause an eyewitness to misidentify a suspect, but expert also gave his opinion as to whether eyewitnesses in this case testified truthfully. This testimony was inadmissible under Rule 704(b). Moreover, based on evidence presented & D's cross-examination of eyewitnesses, Tr. Ct. did not err in finding that, pursuant to Indiana Evidence Rule 702(a), expert testimony was not necessary to place concept of eyewitness misidentification within jury's realm of understanding. Ct. noted that while eyewitness identification expert testimony is admissible in certain circumstances, Cook v. State, 734 N.E.2d 563 (Ind. 2000), in this case circumstances necessitating such testimony were not present because two eyewitnesses' accounts of robbery were consistent & supported by gas station's surveillance video, & identification was not primary issue at trial. Held, judgment affirmed. Baker, J., concurring, wrote separately to emphasize importance of eyewitness identification experts & that Cts. need to be mindful of research regardin g reliability of eyewitness testimony.

RELATED CASES: Woodson, 961 N.E.2d 1035 (Ind. Ct. App 2012) (Ct. noted "close scrutiny" eyewitness identification in criminal cases has received since Farris was decided; even if counsel acted unreasonably or under a mistaken belief in failing to pursue hiring an expert witness on eyewitness identification, D failed to show prejudice by that failure because it is highly likely that expert's testimony would have been found inadmissible at time of D's trial).

TITLE: Gutierrez v. State
INDEX NO.: O.7.b.
CITE: (02-22-12), 961 N.E.2d 1030 (Ind. Ct. App 2012)
SUBJECT: Vouching - fundamental error in child molest case
HOLDING: Repeated vouching for child molest victim constituted fundamental error.

Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness had testified truthfully; or legal conclusions. Ind. Rule of Evid. 704(b). It is essential that the trier of fact determine the credibility of the witnesses and the weight of the evidence. Here, D was charged with two counts of class A felony child molesting on the basis of M.L.'s accusation that D, who was living with M.L.'s family, would touch her with his hands, his mouth, and have intercourse with her at least three times while her sisters were sleeping in the same room. M.L.'s statements about the abuse were inconsistent. However, at trial, the nurse who examined the child was permitted to testify, over counsel's objection, that she believed M.L. was telling the truth. Without objection, a DCS case manager also testified that she "absolutely" believed M.L. During closing, the prosecutor argued "Apparently, the priest believed [M.L.] because he reported it. We know the police officers believe her. We know the welfare lady believes her. She said so. The sexual assault lady believed what she had to say. Lot[s] of people are in her corner." The prosecutor also stated that he believed D had "lied a lot." The opinions of the nurse and the case worker violated Rule 704(b) and invaded the province of the jury to judge the credibility of the witnesses. To compound matters, the prosecutor improperly told the jury that he believed the child's testimony. Thus, Court is compelled to reverse D's convictions and order a new trial free of prohibited matters. Held, judgment reversed and remanded for a new trial.

RELATED CASES: Hamilton, 43 N.E.3d 628 (Ind. Ct. App 2015) aff'd on rehearing, 49 N.E.3d 554, (admitting forensic interviewer's testimony that neither complaining witness showed any indicators of being coached was impermissible vouching testimony).

TITLE: Halliburton v. State

INDEX NO.: O.7.b.

CITE: (12/19/2013), 1 N.E.3d 670 (Ind. S. Ct. 2013)

SUBJECT: Mother's testimony that she begged daughter to tell the truth not vouching

HOLDING: Witness's mother's testimony that she begged her daughter to tell the truth to law enforcement about her boyfriend's involvement in murder of neighbor was not vouching in violation of Ind. Ev. R. 704. Ind. Ev. R. 704 prohibits testimony about whether another witness has testified truthfully. Mother did not offer opinion about her daughter's testimony at trial, nor did she testify to what she believed "the truth" to be. Held, no error in admitting mother's testimony.

TITLE: Head v. State
INDEX NO.: O.7.b.
CITE: (2/18/88), Ind., 519 N.E.2d 151
SUBJECT: Expert witness - opinion on credibility of child victim witness
HOLDING: Tr. Ct. erred in allowing expert witness to testify as to credibility of child victim witness. Expert properly testified about psychological makeup of child victim witness, and offered opinion that child was not prone to fantasy or fabrication. Over D's objection, prosecutor and expert examined each portion of child's testimony in detail, and expert stated that in each instance child was telling truth. Ind. S. Ct. has recognized special problems in assessing credibility of child victim witnesses in child molest cases and has allowed expert testimony as to whether child is prone to exaggeration or fantasy, and as to child's ability to accurately describe sexual occurrence. However, Ct. has cautioned against allowing such experts to testify directly re truth of child's testimony. Lawrence 464 N.E.2d 923. In adult rape case, expert cannot testify as to witness' truthfulness or D's guilt. Ross 516 N.E.2d 61 (see card at O.7.b); Reichard, 510 N.E.2d 163. Here, too expert invaded province of jury. Held, reversed and remanded.

RELATED CASES: Baumholser, 62 N.E.3d 411 (Ind. Ct. App 2016) (no error, fundamental or otherwise, where forensic interviewer testified that child molesting victims often delay reporting the abuse; testimony did not constitute impermissible vouching, Ind. Evidence Rule 704(b), because forensic interviewer did not testify as to the truth or falsity of the child's allegations, but simply observed how victims normally behave); Norris, 53 N.E.3d 512 (Ind. Ct. App 2016) (erroneous admission of vouching testimony was harmless because of other substantial evidence of guilt); Hamilton, 43 N.E.3d 628 (Ind. Ct. App 2015) aff'd on rehearing, 49 N.E.3d 554, (admitting forensic interviewer's testimony that neither complaining witness showed any indicators of being coached was impermissible vouching testimony); Hoglund, 962 N.E.2d 1230 (Ind. 2012) (Rule 704(b) overruled Lawrence v. State, 464/925; even in child molesting cases, indirect and direct vouching is inadmissible); Velasquez, 944 N.E. 2d 34 (Ind. Ct. App 2011) (expert's opinion that complaining witness in molest case suffered from PTSD was admissible; expert did not specifically state that she believed allegations, but just that child's behavior, including her diagnosis of PTSD based upon that behavior, tend to show that the child had suffered a traumatic experience and that her behavior was consistent with that experience); Callis, App., 684 N.E.2d 233 (Tr. Ct. properly admitted social psychologist's testimony regarding phenomenon of coerced confessions, but properly excluded his opinion about D's interrogation and interrogation process in this case; expert cannot testify as to truthfulness of another witness); DeMotte, App., 555 N.E.2d 1336 (D has corresponding right to offer testimony as to child's inability to perceive and describe sexual encounter); Ulrich, 550 N.E.2d 114 (Tr. Ct. erred in allowing psychiatrist to testify that victim's consistency in remembering major events in her life indicated that she was reliable and credible; victim was mentally retarded 25-year-old with mental age of 7-9); Stout, 528 N.E.2d 476 (social worker who had talked with child molest victim 24 times was allowed to testify that victim's matter-of-fact testimony was not unusual and that she just wanted to get it over with).

TITLE: Jimerson v. State
INDEX NO.: O.7.b.
CITE: (6/28/2016), 56 N.E.3d 117 (Ind. Ct. App 2015)
SUBJECT: Restriction on expert testimony regarding false confessions
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion in restricting the testimony of D's expert witness on false confessions. Expert was allowed to testify about the phenomena of false or coerced confessions and about problematic police practices, but was not permitted to testify whether a particular technique had been applied in D's case.

Although Miller v. State, 770 N.E.2d 763 (Ind. 2002), can be read to provide for admissibility of expert testimony on techniques used in a particular interrogation, this is not to say that such testimony is always admissible or that an expert may review a confession frame by frame for the jury. Expert testimony is appropriate when it addresses issues not within the common knowledge and experience of ordinary persons and would aid the jury. Ind. Evidence Rule 702(a). But where a jury is able to apply concepts without further assistance, highlighting individual exchanges or vouching for the truth or falsity of particular evidence is invasive.

Here, together with extensive background testimony from expert, jury was provided with D's statement in audio, video, and written form. Jury had been given adequate information to apply its common knowledge and experience, so there was no need for an expert to point out the techniques allegedly employed to secure D's confession. Thus, Tr. Ct. did not abuse its discretion in prohibiting expert from addressing the particular circumstances surrounding D's confession. Held, judgment affirmed.

RELATED CASES: Kincaid, 171 N.E.3d 1036 (Ind. Ct. App. 2021) (Tr. Ct.'s refusal to allow D's expert to offer an opinion as to whether the officers who questioned her used the Reid technique and whether that could have contributed to her false confession did not deprive D of a fair trial; officers' testimony that they did not use the technique communicated nothing about the veracity of D's statement and, therefore, was not prohibited by Evidence Rule 704(b)).

TITLE: Kelley v. State
INDEX NO.: O.7.b.
CITE: (5th Dist. 02/14/91), Ind. App., 566 N.E.2d 591
SUBJECT: Voucher rule, waiver - child molest
HOLDING: It was not fundamental error to allow child molest victim's therapist to testify that she believed child was telling truth, & therefore because of failure to object at trial, issue is waived on appeal. Ct. App. found that testimony did not rise to level where it would affect fairness or integrity of trial or deny due process. Ct. acknowledged Head 519 N.E.2d 151 where S.Ct. held such testimony invaded province of jury & was therefore inadmissible but noted that in Head there were repeated objections to testimony, & here there were none. Ct. also noted that various other evidentiary arguments were waived because no offer to prove was made. Held, conviction affirmed.

RELATED CASES: Weis, App., 825 N.E.2d 896 (neither of investigating officer's statements invaded province of jury as the deputy explained the course of investigation after speaking with the alleged victim & not her specific belief in the child's truthfulness & case worker only explained the protocol for visitation between an alleged abuser & victim); Sims 601 N.E.2d 344 (although reversing on other grounds, (see card at O.8.j) Ct. found unobjected-to voucher testimony did not require reversal, because testimony came from father who would be expected to believe child; reversing Ct. App. decision at 591 N.E.2d 1044 on this issue); Jones 581 N.E.2d 1256 (testimony by child welfare worker that she believed alleged victim had been molested, improperly vouched for child's testimony & invaded province of jury).

TITLE: Miller v. State
INDEX NO.: O.7.b.
CITE: (6-26-02), Ind., 770 N.E.2d 763
SUBJECT: Erroneous exclusion of expert testimony - false confessions
HOLDING: In murder prosecution, where D's statement played prominent role in State's case, Tr. Ct. erroneously excluded testimony of psychologist called by defense as expert in field of police interrogation & false confessions. Expert testimony is appropriate when it addresses issues not within common knowledge & experience of ordinary persons & would aid jury. Ind. Evidence Rule 704(a). Although expert opinion testimony regarding truth or falsity of one or more witnesses' testimony is prohibited, Callis v. State, 684 N.E.2d 233 (Ind. Ct. App 1997), Callis should not be read to generally prohibit expert testimony regarding police techniques used in a particular interrogation. Fact that content of interrogation was not in dispute was not proper basis on which to exclude expert's testimony. D's trial strategy clearly included his challenge to voluntariness of incriminatory statements in his videotaped police interview. General substance of expert's testimony would have assisted jury regarding psychology of relevant aspects of police interrogation & interrogation of mentally retarded persons, topics outside common knowledge & experience. In event expert's testimony would have invaded Rule 704(b)'s prohibition of opinion testimony as to truth or falsity of D's statements, Tr. Ct. could have sustained individualized objections at trial. Excluding proffered testimony in its entirety deprived D of opportunity to present defense. Given prominence of D's statement in State's case & unique circumstances present, Ct. concluded that erroneous exclusion of whole of expert's testimony affected substantial rights of D. Held, conviction reversed & remanded for new trial; Boehm, J., concurring, noted split of authority on issue of admissibility of expert testimony as to false confessions.

RELATED CASES: Ruiz, 926 N.E.2d 532 (Ind. Ct. App 2010) (where expert on false confessions had not interviewed D or reviewed police interrogation, his proffered opinion testimony was speculative and not based on record); Miller, App., 825 N.E.2d 884 (on retrial, State must be permitted to present evidence on issue of D's mental capacity to assist jury in determining D's statement's weight & credibility; see full review at M.5.a); Carew, App., 817 N.E.2d 281 (appellate counsel was ineffective for failing to challenge on direct appeal Tr. Ct.'s exclusion of expert testimony re: deceptive police techniques used in interrogation of mentally retarded individuals; see full review at Y.4.c).

TITLE: Powers v. State
INDEX NO.: O.7.b.
CITE: (10/21/82), Ind., 440 N.E.2d 10960
SUBJECT: Expert witness - opinion on ultimate issue
HOLDING: Opinion by police officer that drugs were possessed for delivery & not for personal use was properly admitted. Here, D objected to testimony by officer that amount of drugs found in D's possession indicated his intent to sell them. Witness may give opinion regarding ultimate fact question. Shelby 428 N.E.2d 1241; Woods 372 N.E.2d 178. See Wofford 394 N.E.2d 100 (intoxication); Porter 391 N.E.2d 801 (truth of statements to police); Bobbitt 361 N.E.2d 1193 (sanity); Ball, App., 406 N.E.2d 305 (child abuse). Held, no error. CONCURRING IN RESULT, Prentice would hold that question of person's intent at time crime committed, not related to insanity issue, is question of fact for jury & not proper subject of expertise. Simpson 381 N.E.2d 1229. Prentice distinguishes cases cited by majority. Circumstance of possession of large quantity of drugs does not change between time of offense & time of trial. However, Prentice finds sufficient evidence of intent to render error harmless.

RELATED CASES: Hill 470 N.E.2d 1332 (Crim L 448(1), 479; no error in allowing serologist to opine re time of occurrence of intercourse); Augustine 461 N.E.2d 101 (opinion testimony by doctor on D's state of mind (self-defense) properly excluded; jury is as well qualified as witness to judge D's state of mind); Brown 448 N.E.2d 10 (Crim L 429 (1), 448(16); Homic 338(1); although it was error to admit death certificate containing legal conclusion as to cause of death, *citing* Ledcke 296 N.E.2d 412, Ct. finds D was not prejudiced); Summers, App., 495 N.E.2d 799 (Crim L 470, 485(1); police officer's opinion that D was driving car at time it was struck by train was properly admitted).

TITLE: Prouse v. State
INDEX NO.: O.7.b.
CITE: (6/26/2018), 105 N.E.3d 1109 (Ind. Ct. App 2018)
SUBJECT: Fire marshal's testimony was not an improper comment on guilt
HOLDING: In murder and arson prosecution, deputy fire marshal's testimony indicating that whoever set the house fire did so to cover up something did not constitute fundamental error. D argued that witness's testimony improperly commented on the perpetrator's guilt and intent behind setting the fire in violation of Indiana Evidence Rule 704(b). Even assuming this testimony violated Evid. R. 704(b)'s proscription on opinion testimony concerning intent, any error did not rise to level of fundamental error because other independent evidence overwhelmingly established that the fires were set to cover up the victim's stabbing death. Held, judgment affirmed.

TITLE: Ross v. State
INDEX NO.: O.7.b.
CITE: (12/17/87), Ind., 516 N.E.2d 61
SUBJECT: Expert testimony - psychodynamics of rape
HOLDING: Tr. Ct. erred in allowing witness qualified as expert in psychodynamics of rape to classify type of rapes allegedly committed by D. Where victim's state of mind is in issue, expert opinion on "rape trauma syndrome" is admissible. Simmons 504 N.E.2d 575 (see card at O.7.a.1). Here, no such issue was raised. State, in hypothetical question to expert witness, set out in lengthy detail testimony of prior witnesses re rapes allegedly committed by D. State then asked expert to classify those rapes. Expert answered that they were power rapes. This case is similar to Reichard 510 N.E.2d 163, in which state asked same expert witness same type of question. In Reichard, state asked expert to categorize what kind of rapist, if any, D was. Ind. S. Ct. found that this amounted to eliciting expert opinion on ultimate issue of guilt. Here, problem was not corrected by asking expert to categorize rapes instead of rapists. Question invaded province of jury & was highly prejudicial to appellant. Unless type of rape is in issue, such as question re D's sanity or alleged victim's competence to testify, such evidence is irrelevant & highly inflammatory. Held, reversed & remanded.

TITLE: Scisney v. State
INDEX NO.: O.7.b.
CITE: (5th Dist., 12-30-97), Ind. App., 690 N.E.2d 342, aff'd by 701 N.E.2d 847 (Ind. 1998)
SUBJECT: Expert witness - opinion on ultimate issue; harmless error
HOLDING: It was harmless error for State to solicit testimony from police officer as to whether evidence suggested that D was more likely dealer than user. Witnesses may not testify to opinions concerning intent, guilt or innocence in criminal case; truth or falsity or allegations; whether witness has testified truthfully; or legal conclusions. Ind. R. Evid. 704(b). However, improper admission of evidence is harmless error when conviction is supported by substantial independent evidence of guilt which satisfies reviewing Ct. that there is no substantial likelihood that challenged evidence contributed to conviction. Here, after State presented narcotics officer with facts of case & asked whether facts had significance based upon his training & experience, officer concluded that individual would be "suspect dealer." Then, State isolated each relevant fact & solicited testimony from officer concluding that each fact was indicative of dealer & not user. Although this was impermissible, State established D was dealer based on other evidence. D possessed beeper, drove car belonging to someone else & had with him large quantity of cocaine. Thus, officer's testifying to legal conclusion that D was dealer & not user was harmless error. Held, conviction affirmed.

RELATED CASES: O'Neal, App., 716 N.E.2d 82 (Although officer's experience & training may not be sufficiently comprehensive to qualify him as expert witness under Indiana Evidence Rule 702, Ct. concluded that he was sufficiently qualified as skilled witness under Evid.R. 701 to offer his rationally based & helpful opinion on issue of D's intent to deal crack cocaine).

TITLE: Stout v. State
INDEX NO.: O.7.b.
CITE: (1st Dist., 04-26-93), Ind. App., 612 N.E.2d 1076
SUBJECT: Voucher testimony
HOLDING: Testimony from child's counselor was not improper voucher testimony. Counselor was asked whether she had opinion as to why she would get bits and pieces of incident from children who suffered a traumatic event. D did not object. Witness then testified about effect of trauma blocking memory. Few questions later, witness was asked for opinion as to why child witness might testify in greater detail presently than in 1985 hearing when witness was 11 years old. Over objection that question was for jury to decide and resolve, witness testified: [o]ne possible reason or my opinion might be that the person was threatened or told not to tell and was scared to tell. That the person might be very embarrassed about the facts or that the person may be so traumatized that they totally ... they repressed or denied important aspects of the traumatic event until a later date. When you are dealing with a lot of emotional or physical stress or demands, you deal with what you have to deal with as you can deal with it. And you can't deal with everything all at once. You deal with stress and trauma gradually as in a process, bit by bit, not all at once. Ct. found that counselor never stated belief child was telling truth. Expert testimony that individual's subsequent behavior is consistent or inconsistent with that observed from other victims is admissible. Henson (1989), 535 N.E.2d 1189. Held, conviction affirmed, Sullivan, J., dissenting on other issue.

RELATED CASES: Baumholser, 62 N.E.3d 411 (Ind. Ct. App 2016) (no error, fundamental or otherwise, where forensic interviewer testified that child molesting victims often delay reporting the abuse; testimony did not constitute impermissible vouching, Ind. Evidence Rule 704(b), because forensic interviewer did not testify as to the truth or falsity of the child's allegations, but simply observed how victims normally behave).

O. EVIDENCE

O.8. Privileges (generally IRE 501)

O.8.b. Husband-wife (Ind. Code 34-1-14-5)

TITLE: Glover v. State
INDEX NO.: O.8.b.
CITE: (11-02-05), Ind., 836 N.E.2d 414
SUBJECT: Marital privilege waivable by either spouse
HOLDING: The marital privilege, Ind. Code 34-46-3-1(4), prevents a Ct. from requiring a spouse to testify as to confidential marital communications, but does not bar the spouse from testifying if the spouse chooses to do so. The privilege is more limited than privileges attaching to communications to attorneys, physicians, & clerics. In contrast to the other privileges, the marital privilege is grounded at least in significant part not on a policy of promoting disclosure but on concern for the health of the ongoing relationship between husband & wife & the policy of preventing further conflict between them by forcing one to testify against the other.

Here, D's wife told police her husband admitted killing another woman & D moved to suppress that statement based on the marital privilege. Tr. Ct. denied the motion on ground that D's marriage was a sham designed only to save wife from deportation & to defraud the federal government. On transfer, Ct. rejected State's request to expand the requirement of a legal marriage to exclude communications between individuals who have entered into a "fraudulent" or "sham" marriage. Indiana does not recognize a "fraudulent" marriage exception to the marital privilege, & Ct. is reluctant to require Cts. to inquire into quality of a marriage beyond examining whether the marriage was for purpose of disqualifying a witness. Communications in an effort to provide false testimony are not protected by privilege because they are intended to cause communications to others.

In this case, although the Tr. Ct. could not require wife to testify against her husband, Ind. Code 34-46-3-1(4) permits a willing spouse to testify. Held, transfer granted, Ct. App.' opinion at 816 N.E.2d 1197 vacated, denial of D's motion to suppress wife's testimony affirmed.

TITLE: Gordon v. State
INDEX NO.: O.8.b.
CITE: (03-03-93), Ind., 609 N.E.2d 1085
SUBJECT: Husband-Wife privilege not applicable
HOLDING: In D's trial for attempted murder & attempted robbery, it was not error for wife to testify on behalf of State as to identity & whereabouts of gun, & identity of pictures of husband-D & his co-D. Wife testified that gun used in shooting had been purchased by her, & that she last saw it at her sister-in-law's home. Gun was in wife's purse that day, but in evening she noticed it was gone. Wife testified that husband-D was in house that day, but at time she found gun missing, he had left. She also testified that on that day she & husband had borrowed co-D's car, & she additionally identified exhibit as picture of husband & co-D as they appeared on that day & another exhibit as being picture of her husband. On CX, wife testified that police told her if she didn't testify about gun, she might be charged as well. Wife's testimony was not in violation of Ind. Code 34-1-14-9, because statute refers only to competency of spouse when other is excluded from testifying. It was also not in violation of Ind. Code 34-1-14-5, because that statute excludes only testimony of spouse as to information gained from communications arising from confidential relationship of marriage. Rode, App., 524 N.E.2d 797. Furthermore, acts of spouse which are not intended to convey message, are not covered by confidentiality provisions in statute, Kindred, 524 N.E.2d 279. Ct. found that nowhere in direct or CX did wife allude to any communications between herself & D, & therefore it was not error for her to testify. Held, convictions affirmed.

TITLE: Kindred v. State
INDEX NO.: O.8.b.
CITE: (6/8/88), Ind., 524 N.E.2d 279
SUBJECT: Non-verbal acts - documents; intent to convey confidential message
HOLDING: Tr. Ct. properly admitted wife's testimony re content of items given to her by D. D, charged with forgery, handed wife $1,500, bankbook, & fake driver's license as they approached roadblock. She put money in purse & bankbook & license in glove compartment, pursuant to D's instructions. Police searching car failed to find items in glove compartment, & after discovering contents, D's wife destroyed them. At trial, she testified re contents, but was not allowed to testify re how she obtained items. D argues she should not have been allowed to testify re contents, either, arguing this was information gained by reason of marital relationship. Husband-wife privilege protects only communications made because of confidence resulting from marital relationship. Beyerline 45 N.E. 772. Such communications are not limited to "utterances," but include any communication by act which is done only because of marital confidence. Smith 152 N.E. 803. Nevertheless, not all acts performed privately in presence of spouse are privileged. It is important to determine whether acting spouse intended to convey message to other. There must be some indication that other spouse's presence or attention were desired, & that communication was intended. Here, when D handed wife license & bankbook before reaching roadblock, only message arguably intended was "conceal these items because they may incriminate me." Wife's testimony re D giving her items was properly excluded. However, contents of items were not disclosed to wife by D, but by her own later actions. Thus, testimony re contents was properly admitted.

TITLE: Leonard v. State
INDEX NO.: O.8.b.
CITE: (5/3/89), Ind., 537 N.E.2d 480
SUBJECT: Husband-wife privilege
HOLDING: Tr. Ct. erred in finding that D had waived husband-wife privilege when he asked his wife to deliver hacksaw blades to another jail inmate. D was charged with conspiracy to commit escape. Evidence showed that while in jail awaiting trial on another charge, D arranged for his wife to purchase shoes & hacksaw blades, insert blades under soles of shoes, & deliver shoes to jail with instructions to give them to another inmate. Over D's vigorous objections, his wife was compelled to testify about telephone conversation in which D gave her instructions, & about how she carried out those instructions. On appeal, D argues that this violated husband-wife privilege. Even where they participate in crime, communications between husband & wife concerning that crime are privileged. Shepherd 277 N.E.2d 165. State argues that because D's wife was to tell guard to give shoes to another inmate, he did not intend communication to be confidential. State argues that D must have informed other inmate of plan. However, Ind. S. Ct. determines that most logical inference is that other inmate was not told of the plan, but was merely being used to shield D & wife from discovery if plan went awry. Nothing in record indicates that D or wife intended any other person to be privy to their conversation. Permitting state to force D's wife to testify violated husband-wife privilege. Held, reversed & remanded for new trial.

TITLE: Russell v. State
INDEX NO.: O.8.b.
CITE: (3-9-01), Ind.
SUBJECT: Spousal privilege - harmless error
HOLDING: Tr. Ct. erred in allowing D's former wife to testify regarding statements he made to her during their marriage. Wife was permitted to tell jury about statements he made to her before his arrest in which he admitted participation with Co-Ds in crimes. When D made these disclosures to his wife, he threatened to kill her if she revealed them. She also testified regarding content of D's phone calls to her after his arrest from jail in which he instructed her to lie to police about his prior statements & to provide police with false information. Ct. noted that where spouse's testimony concerns disclosures by other spouse not made in reliance upon marital relationship but because disclosing spouse was in need of his mate's assistance & attempted to coerce by force & fear, testimony is not within spousal privilege. Carlyle v. State, 428 N.E.2d 10 (Ind. 1981). Moreover, wife may disclose threat made to her by her husband. Rubalcada v. State, 731 N.E.2d 1015 (Ind. 2000).

Here, despite D's threats during his pre-arrest disclosures to his wife, content otherwise communicated clearly fell within marital privilege. As to post-arrest telephone calls, however, statements were not disclosures made within confines of marital relationship, but rather were attempt by D to persuade his wife to communicate to third party. Notwithstanding significant inculpatory nature of erroneously admitted testimony regarding D's pre-trial disclosures, its admission was harmless given very substantial evidence of guilt properly admitted. Held, convictions affirmed in part, reversed in part on other grounds.

TITLE: Solomon v. State
INDEX NO.: O.8.b.
CITE: (9/1/82), Ind., 439 N.E.2d 570
SUBJECT: Husband-wife privilege
HOLDING: Communications are privileged when made between husband & wife & intended to be confidential by reason of the marital relationship. Communication intended to be transmitted to a third person is not privileged because the communication is not confidential. Robinson 424 N.E.2d 119; Resnover 372 N.E.2d 457. Here, while in jail awaiting trial for burglary & rape, D wrote lengthy, incriminating letter to victim apologizing & asking her to drop all charges against him. D gave letter to his wife who put it in envelope, addressed it to victim & mailed it. State introduced letter at trial; D objected, asserting husband-wife privilege. D testified he had given letter to his wife to hold (with thought he might send it later), instructing her not to send it. Wife testified D had given her letter without instruction. Letter is neither privileged husband-wife communication nor based in any way on marital relationship. Held, no error.

RELATED CASES: Overstreet, 783 N.E.2d 1140 (D's statement to wife instructing her to say that he had been drinking with friends if someone asked why he had been at crime scene was not disclosure made within confines of marital relationship; it is reasonable inference from this statement that D intended wife to transmit comment to third party); Russell, 743 N.E.2d 269 (D's post- arrest telephone calls to wife were not disclosures made within confines of marital relationship but rather were attempt by D to persuade his wife to communicate to third party); Barajas, App., 627 N.E.2d 437 (Because D was not divorced from first wife when he married present wife, second marriage was void & spousal privilege did not apply); Perkins 483 N.E.2d 1379 (letter to wife communicating plan to smuggle marijuana into prison was not confidential communication because one could infer information was to be communicated to other parties to conspiracy); Karlos 476 N.E.2d 819 (Witn 189; Tr. Ct. did not err in denying D's motion in limine that testimony of his girlfriend, with whom he had lived, should barred based on marital privilege; Ct. refuses to so extend marital privilege, *citing* Gajdos 462 N.E.2d 1017 & Lane 364 N.E.2d 756).

TITLE: State v. Farber
INDEX NO.: O.8.b.
CITE: (3/26/97), Ind. App., 677 N.E.2d 1111
SUBJECT: Spousal privilege
HOLDING: In murder & robbery prosecution, Tr. Ct. erred in suppressing evidence obtained as a result of conversation protected by spousal privilege. Ind. Code 34-1-14-5 (now 34-46-3-1) provides that husband & wife shall not be competent witnesses as to communications made to each other. Provision has been interpreted as affording privilege subject to certain exceptions as well as waiver by communicating spouse. Kindred, 524 N.E.2d 279. Although statute does not include term "confidential," privilege encompasses only confidential communications & information gained by reasons of marital relationship. Barajas, 627 N.E.2d 437. Only those communications passing from one marriage partner to the other because of confidence resulting from their intimate relationship are protected by privilege. Rode, App., 524 N.E.2d 797.

Here, D's conversations with his wife were recorded & monitored by police with wife's consent. Because of privilege, Tr. Ct. found that conversation could not be used as evidence at trial. However, Court held that fact that conversation was excluded under privilege did not mean that officers acted illegally in obtaining evidence. In terms of secretly- recorded conversations, Court noted that this case was no different than those involving police informants. Although Tr. Ct. properly suppressed audiotaped conversation between D & his wife & any testimony regarding contents of recorded statement, there was no 4th Amendment violation in recording conversation. Thus, Tr. Ct. erred by suppressing D's confession to police & physical evidence based on "fruit of poisonous tree" doctrine.

RELATED CASES: Dixson, App., 865 N.E.2d 704 (recorded conversation between D & wife from jail are not protected under the marital communications privilege because it was made in the presence of a third party, i.e., sheriff).

TITLE: State v. Roach
INDEX NO.: O.8.b.
CITE: (2nd Dist., 8-5-96), Ind. App., 669 N.E.2d 1009
SUBJECT: Spousal testimonial privilege not recognized in Indiana
HOLDING: Tr. Ct. erroneously determined that wife's testimony fell within spousal testimonial privilege. Wife signed affidavit used to charge husband with battery. Wife was called as State's sole witness at trial but refused to testify against her husband. Relying on federal law & Ind.Evid.R. 501, Tr. Ct. refused to compel wife to testify & found that she had not waived her right to assert adverse spousal testimonial privilege. After State rested its case, Tr. Ct. entered judgment of acquittal. Ct. held that adoption of Ind.Evid.R. 501 does not justify creation of adverse spousal testimony privilege not recognized in Indiana state Cts. Indiana abolished rule of absolute spousal incompetence in favor of narrow privilege encompassing only confidential communications & information gained by reason of marital relationship. Shepard v. State, 277 N.E.2d 165 (1971). In criminal case where, as here, spouse was injured party, marital communications privilege does not apply. Jordan, 142 Ind. 422 (1895). Thus, wife was competent witness, & marital communication privilege statute, Ind. Code 34-1-14-5, would not prevent her from testifying against husband. Although Tr. Ct.'s determination that wife's testimony fell within privilege was erroneous, double jeopardy precluded retrial for this offense.

RELATED CASES: Russell, 743 N.E.2d 269 (despite D's threats during his pre-arrest disclosures to wife, content otherwise communicated clearly fell within marital privilege, & Tr. Ct. committed harmless error in permitting wife to testify re: these statements); Rubalcada, 731 N.E.2d 1015 (privilege did not apply to D's threats to wife that he would kill her if she disclosed details of his crimes; threats were not privileged communications); Van Donk, App., 676 N.E.2d 349 (in criminal case where spouse is injured party, spousal communication privilege does not apply).

TITLE: State v. Wilson
INDEX NO.: O.8.b.
CITE: (11-02-05), Ind., 836 N.E.2d 407
SUBJECT: Spouse's testimony not barred by marital privilege
HOLDING: One spouse is not precluded from testifying in a criminal prosecution of the other.

Indiana long ago abolished the rule of absolute spousal incompetence in favor of a narrow privilege encompassing only confidential communications & information gained by reason of the marital relationship. State v. Roach, 669 N.E.2d 1009 (Ind. Ct. App 1996). Ind. Code 34-46-3-2, which was recodified in 1998, provides that "[w]hen a husband or wife is a party, & not required to testify in his or her own behalf, the person's spouse shall also be excluded." Ct. acknowledged that as a D in a criminal case, D is "not required to testify in his own behalf," & it is hard to give any meaning to the term "shall be excluded" other than a declaration that D's wife cannot testify. Ct. nevertheless concluded that this new statute effected a substantial & irrational change in the law & is in conflict with other provisions of the 1998 Recodification Act. The history of statutes addressing the role of a spouse as a witness confirms that the new statute was simply a mistake in recodification. At least under these unusual circumstances, the new section must be rejected as in conflict with provisions in the 1998 Recodification Act that no new law was created. Ind. Code 34-7-1-1 sets out the "Purpose" of the 1998 Recodification Act, providing that it is intended to recodify existing law, not to change it. This provision should be honored, & Ind. Code 34-46-3-2 is an invalid extension of pre-codification law & is of no effect. Ct. noted that the insertion of the new statute was the result of an overly enthusiastic adoption of the principle that the marital Privilege Statute should be rephrased in terms of privilege rather than competency. Held, transfer granted, Ct. App.' opinion at 816 N.E.2d 61 vacated, judgment precluding wife from testifying in welfare fraud & theft trial against D reversed.

TITLE: U.S. v. Ramos-Oseguera
INDEX NO.: O.8.b.
CITE: 120 F.3d 1028 (9th Cir. 1997)
SUBJECT: Husband-Wife Testimonial Privilege -- Joint Participants in Crime
HOLDING: Spousal testimonial privilege has no "joint participant" exception that would permit an unwilling spouse to be forced to testify against the other. Although marital communications privilege is subject to exception for communications regarding present or future crimes in which both spouses are participants, this exception does not apply to spousal testimonial privilege.

O. EVIDENCE

O.8. Privileges (generally IRE 501)

O.8.c. Physician-patient (Ind. Code 34-1-14-5)

TITLE: Corder v. State
INDEX NO.: O.8.c.
CITE: (8/20/84), Ind., 467 N.E.2d 409
SUBJECT: Physician - patient privilege; psychiatrist; insanity defense
HOLDING: Tr. Ct. did not err in admitting statements D made to Ct.-appointed psychiatrist (impeachment purposes). Here, D waived issue by failing to include it in MCE. Ct. notes privilege applies only to those communications necessary to treatment or to diagnosis looking toward treatment. Collins v. Bair 268 N.E.2d 95. Mental examination was to determine whether insanity defense applied to case. Physician was not treating D. Held, no error.

TITLE: Darnell v. State
INDEX NO.: O.8.c.
CITE: (1st Dist., 11-27-96), Ind. App., 674 N.E.2d 19
SUBJECT: Physician-patient privilege - statements to nurse
HOLDING: Tr. Ct. did not err in admitting nurse's testimony regarding statements D made to her while receiving treatment in emergency room. Physician-patient privilege has been extended to third persons who aid physicians or transmit information to physicians on behalf of patients. Doss v. State, 267 N.E.2d 385. Privilege did not apply in this case to exclude nurse's statements, because nurse was not considered "physician" under Ind. Code 34-1-14-5, & D did not show that nurse treated him under direct supervision of physician. Although all nurses work under general supervision of physician, closer degree of supervision or control by physician must exist in order for physician-patient privilege to be applicable. Ct. rejected D's request to declare all communications between nurses & patients privileged, as decision to create privilege covering new class of persons should be left to legislature. Ct. also noted that D's statement was not made for purposes of his treatment but revealed how he reacted after he was attacked. Therefore, because statement was not necessary to nurse's treatment of D's injuries, it was not privileged statement. Corder, 467 N.E.2d 409. Held, judgment affirmed.

TITLE: Daymude v. State
INDEX NO.: O.8.c.
CITE: (1st Dist. 7/19/89), Ind. App., 540 N.E.2d 1263
SUBJECT: Physician - patient (P-P) privilege; child abuse or neglect
HOLDING: Ind. Code 31-6-11-1 does not abrogate P-P privilege regarding communications undertaken in course of treatment required by CHINS order. D, who is charged with child molesting, brings interlocutory appeal challenging Tr. Ct.'s ruling requiring health care provider to disclose confidential communications. P-P privilege is recognized in case law & statute. [Citations omitted.] However, Ind. Code 31-6-11-3 requires "any individual" who has reason to believe that child is victim of abuse or neglect to make report. Ind. Code 31-6-11-8 specifically abrogates P-P privilege for purpose of reporting child abuse. However, D argues that abrogation does not extend to communications made during counseling ordered as result of CHINS proceedings. To extend abrogation to information disclosed during Ct.-ordered counseling goes beyond purpose of statute, which is simply to encourage effective reporting. Both MN & AL Cts. have ruled that their states' abrogation statutes do not extend this far. Here, report had been made & purpose of statute had been served. If P-P privilege is denied to those family members involved in CHINS counseling, abusers will be discouraged from openly & honestly communicating with counselors, & treatment, which is ultimately aimed toward serving & protecting child, will be hindered. Held, Tr. Ct. reversed.

RELATED CASES: Hayes, App., 667 N.E.2d 222 (therapist's disclosure to child protective services of admissions made by D did not violate therapist-client privilege because privilege abrogated in this case by Ind. Code 31-6-8(2), which does not apply only when abused child report abuse); Devore, App., 658 N.E.2d 657 (sentencing Ct. did not abuse discretion in admitting medical records into evidence, because D's claim of physician-patient privilege was abrogated by Ind. Code 31-6-11-8; Daymude did not apply in this case).

TITLE: Green v. State
INDEX NO.: O.8.c.
CITE: (10/20/71), Ind., 274 N.E.2d 267
SUBJECT: Physician-patient privilege - cannot use to shield criminal activity
HOLDING: D claimed Tr. Ct. erred by admitting bullet removed by physician into evidence because it was obtained in violation of physician-patient privilege. Physician-patient privilege extends only to those acting as agent or arm of physician when he is in consultation with or is treating patient. Doss, 367 N.E.2d 385. Here, police officer, to whom bullet was given when it was removed from D, had right if not duty to be present in doorway to operating room when bullet was being removed. Officer was properly permitted to testify regarding how he obtained bullet & there was no breach of privilege when physician handed bullet to officer who witnessed its removal.

S.Ct. further noted that object of privilege is to inspire full & complete disclosure of knowledge pertinent & necessary to trustful & proper relationship in such cases & privilege may not be used as shield for criminal activity. Held, judgment affirmed.

TITLE: Hurt v. State

INDEX NO.: O.8.c.

CITE: (1st Dist. 5/15/90), Ind. App., 553 N.E.2d 1243, disapproved on other grounds 826 N.E.2d 640

SUBJECT: Physician-patient privilege - Ind. Code 9-11-4-6

HOLDING: Whenever suspect is taken for treatment and/or testing as described in Ind. Code 9-11-4-6, physician-patient privilege is waived regardless of whether samples are obtained, or tests performed. D's car hit tree, & in course of police investigation of accident she asked to be taken to hospital. At hospital, D refused to submit to blood test. Physician examined her for injuries, & at trial he testified that he noticed she had problems with her gait, smelled of alcohol, & was glassy-eyed. He also testified that D snapped at him, "There's no way that you can prove I'm drunk or I'm intoxicated." D was convicted of DUI, & on appeal argues that physician's testimony was within scope of physician-patient privilege. Privilege is legislative creation, & its scope can be defined & restricted by legislature. For purpose of DUI proceedings, legislature has abolished physician-patient privilege by enacting Ind. Code 9-11-46. D argues that statute abolishes privilege only when bodily substance samples are taken & chemical tests performed. However, Ct. App. finds that this reading would vitiate statute's purpose. Ct. examines statute's provisions & concludes that testing of bodily substance samples is not prerequisite to admission of testimony otherwise protected by physician-patient privilege. Here, physician's testimony was not subject to privilege in any case, since statements & observations he testified to were made after he completed examination of D. See Corder 467 N.E.2d 409. Held, conviction affirmed.

RELATED CASES: Hannoy, App., 789 N.E.2d 977, reh'g granted 793 N.E.2d 1109 (blood test results law enforcement obtained from hospital during normal course of treatment after traffic accident were admissible).

TITLE: Thomas v. State

INDEX NO.: O.8.c.

CITE: (2nd Dist., 10-12-95), Ind. App., 656 N.E.2d 819

SUBJECT: Victim's statements - physician-patient privilege & statements pertinent to diagnosis & treatment

HOLDING: Tr. Ct. did not err in permitting emergency room physician to testify regarding cause & details of attack by D. Victim sustained severe injuries as result of attack, & when physician asked about cause of injuries, victim responded that she had been in fight with husband & that fight had included biting. Victim later informed detective about details of attack & identity of her attacker. Ind. Code 34-1-14-5 provides physician-patient privilege which belongs to patient & may be waived either expressly or by implication. Baker v. Whittaker (1962), Ind., 182 N.E.2d 442. In relating details of attack to detective, victim-patient impliedly waived privilege with respect to statements made to physician pertaining to same subject matter as was discussed with detective. Held, no error.

O. EVIDENCE

O.8. Privileges (generally IRE 501)

O.8.d. Attorney-client (Ind. Code 34-1-14-5)

TITLE: Brown v. State
INDEX NO.: O.8.d.
CITE: (4/27/83), Ind., 448 N.E.2d 10
SUBJECT: Attorney-client privilege - waiver
HOLDING: By having witness (polygraph examiner who administered polygraph to D at D's attorney's request) testify at juvenile waiver hearing concerning communication with D, D waived attorney-client privilege; thus, testimony of witness (called by prosecution) at D's trial did not violate privilege. Here, D called polygraph examiner in an effort to resist waiver to adult Ct. but contested state's use of that witness at trial. Ct. reviews history & purpose of attorney-client privilege in IN. Finding that attorney-client privilege did attach to communications between D & polygraph examiner at time they took place, Ct. relies on US v. Nobles (1975), 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 to find D waived privilege by calling examiner to testify at waiver hearing. Held, no violation of privilege.

RELATED CASES: Lindsey 485 N.E.2d 102 (by testifying re his recollection of confidential communications he made to attorney, D waived any attorney-client privilege that may have existed; Ct. deems D to have consented to allowing attorney to be called to testify re same, *citing* Fluty 71 N.E.2d 565); Webster, Ind., 302 N.E.2d 763 (conversation between attorney & third party at request of client cannot be considered confidential or subject to attorney-client privilege).

TITLE: Brown v. State

INDEX NO.: O.8.d.

CITE: (5/6/2016), 52 N.E.3d 945 (Ind. Ct. App 2016)

SUBJECT: Defense lawyer's "questionable conduct" in unrelated case did not require suppression of evidence

HOLDING: Ind. Professional Conduct Rule 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or disclosure is permitted by Rule 1.6(b). Here, an attorney representing D in an unrelated case violated rules of professional conduct in turning over laptop and fingerprint evidence in this case she had obtained with information from D during representation in the other case. She also testified over objection against D at trial.

Although Court has "significant concerns and deep reservations" about attorney's misconduct, D cited no authority for the proposition that an ethical violation should result in the exclusion of evidence in a criminal trial unless it violates the attorney-client privilege statute, Ind. Code § 34-46-3-1(a). Regardless, any error in admitting this evidence was harmless given co-D's testimony, video surveillance shortly after the crime and D's attempt to evade capture. Held, judgment affirmed and remanded in part on other grounds.

TITLE: Commonwealth v. Chmiel

INDEX NO.: O.8.d.

CITE: 738 A.2d 406 (Pa. 1999)

SUBJECT: Attorney-Client Confidences Revealed in PCR Hearing to Defend IAC Claim Cannot Be Used at Retrial

HOLDING: Another court has held that confidences revealed by trial counsel defending against allegation of ineffectiveness in PCR hearing cannot be used against D in the event of a retrial. To allow such use would chill D's exercise of 6th Amendment right to effective assistance of counsel.

TITLE: Haley v. State
INDEX NO.: O.8.d.
CITE: 398 Md. 106, 919 A.2d 1200 (Md. 2007)
SUBJECT: Attorney-client privilege protected information despite its being made public
HOLDING: Maryland Court of Appeals held information provided by a criminal D to his attorney that would later form the basis of his defense at trial was protected by the attorney-client privilege regardless of the fact that D made the statements with the intention that they would be disclosed to third parties. Therefore, the prosecutor's cross-examination of D on the subject of his disclosures to counsel and their timing violated the privilege.

D was convicted of various crimes related to a carjacking. Complainant testified that he allowed D into his car because he thought that the male D, who was wearing a long wig, was a woman in distress. He stated that the "woman" produced a knife, which prompted him to jump out of the car. The assailant then drove away, the complaining witness said. D testified that he and the complaining witness had a long-standing sexual relationship, that D always drove when the two were together, and that the complaining witness left the vehicle in anger after an argument. To support his story of an ongoing relationship, D claimed he could describe the inside of the complaining witness's residence and his dog.

At issue was the prosecutor's cross-examination of D regarding his claimed knowledge of the home and pet. The Tr. Ct. allowed the state to question D about when he relayed information about his familiarity with the house and dog to his defense counsel. Specifically, the prosecutor asked D whether it was not true that "all this information about the house and everything you never brought up any of that information with your attorney until 4:30 yesterday afternoon?" To drive home the point that the story was a recent fabrication, the prosecutor also pointed out that the incident in question took place about a year earlier and asked, "is it your testimony that you told him before yesterday afternoon?" D asserted that he had told counsel earlier about the relationship.

D argued on appeal that the prosecutor's line of questioning violated the attorney-client privilege. Court held that both the substance and the timing of the communication to defense counsel were privileged communications. Therefore, the prosecutor's cross-examination on the issue constituted a breach of the attorney-client privilege.

TITLE: Korff v. State
INDEX NO.: O.8.d.
CITE: (3/19/91), Ind., 567 N.E.2d 1146
SUBJECT: Attorney-client privilege
HOLDING: It is not violation of the attorney-client privilege for a lawyer to testify that he informed his client of time, date and place of client's trial. Here, D failed to appear in court despite being told by his attorney of time, place & date of trial & need for his presence. In resulting prosecution for failure to appear, Tr. Ct. granted D's motion to suppress testimony of his previous attorney on grounds of attorney-client privilege.

Court concluded that communications as to time & location of hearing is not privileged under common law or any statute defining attorney-client privilege. In so holding, Court noted that: (1) our system will collapse if courts cannot rely on attorneys to notify their clients of trial dates; (2) relating information regarding time & place of trial & necessity for client to appear is counsel's duty as officer of Ct.; & (3) attorney is merely relating information accessible from public records. Held, Transfer granted, memorandum decision of Court of Appeals vacated, and cause remanded to Tr. Ct. for further proceedings; Debruler, J., dissenting.

TITLE: Lahr v. State
INDEX NO.: O.8.d.
CITE: (2nd Dist., 7-14-00), Ind. App., 731 N.E.2d 479
SUBJECT: Attorney-client privilege - crime-fraud exception
HOLDING: Tr. Ct. did not abuse its discretion in allowing D's attorney to testify at his forgery & obstruction of justice trial about alleged confidential communications between himself & attorney. Not every communication between attorney & client is "confidential communication" entitled to reasonable expectation of confidentiality. Corll v. Edward D. Jones & Co., App., 646 N.E.2d 721. Communications intended by client to be made public are not considered privileged because there is no reasonable expectation of confidentiality surrounding such information. Here, while attorney visited D in jail, D produced two forged grievance letters that he had allegedly sent to jail commander. D forged letters for purposes of bolstering his self-defense argument in aggravated battery trial. Ct. concluded that D clearly intended letters to be made public & therefore had no reasonable expectation of confidentiality in them.

Moreover, communications between attorney & D were excepted from attorney-client privilege because they were undertaken for purpose of committing or continuing crime or fraud. Applying crime-fraud exception to privilege, Ct. noted that D enlisted aid of his attorney in furtherance of continuing crime or fraud, & information concerning this subterfuge was not protected by attorney-client privilege. Thus, D's communications to his attorney fell within crime-fraud exception to attorney-client privilege & were properly admissible into evidence. Held, judgment affirmed in part & reversed in part on other grounds.

TITLE: Lewis v. State
INDEX NO.: O.8.d.
CITE: (7/18/83), Ind., 451 N.E.2d 50
SUBJECT: Attorney-client privilege - jail interview
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial made during state's rebuttal presentation of police officer who testified to substance of conversation he overheard between D & his attorney at jail. Here, Ct. rejects D's contention that testimony was inadmissible because it was a privileged communication which he had not knowingly waived. Before attorney-client privilege can exist, communication must be confidential. Ind. Code 34-1-14-5. Circumstances indicate communication was not confidential. Held, no error.

TITLE: Mohawk Industries, Inc. v. Carpenter

INDEX NO.: O.8.

CITE: (U.S.), (12-08-09), 130 S.Ct. 599

SUBJECT: Disclosure orders about attorney-client privilege cannot qualify for immediate appeal

HOLDING: Resolving a split among the courts of appeals, Court held that an order requiring the disclosure of information protected (arguably) by the attorney–client privilege is not immediately appealable under the collateral order doctrine. The collateral order doctrine allows for the immediate appellate review of an order that fulfills three criteria: first, the order must conclusively determine the disputed question; second, it must resolve an important issue completely separate from the merits of the case; and third, the order must be effectively unreviewable were a party to wait for the final judgment in a case. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Concluding, as did the Eleventh Circuit, that an order requiring the disclosure of allegedly privileged information can manageably be reviewed on appeal from a final judgment, Court held that the collateral order doctrine does not allow the immediate appeal of such an order. Held, Eleventh Circuit decision at 541 F.3d 1048 affirmed; Thomas, J., CONCURRING in part and concurring in judgment.

TITLE: Newman v. State

INDEX NO.: O.8.d.

CITE: 384 Md. 285, 863 A.2d 321 (Md.Ct. App. 2004)

SUBJECT: Attorney-Client Privilege -- Rule 1.6 Does Not Waive

HOLDING: Although attorney was ethically allowed to disclose confidential communication regarding client's murder plot, client retained right to invoke attorney-client privilege in order to preclude attorney's testimony at her trial on murder conspiracy charge. Rule of Professional Conduct 1.6 authorized the divorce attorney's disclosure of her client's statements regarding killing one of her children and framing her husband. Later, client's husband was shot by a masked intruder who turned out to be a friend of client's who had attended conferences with attorney and client. At client's trial on conspiracy to commit murder, her attorney testified, over client's objection and assertion of attorney-client privilege, regarding client's statements about murdering child and framing husband. Maryland Court of Appeals holds that authorized disclosure pursuant to Rule 1.6 does not destroy the attorney-client privilege or prevent the client from later asserting it to preclude the attorneys' testimony.

TITLE: Skinner v. State

INDEX NO.: O.8.d.

CITE: (1st Dist; 01-28-10), 920 N.E.2d 263 (Ind. Ct. App. 2010)

SUBJECT: Attorney -client privilege - D did not have paramount interest in obtaining information re: attorney's prior representation of state witness

HOLDING: On interlocutory appeal, Court affirmed denial of D's motion to compel disclosure of information from D=s first attorney about his prior representation of State's witness, Jason Wingler, because information D sought does not fall within six exceptions to general rule barring disclosure of information obtained during attorney-client relationship. Ind. Professional Rule Conduct 1.6(b). See Ind. Code 34-46-3-1(1) (attorneys not required to testify about "confidential communications made to them during the course of their professional business.") Determining whether information is discoverable requires balancing of factors such as: a) relevance of information, b) access to information from other sources, and c) nature and importance of any interests invaded. Paramount interest here in non-disclosure is attorney-client privilege between D's first attorney and Wingler. Potential relevance of information about Wingler is outweighed by importance of attorney-client privilege and by D=s access to other information to impeach Wingler: a) Wingler's convictions for crimes of dishonesty and b) Wingler's demand for Aguaranteed sentence modification@ for two current sentences in exchange for his testimony. Held, denial of motion to compel disclosure of information affirmed.

TITLE: State v. Thompson
INDEX NO.: O.8.d.
CITE: 329 S.C. 72; 495 S.E.2d 437 (S.C. 1998)
SUBJECT: Attorney - Client Privilege Extends to Consulting Psychiatrist
HOLDING: South Carolina Supreme Court holds that attorney-client privilege extends to D's admissions to psychiatrist retained by counsel in hope that psychiatrist's report would aid in plea negotiations. Attorney-client privilege extends to communications with psychiatrist retained to aid in preparation of case, and fact that psychiatrist's conclusion regarding D's eligibility for sex offender treatment was intended to be turned over in aid of plea negotiations did not waive privilege for D's statements made in obtaining that conclusion. Tr. Ct.'s ruling that prosecutor could use statements made to psychiatrist to impeach D if he testified unconstitutionally deprived him of right to testify.

TITLE: Taylor v. State
INDEX NO.: O.8.d.
CITE: (03/06/92), Ind., 587 N.E.2d 1293
SUBJECT: Attorney-client privilege
HOLDING: It was not error to admit handwritten statement of D regarding initial interview with police, even though D prepared document for his attorney & at his request. D wrote incomplete statement regarding circumstances of wife's death. He had not completed statement when arrested, but he testified that he intended to deliver it to counsel at some point. Although Tr. Ct. had evidence that defense counsel had asked that statement be prepared, & that sheets of paper were D's response to request, it noted that statement did not contain name of proposed receiver or date it was written, & decided that document was not intended for trial counsel. S. Ct. noted that Ind. Code 34-1-14-5, regarding attorney-client privilege, requires confidential communication before the privilege applies. Ct. found that statement was not confidential because its content was information given to police during D's initial interview about his wife's death. Transcript of this interview was admitted without objection, & therefore subject matter of statement was already in evidence, & it was not error to admit D's handwritten statement.

TITLE: Waldrip v. Head
INDEX NO.: O.8.d.
CITE: 532 S.E.2d 380 (Ga. 2000)
SUBJECT: Waiver of Attorney-Client Privilege -- IAC Allegation
HOLDING: The Georgia Supreme Court has held that the waiver of attorney-client privilege implicit in a habeas corpus petitioner's allegations of ineffective assistance of counsel (IAC) is limited to communications related to the petitioner's specific claims of ineffectiveness. The majority also ruled that petitioner is entitled to a protective order limiting disclosure to those persons whose assistance is needed in rebutting petitioner's claim of ineffectiveness.

O. EVIDENCE

O.8. Privileges (generally IRE 501)

O.8.e. Priest-penitent (Ind. Code 34-1-14-5)

TITLE: Elliott v. State

INDEX NO.: O.8.e.

CITE: (7/17/2020), Ind. Ct. App., 152 N.E.3d 27

SUBJECT: Clergy privilege did not apply where church did not have formal obligation of confession of sin or need for confidentiality

HOLDING: The clergyman privilege applies only to confidential communications made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor and confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church. The clergymen privilege is a subsection within the "Privileges of Attorneys, Physicians, Clergymen, and Spouses" statute, codified at Indiana Code section 34-46-3-1(3), which provides: Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: (3) Clergymen, as to the following confessions, admissions, or confidential communications: (A) Confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church. (B) A confidential communication made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor. Here, Court of Appeals finds that statements Defendant made to his Pastor who visited him in the jail did not fall within privilege and were properly admitted at trial. Defendant told the Pastor that he planted a knife to make it look as if his wife had attacked him before he shot and killed her. The Court of Appeals found the statements made by Defendant to the Pastor were not made in the course of discipline nor were they confidential based in part upon the statements by the Pastor in deposition that his church recognized the need for discretion and but not confidentiality and their church did not recognize a formal confession of sin. Therefore, the statement by Defendant to his Pastor did not fall under section A or B of the statute. Court finds that seventy-five-year sentence for murder enhanced because committed by use of a firearm affirmed and not inappropriate under Indiana 7(B) review.

TITLE: Haggenjos v. State
INDEX NO.: O.8.e.
CITE: (5/29/86), Ind., 493 N.E.2d 448
SUBJECT: Privileges - priest/penitent
HOLDING: Ct. rejects D's contention that trial counsel was ineffective for his failure to object to testimony about D's conversation with a priest. Ct. finds this conversation did not rise to a privileged level since it was not a confession or admission made in course of discipline enjoined by the church. Ball 419 N.E.2d 137; Ind. Code 34-1-14-5. Held, no error in denial of PCR.

RELATED CASES: Bonham, 644 N.E.2d 1223 (pastor's testimony about statement in which D described killing victim was admissible where church had no course of discipline that required formal confession of sins); Ball, 419 N.E.2d 137 (conversation initiated by D with clergyman in which D admitted killing 3 people was not "in course of discipline enjoined by" clergyman's church, since pastoral confession did not constitute tenet or discipline of his church & church did not recognize confidential pastor-parishioner relationship with respect to evidence of crimes.).

TITLE: Mullins v. State
INDEX NO.: O.8.e.
CITE: (2nd Dist., 12-29-99), Ind. App., 721 N.E.2d 335
SUBJECT: Clergyman privilege inapplicable
HOLDING: Tr. Ct. did not err in admitting Catholic priest's testimony regarding D's apology for stealing priest's checks. Noting that Catholic faith recognizes sanctity of confession, D argued that his "confession" to priest was privileged communication pursuant to Ind. Code 34-46-3-1. Statute provides that clergyman shall not be required to testify regarding confessions or admissions made to them in course of discipline enjoined by clergyman's church, or confidential communications made to them in clergyman's professional character as spiritual advisor or counselor.

Ct. agreed that Catholic sacrament of reconciliation clearly falls within strictures of statute as confessions made to clergyman in course of discipline enjoined by clergyman's church. However, D's apology in this case did not fall within sanctity of confession. Only when confronted by victim, who happened to be priest, D apologized & promised to repay him. Further, confrontation occurred in priest's kitchen after he had specifically requested D's presence. D did not argue that this was confidential communication made to priest in his professional character as spiritual advisor or counselor. Held, no error.

TITLE: Rutledge v. State
INDEX NO.: O.8.e.
CITE: (7/8/88), Ind., 525 N.E.2d 326
SUBJECT: Clergy privilege - Gideon jail visitor not clergy.
HOLDING: D's jail cell confession to Gideon member was properly admitted at trial. D argues confession was inadmissible under Ind. Code 34-1-14-5, because Gideon member was spiritual leader in whom D confided. Visitor was farmer who belongs to Gideons International, a group of businessmen who pass out Bibles. Gideons "present to prisoners a plan of salvation but they do not encourage them to make confessions." Group is not affiliated with any church. Thus, Gideon member was not clergyman within meaning of Ind. Code 34-1-14-5. Held, confession properly admitted.

O. EVIDENCE

O.8. Privileges (generally IRE 501)

O.8.f. Psychologist-client (Ind. Code 25-33-1-17)

TITLE: Commonwealth v. Barroso
INDEX NO.: O.8.f.
CITE: 122 S.W.3d 554 (Ky. 2003)
SUBJECT: Compulsory Process Trumps Patient Privilege for Exculpatory Evidence
HOLDING: The 6th Amendment Compulsory Process clause grants Ds right to obtain evidence in possession of third party that would otherwise be subject to psychotherapist-patient privilege. Under Kentucky law, psychotherapist-patient privilege is an absolute privilege. However, where privileged material includes exculpatory evidence, compulsory process rights trump absolute privilege.

TITLE: Jaffee v. Redmond
INDEX NO.: O.8.f.
CITE: 518 U.S. 1, 116 S.Ct. 1923 (1996)
SUBJECT: Psychotherapist Privilege
HOLDING: Under authority of Fed. R. Evid. 501, Ct. recognizes "psychotherapist" privilege, which extends not only to psychiatrists & psychologists, but to confidential communications made to licensed social workers in the course of psychotherapy. Rule 501 (cf. Ind. R. Evid. 501) authorizes federal Cts. to define new privileges by interpreting the principles of common law in light of reason & experience. Privilege would further significant private interests in receiving effective psychotherapy, which requires atmosphere of confidence & trust. Privilege also serves public interest in mental health of citizenry, which is as significant as interest in physical health. Majority holds that privilege is absolute, since privilege dependent upon Tr. Ct.'s later balancing of interests would eviscerate effectiveness of the privilege. Scalia & Rehnquist, JJ., DISSENT.

TITLE: Kavanaugh v. State
INDEX NO.: O.8.f.
CITE: (5th Dist., 6-10-98), Ind. App., 695 N.E.2d 629
SUBJECT: Psychologist-client privilege - communications made to therapist in official capacity
HOLDING: Because D was neither communicating with his therapist nor participating in therapy session when D made statement, D's statements were not privileged. Communications to family therapist in therapist's official capacity are privileged & may not be disclosed by therapist, except under certain enumerated circumstances. Ind. Code § 25-23.6-9-12 (1993) (repealed 1997) (replaced by Ind. Code § 25-23.6-6-1 (Supp. 1997)). Privileges are created by statutes, which must be strictly construed. Here, in order to make clear that therapy sessions were not in lieu of charges being brought, meeting was scheduled with therapist, D, D's attorney, victim's mother, & representatives of County Division of Family & Children Services. At meeting, D's attorney asked representatives from county to leave room & then asked D, in presence of victim's mother & therapist, whether D admitted to therapist that he molested step-child. D sought to prevent State from introducing his answer of "yes" into evidence. However, meeting was held, not to engage in family therapy, but instead to inform D that he would be subject to criminal prosecution regardless of his participation in therapy. In addition, D's response was not communication between D & therapist because D was responding to question posed by attorney. Even if therapist breached confidentiality by telling attorney that D admitted to child molesting, there is no authority that required D's response to attorney's question to be suppressed as fruit of poisonous tree. Held, conviction affirmed.

TITLE: Matter of L.J.M.
INDEX NO.: O.8.f.
CITE: (4th Dist. 1/24/85), Ind. App., 473 N.E.2d 637
SUBJECT: Psychologist - client privilege
HOLDING: Statements juvenile made to caseworker were not privileged communications pursuant to Ind. Code 25-33-1-17. Statutory privilege applies only to certified psychologists (only persons holding doctoral level in psychology or its equivalent may be certified, Ind. Code 25-33-1-5). Evidentiary privileges are disfavored & must be strictly construed. Ct. refuses to extend privilege. Confidential communications made to school counselors are also protected from disclosure. Ind. Code 20-6.1-6-15. Ct. finds D's caseworker at shelter care facility is not school counselor. See R.L., App., 437 N.E.2d 482. Held, no error.

RELATED CASES: Hulett, App., 552 N.E.2d 47 (statements made to counselor employed by Family & Children Services Agency were not privileged).

TITLE: State v. Pelley
INDEX NO.: O.8.f.
CITE: (06-14-05), Ind., 828 N.E.2d 915
SUBJECT: State's request for counseling records - counselor/client & psychologist/patient privilege
HOLDING: Tr. Ct. erred in quashing State's request for counseling records of murder suspect pursuant to Ind. Code § 25-23.6-6-1, the social worker/client privilege. Records requested were from 1986 through 1989, but privilege was not codified until 1990. Because the focus of the statute is on the underlying communication, Ct. held that date information was gathered determines whether Ind. Code § 25- 23.6-6-1 applies. Moreover, absent clear legislative intent to contrary, statute should not be applied retroactively & only protects communications made after effective date. Thus, counselor/client privilege was not applicable in this case.

Ct. also rejected State's claim that communication between psychologist & D's family was discoverable under "homicide exception" to psychologist/patient privilege, which existed at time D's family received counseling. Tr. Ct. properly reviewed the documents *in camera* & determined that they did not fall within this exception. State made no claim that it had sought discovery in this case & that its efforts to do so have been thwarted. State did not explain what information it obtained from witnesses that formed basis for its belief that documents it requested should include information concerning facts & immediate circumstances of murders. See Jorgensen v. State, 574 N.E.2d 915 (Ind. 1991). Held, transfer granted, Ct. App.' opinion at 800 N.E.2d 630 vacated, judgment affirmed in part & reversed in part.

RELATED CASES: Rogers, 60 N.E.3d 256 (Ind. Ct. App 2015) (counselor/client privilege of IC 25-23.6-6-1 does not include communications with unlicensed counselors, including unlicensed social workers).

TITLE: T.W. v. State
INDEX NO.: O.8.f.
CITE: (08-15-11), 953 N.E.2d 1120 (Ind. Ct. App. 2011)
SUBJECT: No abuse of discretion in letting psychologists testify at evaluation hearing
HOLDING: In 2009, Tr. Ct. found T.W. to be delinquent for engaging in two counts of class C felony child molesting if committed by an adult. In September, 2010, shortly after the DOC released T.W., the State petitioned to have him register as a sex offender and also to be evaluated to determine his risk of reoffending. Tr. Ct. appointed two psychologists to evaluate T.W. T.W.'s counsel was not served with copies of the petition to require T.W. to register as a sex offender, the motion to have him evaluated, or the order appointing the psychologists. At the evaluation hearing, T.W. objected to the testimony of the psychologists on the basis that counsel had not received the initial notice of their appointment to evaluate T.W. He also argued that communications between the psychologists were protected by the psychologist-patient privilege.

T.W. did not claim his attorney had a right to attend the examinations. He also cites no authority for the proposition that the testimony should have been excluded because of the lack of notice about the examinations. Even if the lack of notice was error, it would be comparable to a discovery violation, where the normal remedy is for the aggrieved party to seek a continuance unless the violation is flagrant and deliberate or so misleading or in such bad faith as to impair the right to a fair trial. Dye v. State, 717 N.E.2d 5, 11 (Ind. 1999). Defense counsel did not seek a continuance, and the record contains no evidence of malfeasance or bad faith.

Further, the testimony was admissible under Ind. Code 25-33-1-17(6), the "catch-all" provision which allows a licensed psychologist to disclose information acquired from a person "whom the psychologist has dealt in a professional capacity in . . . circumstances under which privileged communication is abrogated under the laws of Indiana." The statute requires Tr. Ct. to consider expert testimony about whether a child qualifies as a sex offender for purposes of the sex offender registry to determine if the child is likely to recidivate. A juvenile court could not fulfill this duty if it could not receive testimony from psychologists who have examined the child because of the statutory psychologist-patient privilege. Held, judgment affirmed.

TITLE: U.S. v. Hayes
INDEX NO.: O.8.f.
CITE: 227 F.3d 578 (6th Cir. 2000)
SUBJECT: Federal Psychotherapist-Patient Privilege -- Dangerous Patient Exception
HOLDING: Sixth Circuit Court of Appeals refuses to find dangerous patient exception to federal psychotherapist-patient privilege. Although many jurisdictions require psychotherapist to notify third party of a patient's threat(s) to kill or injure him/her, there is no connection between this requirement and a therapist testifying about that threat at a later prosecution. The notification requirement serves a far more immediate purpose, particularly in light of fact that a threat is unlikely to be carried out once prosecution has begun. Cf. U.S. v. Glass, 133 F.3d 1356 (10th Cir. 1998).

TITLE: Whitehead v. State
INDEX NO.: O.8.f.
CITE: (7/22/87), Ind., 511 N.E.2d 284
SUBJECT: Psychologist - client privilege; murder
HOLDING: Tr. Ct. did not err in allowing psychologist who met with D on 7 occasions at juvenile detention center, to testify re statements concerning murder. D told psychologist different story from that told to police. D even changed story he told psychologist. Ind. Code 25-33-1-17 provides an exception to psychologist/client privilege in instances of homicide trials where disclosure relates directly to fact or immediate circumstances of homicide. Ct. finds D's communication with psychologist falls within statute. Ct. rejects D's challenge to constitutionality of statute. Legislature has prerogative to eliminate privilege under certain circumstances. Purpose of evidentiary privilege is not to suppress truth, but to promote & protect certain types of confidences. Stayner v. Nye 85 N.E.2d 496. Held, no error. Dickson DISSENTS without opinion.

O. EVIDENCE

O.8. Privileges (generally IRE 501)

O.8.i. Victim-victim counselor (Ind. Code 35-37-6)

TITLE: In re Subpoena to Crisis Connection, Inc.
INDEX NO.: O.8.i.
CITE: (06-23-11), 949 N.E.2d 789 (Ind. 2011)
SUBJECT: Victim- counselor privilege absolute - no right to *in camera* inspection
HOLDING: D, who is accused of child molesting, does not have a constitutional right to inspect the records of a nongovernmental counseling agency where the General Assembly shielded the records from discovery. The victim-advocate privilege protects victims, victim advocates, and victim service providers from being compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative or administrative proceeding. Court is bound by the General Assembly's determination of whether a particular interest is sufficient enough to justify the creation of a privilege and the scope of the protection under the privilege. The three-step test for determining discoverability of records set forth in State v. Cline, 693 N.E.2d 1, 6 (Ind. 1998), is not applicable to privileged information.

Here, D does not have a Sixth Amendment right to have these documents inspected before trial. According to the predominant view of the Confrontation Clause, as long as the Tr. Ct. does not improperly prevent D from cross-examining the alleged victims at trial, his rights under the Confrontation Clause will not be violated. Moreover, D does not have a Due Process Clause right to the inspection of the records because Crisis Connection is not a government agent. The victim-advocate privilege avoids Brady issues by excluding from its protections persons affiliated with the State and specifically states that it does not "relieve a prosecuting attorney of the constitutional and ethical obligation to disclose exculpatory evidence." Ind. Code 35-37-6-14(a)(1). Finally, D's constitutional right to present a complete defense is not violated by nondisclosure because the interests advanced by Indiana's victim-advocate privilege outweigh the interest in the fair administration of criminal justice. Court believes it is unlikely that D would find evidence in Crisis Connection's records that is not available to him by way of other discovery sources. The rule that best serves the policies supporting Indiana's victim advocate privilege is one that generally prohibits disclosure from even *in camera* review of confidential information. Thus, Tr. Ct. abused its discretion by ordering Crisis Connection to disclose records of the complaining witness and her mother for purposes of an *in camera* inspection. Held, transfer granted, Court of Appeals' opinion at 930 N.E.2d 1169 vacated, judgment reversed.

RELATED CASES: Friend, 134 N.E.3d 441 (Ind. Ct. App. 2019) (in child molesting prosecution, trial court did not err by denying defendant's requests for discovery of records of the complainant's one-on-one sessions with her counselor because they were privileged under Ind. Code § 25-23.6-6-1 and could not be disclosed).

TITLE: Rogers v. State
INDEX NO.: O.8.i.
CITE: (7/6/2016), 60 N.E.3d 256 (Ind. Ct. App 2015)
SUBJECT: Privilege unavailable to unlicensed social workers
HOLDING: On interlocutory review, the Court of Appeals ruled that the counselor/client privilege of Ind. Code § 25-23.6-6-1 does not include communications with unlicensed counselors, including unlicensed social workers. Eight-year-old B.L. accused D of molesting her.

B.L.'s mother had suffered a serious injury at one time. D's attorney learned that the staff at a neighborhood community center had been concerned that B.L.'s mother may have been prostituting B.L. in order to obtain drugs. During a discovery deposition, the attorney for the community center's unlicensed social worker told her not to answer four questions, including the following two questions: 1) Did your counseling relationship with B.L. and her family involve anything other than Mother's injury? 2) Did someone tell you that he heard about sexual or otherwise inappropriate behavior between B.L. and other children? D filed a motion to compel the unlicensed social worker to answer the questions. The Tr. Ct. denied the motion, ruling that the counselor/client privilege of Ind. Code § 25-23.6-6-1 applied to the unlicensed social worker.

Assuming, without deciding, that the four questions sought privileged information, the Court applied several rules of statutory construction and held that the privilege for counselors under Ind. Code § 25-23.6-6-1 applies only to licensed counselors, including licensed social workers. Held, denial of motion to compel reversed and matter remanded for further proceedings.

O. EVIDENCE

O.8. Privileges (generally IRE 501)

O.8.j. Other

TITLE: Hayes v. State
INDEX NO.: O.8.j.
CITE: (4th Dist., 7-3-96), Ind. App., 667 N.E.2d 222
SUBJECT: Therapist-client (T-C) privilege - report of child molesting
HOLDING: Tr. Ct. did not err in admitting incriminating statements resulting from therapist's disclosure to Child Protective Services of client's sexual abuse of step-daughter. Therapist-client privilege is abrogated for purposes of reporting child molesting, & abrogation statute applies to information received from any person, including wrongdoer. Ind. Code 31-6-11-8; Devore v. State, 658 N.E.2d 657 (Ind. Ct. App 1995). Goal of Ind.'s Reporting Statute, Ind. Code 31-6-11-3, is to promote reporting of child abuse cases & to provide mechanism for investigation of abuse to protect child & to provide rehabilitative services for child & his parents. Ind. Code 31-6-11-1. D argued that because he was actively seeking rehabilitative therapy at time therapist reported perceived abuse, her actions frustrated rehabilitation goal of Reporting Statute. However, purpose of statute was fulfilled when therapist reported abuse, not prior to D's communication & therapist's disclosure of that communication. Because D was neither subjected to custodial interrogation, nor questioned by State actor, his privilege against self-incrimination was not violated. D was not entitled to Miranda warnings prior to his counseling session with therapist, & his statements made to therapist were properly admitted. Held, judgment affirmed.

TITLE: Hurt v. State
INDEX NO.: O.8.j.
CITE: (1st Dist., 5-29-98), Ind. App., 694 N.E.2d 1212
SUBJECT: Privilege - disclosure of confession made in federally funded hospital
HOLDING: Records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of United States shall be confidential & be disclosed if authorized by appropriate Ct. order. 42 U.S.C. § 290dd-2. Here, D, while in hospital, confessed to homicide. Although hospital in which D was staying had federally-funded alcohol & drug abuse program, program was separate from programs for general psychiatric treatment. Fact that D had history of alcohol abuse was not sufficient to show that D was enrolled in alcohol program. Moreover, even if D was part of alcohol program, there was insufficient evidence that D confessed to homicide as part of alcohol treatment. Although D was encouraged to accept responsibility for past activities & make restitution to his victims, this may have been related to his treatment for schizophrenia & antisocial personality disorder. Thus, because there is no evidence that D's confession was maintained in connection with performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, hospital was not required to obtain Ct. order prior to releasing D's statements to police. Held, judgment affirmed.

TITLE: Sims v. State
INDEX NO.: O.8.j.
CITE: (10-28-92), Ind. 601 N.E.2d 344
SUBJECT: Statements to sex offender counselor are confidential
HOLDING: Where D was compelled to seek sex offender treatment from counselor, information given to counselor was privileged & could not be used against him at trial (on transfer of opinion at 591 N.E.2d 1044, which also reversed conviction, but on different grounds). D had previously been convicted of sexual battery, & as term of probation was required to attend & complete sex offender treatment. At trial his counselor was permitted to testify to details related by D during course of treatment. Counselor was also permitted to give his clinical observations that D did not respond well, & that he was "a regressive pedophile." In Daymude App., 540 N.E.2d 1263, Ct. held this type of communication to be privileged. While communication did not fall within physician-patient privilege; it nevertheless should be protected because it shared the same end, to insure persons communicate fully & completely to promote successful treatment. Here, D was required to seek treatment, & probably believed his communications would be confidential. Compliance with Ct. order dictated that D disclose potentially incriminating evidence, & non-compliance could have resulted in finding D in contempt of Ct. or in violation of probation. Ct. found that admission of counselor's testimony was tantamount to circumvention of D's Fifth Amendment rights. Ct. also noted that recent enactment of Ind. Code 25-23.6-6-1, making communications between social worker & client privileged, while not in effect at time of trial, supported finding D's communications confidential.

RELATED CASES: Moore, 909 N.E.2d 1053 (Ind. Ct. App 2009) (implying that SOMM requirements that prisoner admit to crime under threat of credit time deprivation violates the Fifth Amendment)

TITLE: Williams v. State
INDEX NO.: O.8.j.
CITE: (01-11-12), 959 N.E.2d 360 (Ind. Ct. App 2012)
SUBJECT: D is entitled to his own prescription records
HOLDING: Tr. Ct. abused its discretion by granting Board of Pharmacy's motion to quash D's request for his own pharmaceutical records. If information sought in a subpoena is not privileged, the information must be disclosed if it is designated with sufficient particularity, material to the defense and there is no 'paramount interest' in nondisclosure. Here, D was charged with possession of a controlled substance. Because he could not originally remember the doctor who prescribed the controlled substance or the pharmacies that dispensed them, D filed a request for his information from the INSPECT program run by the Board of Pharmacy, which maintains a database of controlled substances dispensed from pharmacies. Although information received by the INSPECT program is considered "confidential" and the list of people to whom the Board can disclose information does not include the patient, a patient is entitled to his information. To the extent this information obtained by the Board is considered privileged, the privilege inures to the patient, not the Board (or the physician or the pharmacist, for that matter). D's request for information from the database regarding his prescriptions amounts to a waiver of any privilege. Thus, the three-part test for disclosure applies. D's requests for his prescriptions was sufficiently particular. The fact that D requested "any and all" of his prescriptions was not overly burdensome being the databank is computerized. Also, the prescriptions were material being they could provide a defense. Finally, the Board has no paramount interest in non-disclosure. Because **D** sought to waive his privilege for the purpose of exercising his constitutional right to present a defense, both the rationale for and the Board's interest in keeping the patient's prescription records confidential evaporate. Held, judgment reversed and remanded.

O. EVIDENCE

O.8. Privileges (generally IRE 501)

O.8.k. Counselor-client (IC25-23.6-6-1)

TITLE: State v. Pelley
INDEX NO.: O.8.k.
CITE: (06-14-05), Ind., 828 N.E.2d 915
SUBJECT: State's request for counseling records - counselor/client & psychologist/patient privilege
HOLDING: Tr. Ct. erred in quashing State's request for counseling records of murder suspect pursuant to Ind. Code § 25-23.6-6-1, the social worker/client privilege. Records requested were from 1986 through 1989, but privilege was not codified until 1990. Because the focus of the statute is on the underlying communication, Ct. held that date information was gathered determines whether Ind. Code § 25- 23.6-6-1 applies. Moreover, absent clear legislative intent to contrary, statute should not be applied retroactively & only protects communications made after effective date. Thus, counselor/client privilege was not applicable in this case.

Ct. also rejected State's claim that communication between psychologist & D's family was discoverable under "homicide exception" to psychologist/patient privilege, which existed at time D's family received counseling. Tr. Ct. properly reviewed the documents *in camera* & determined that they did not fall within this exception. State made no claim that it had sought discovery in this case & that its efforts to do so have been thwarted. State did not explain what information it obtained from witnesses that formed basis for its belief that documents it requested should include information concerning facts & immediate circumstances of murders. See Jorgensen v. State, 574 N.E.2d 915 (Ind. 1991). Held, transfer granted, Ct. App.' opinion at 800 N.E.2d 630 vacated, judgment affirmed in part & reversed in part.

RELATED CASES: Rogers, 60 N.E.3d 256 (Ind. Ct. App 2016) (counselor/client privilege of IC 25-23.6-6-1 does not include communications with unlicensed counselors, including unlicensed social workers; see full review, this section).

TITLE: Rogers v. State
INDEX NO.: O.8.k.
CITE: (7/6/2016), 60 N.E.3d 256 (Ind. Ct. App 2015)
SUBJECT: Privilege unavailable to unlicensed social workers
HOLDING: On interlocutory review, the Court of Appeals ruled that the counselor/client privilege of Ind. Code § 25-23.6-6-1 does not include communications with unlicensed counselors, including unlicensed social workers. Eight-year-old B.L. accused D of molesting her.

B.L.'s mother had suffered a serious injury at one time. D's attorney learned that the staff at a neighborhood community center had been concerned that B.L.'s mother may have been prostituting B.L. in order to obtain drugs. During a discovery deposition, the attorney for the community center's unlicensed social worker told her not to answer four questions, including the following two questions: 1) Did your counseling relationship with B.L. and her family involve anything other than Mother's injury? 2) Did someone tell you that he heard about sexual or otherwise inappropriate behavior between B.L. and other children? D filed a motion to compel the unlicensed social worker to answer the questions. The Tr. Ct. denied the motion, ruling that the counselor/client privilege of Ind. Code § 25-23.6-6-1 applied to the unlicensed social worker.

Assuming, without deciding, that the four questions sought privileged information, the Court applied several rules of statutory construction and held that the privilege for counselors under Ind. Code § 25-23.6-6-1 applies only to licensed counselors, including licensed social workers. Held, denial of motion to compel reversed and matter remanded for further proceedings.

O. EVIDENCE
O.9. Hearsay

TITLE: Carr v. State
INDEX NO.: O.9.
CITE: (7-23-18), 106 N.E.3d 546 (Ind. Ct. App.)
SUBJECT: Defendant's wrongdoing made statement of unavailable declarant admissible under 6th Amendment and Indiana Rules of Evidence
HOLDING: Defendant forfeited his 6th Amendment right to confront his victim at trial because his wrongdoing procured her absence from trial. That same wrongdoing made her statement also admissible under the Indiana Rules of Evidence.

Defendant stabbed S.G., his former girlfriend, in the eye with a steak knife. At the hospital, S.G. told Detective Tobi Cobain that Defendant was the perpetrator. The State charged Defendant with, inter alia, battery resulting in serious bodily injury, a Level 5 felony, and criminal confinement while armed with a deadly weapon, a Level 3 felony. The trial court entered a no-contact order. Over the next several months, Defendant violated the order by writing letters of apology to S.G. and attempting 384 phone calls to her, 46 of which were completed. In these communications, Defendant asked S.G. to change her story and to not appear at trial. He promised her $20,000, and also said his parents would support her financially if she was "loyal." In November of 2017, the State personally served S.G. with a subpoena to appear at trial. However, the State soon lost contact with her, so in the six weeks leading up to trial, the State called her several times, contacted her parents, and visited her last known address, all to no avail. S.G. did not appear at trial. At trial S.G.'s statement to Detective Cobain were admitted.

Defendant forfeited his right to confront S.G., and thus her statements to Detective Cobain were admissible, because of his wrongdoing. See Crawford v. Washington, 541 U.S. 36, 62 (2004) (relying on Reynolds v. United States, 98 U.S. 145, 158-59 (1878)). He tried to influence her testimony through letters of apology and promises of financial support. The same behavior allowed admission of the statement through Indiana Rule of Evidence 804(b)(5), which provides that a statement from an unavailable witness is admissible if the party against whom it is offered "intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying." Held, judgment affirmed.

TITLE: Vasquez v. People
INDEX NO.: O.9.
CITE: 173 P.3d 1099 (Colo. 2007)
SUBJECT: Despite "forfeiture by wrongdoing", evidence rules may still exclude hearsay
HOLDING: Colorado Supreme Court held a D whose Sixth Amendment confrontation clause challenge to the admission of hearsay statements is thwarted by the "forfeiture by wrongdoing" doctrine can still rely on state evidence rules to have the hearsay excluded. Court also elaborated on the showing that prosecutors must make to establish the intent element of the constitutional forfeiture-by-wrongdoing doctrine.

In People v. Moreno, 160 P.3d 242 (Colo. 2007), the Court declared: "To deprive a criminal D of the protection of the Confrontation Clause, his wrongful conduct must also be designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends." However, the Court had not established the showing that prosecutors must make to satisfy the doctrine's intent requirement. D argued that he cannot be deemed to have forfeited his right to confront a witness unless the State can prove that he procured the unavailability of that witness with the intention of preventing testimony in the particular case at hand, in this case charges of violating a protective order and bail condition. D contended that because the charges in this case were not filed until months after he killed his wife, the homicide could not have been motivated by an intention to silence her regarding the present case. Court noted knowing of no state jurisdiction that had addressed a situation in which a D had the requisite intent to work a forfeiture in one proceeding, then subsequently benefited from the witness's unavailability in additional proceedings. Colorado's evidence rules governing the admission of hearsay do not contain a forfeiture-by-wrongdoing provision.

Court found that under both the state and federal constitutions the State must only prove that (1) the witness is unavailable; (2) the D was involved in, or responsible for, procuring the unavailability of the witness; and (3) the D acted with the intent to deprive the criminal justice system of evidence. If this is found, then the D forfeits his right to confront that witness at any proceeding in which the witness's statements are otherwise admissible. However, Court also decided that even though the D forfeited his constitutional rights, he could still challenge the admissibility of his wife's statements to police officers under the hearsay rules. While the confrontation clause and the state hearsay rules are designed to protect similar values, Court found that, in light of the absence of a forfeiture-by-wrongdoing provision in the state hearsay rules, the "prudent course" is to require that the hearsay rules be satisfied separately from the confrontation clause.

O. EVIDENCE
O.9. Hearsay
O.9.a. In general

TITLE: Baker v. State
INDEX NO.: O.9.a.
CITE: (10/9/2018), 111 N.E.3d 1146 (Ind. Ct. App 2018)
SUBJECT: Hearsay - Officer's testimony about another officer's question
HOLDING: In resisting law enforcement prosecution, officer's testimony that he observed and heard another unidentified officer ask D "why he ran" was a question offered for the truth of the mater asserted and should not have been admitted into evidence. See Powell v. State, 714 N.E.2d 624 (Ind. 1999). Court rejected State's argument that D effectively adopted the officer's question as his own statement pursuant to Ind. Evid. Rule 801(d)(2) by answering "because I was scared." D had been apprehended after a high speed flight from attempted traffic stop, handcuffed, ordered to sit on a curb and was surrounded by several police officers when the unnamed officer asked why he ran. D was obviously in custody, so Rule 801(d)(2) does not apply. Although Tr. Ct. abused its discretion in admitting question and response over hearsay objection, error was harmless because independent evidence of guilt was sufficient to establish “little likelihood the officer’s question contributed to the jury’s verdict.” D waived his Sixth Amendment confrontation claim and Fifth Amendment Miranda claim due to failure to raise during trial, and error was not fundamental.

TITLE: Bonner v. State
INDEX NO.: O.9.a.
CITE: (6-7-95), Ind., 650 N.E.2d 1139
SUBJECT: Hearsay statements - reversible error
HOLDING: Improper admission of prejudicial hearsay evidence constituted reversible error, granting transfer & reversing Ct. App. decision at 641 N.E.2d 634. At trial, three police officers testified, over defense objection, to substance of statements made to them by confidential informants. Officers testified to fact that they had been informed that D was trafficking drugs & gave details regarding location of transactions & types of drugs sold. Because out-of-Ct. statements lacked relevance to any contested issue other than matters asserted therein, Ct. held that they must be viewed either as irrelevant or as hearsay, & their admission was improper.

Despite presence of jury admonition, Ct. declined to find error harmless. Simple fact that admonition is given does not necessarily mean that particularly prejudicial, erroneously admitted evidence will be erased from minds of reasonable jurors or omitted from their deliberations. White v. State, Ind., 272 N.E.2d 312; Smith v. State, Ind. App., 471 N.E.2d 733. Here, jury was subjected to repeated evidence, through separate testimony of three officers, that police received information before date of charged offense indicating that D was participating in drug trafficking. Although there was other evidence of D's guilt, nature, scope, & repetition of erroneously admitted testimony was likely to have had prejudicial impact upon jury. Held, reversed & remanded.

RELATED CASES: Robinette, 741 N.E.2d 1162 (despite limiting instructions, erroneously admitted videotaped interrogation required reversal); Headlee, App., 678 N.E.2d 823 (in possession of cocaine prosecution, Tr. Ct. committed reversible error in admitting hearsay testimony that confidential informant had given D cocaine in exchange for legal services in past).

TITLE: Bustamante v. State
INDEX NO.: O.9.a.
CITE: (8/7/90), Ind., 557 N.E.2d 1313
SUBJECT: "Statement" defined - must be capable of being true or false
HOLDING: In murder and arson case, D claimed letter from his wife, who died in fire, requesting loan from wife's mother was inadmissible hearsay. "Hearsay" is out-of-court statement offered to prove truth of facts asserted therein that rests on credibility of declarant who is not in court and is unavailable for cross-examination. Hughes, 546 N.E.2d 1203. True requests, commands, & questions are not assertions, & evidence regarding such utterances may come in because they are not offered for truth of facts asserted. Mayhew, 537 N.E.2d 1188. Court held that part of wife's letter which requested loan from mother was not hearsay at all because it asserted no fact as true which was susceptible to being true or false.

NOTE: IRE 801(a) defines "statement" as oral or written assertion or nonverbal conduct of person if it is intended by person as assertion.

RELATED CASES: Mayhew, 537 N.E.2d 1188 (post-crime statements of co-conspirator telling another to falsify her statement not subject to hearsay exclusion because "they asserted no fact as true which was susceptible of being true or false).

TITLE: Byrd v. State
INDEX NO.: O.9.a.
CITE: (10/7/91), Ind. App., 579 N.E.2d 457
HOLDING: Definition of hearsay - nonverbal conduct as assertion
SUBJECT: In murder case, D claimed Tr. Ct. erred in admitting testimony concerning victim's state of mind. For purposes of hearsay, "statement" may be non-verbal, so long as it is meant as equivalent of a verbal assertion. Luginbahl, App., 507 N.E.2d 620. Any statement not offered for purposes of proving facts asserted therein simply is not hearsay, & therefore cannot be subject to any hearsay exception. Ballard's Estate, App., 434 N.E.2d 136. Here, Ct. witness was permitted to testify about two instances of victim's nonverbal conduct (huddling in corner & brushing tire tracks from snow). Ct. found conduct amounted to non-assertive conduct, & therefore not hearsay.

NOTE: Nonverbal conduct signals such as nodding, pointing finger, waving hands, & sign language are obvious equivalents of assertions. See Hall, 284 N.E.2d 758 (testimony witness pointed out vehicle to police is hearsay); Willis, App., 318 N.E.2d 385 (police officer's testimony that woman pointed to D was offered to show why police were investigating whether D had pistol, not to prove truth of woman's assertion).

TITLE: Carpenter v. State
INDEX NO: O.9.a.
CITE: (8/26/2014), 15 N.E.3d 1075 (Ind. Ct. App. 2014)
SUBJECT: Mail with D's name and address wasn't hearsay
HOLDING: In issue of first impression in a drug and firearms case, Court found no abuse of discretion in admission of mail containing D's name and address because the mail was not hearsay. The pieces of mail made no factual assertion and thus could not have been admitted for the truth of matters of asserted. See Powell v. State, 714 N.E.2d 624, 628 (Ind. 1999). The mail was used as circumstantial evidence to prove D stored property at the address listed on multiple pieces of mail. See State v. Peek, 365 S.E.2d 320, 322 (N.C.Ct. App. 1988); Hernandez v. State, 863 So.2d 484, 486 (Fla. Dist. Ct. App. 2004), rev. denied. The State used the mail simply to establish that D controlled the premises. Held, judgment affirmed.

TITLE: Cook v. State
INDEX NO.: O.9.a.
CITE: (2/18/2019), 119 N.E.3d 1092 (Ind. Ct. App. 2019)
SUBJECT: Evidence of alleged third-party confession properly excluded
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion by excluding hearsay evidence that another person had allegedly confessed to committing the shooting. D argued that the confession was not offered to prove the truth of the matter asserted, but admissible to show the course of investigation and to prove detective's bias toward D and refusal to look at another suspect. But detective interviewed the alleged suspect after interviewing D, thus refuting D's contention that the detective refused to look for another suspect and was biased against D. The out-of-court multiple or double hearsay statements had little or no bearing on the detective's particular course of action during the investigation. And D failed to set forth how each layer of the out-of-court statements qualifies as an exception to the hearsay rule. Held, judgment affirmed.

TITLE: Cox v. State
INDEX NO.: O.9.a.
CITE: (3-3-99), Ind., 706 N.E.2d 547
SUBJECT: Revocation of probation/work release hearing - evidence & hearsay rules inapplicable
HOLDING: Ind. Rules of Evidence in general & rule against hearsay in particular do not apply in proceedings relating to sentencing, probation, parole, or in community corrections placement revocation hearings. Ind. Evidence Rule 101(c). Further, in probation & community corrections placement revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability. This includes reliable hearsay. However, absence of strict evidentiary rules places particular importance on fact-finding role of judges in assessing weight, sufficiency & reliability of proffered evidence. This assessment carries with it special level of judicial responsibility & is subject to appellate review. Nevertheless, Tr. Ct.'s assessment is not subject to Rules of Evidence, nor to common law rules of evidence in effect prior to Rules of Evidence.

Here, State presented reliable hearsay evidence that D tested positive for marijuana use, admitting into evidence results of urinalysis conducted by independent toxicology laboratory. With admission of this evidence, State presented sufficient evidence to support Tr. Ct.'s revocation of D's placement at work release center. Held, transfer granted, Ct. App.' opinion at 686 N.E.2d 181 vacated, revocation of placement in work release center affirmed. See card at E.6.k or F.4.a for Ct.'s discussion of due process & confrontation issues.

RELATED CASES: McQueen, App., 826 N.E.2d 1237 (in light of D's own testimony that he illegally took OxyContin & as a result tested positive for oxycodone in violation of Work Release Center rules, there was no prejudice to him in admission of hearsay testimony regarding results of toxicology report); C.S., App., 817 N.E.2d 1279 (Ct. rejected juvenile's claim that his confrontation rights to cross-examine his accuser were violated because the testing information was presented by a probation officer without knowledge of the testing procedures employed); Pitman, App., 749 N.E.2d 557 (evidence that D was arrested for & charged with battery, in form of certified copies of Ct. docket with probable cause finding, police report & charging information, was sufficient to support revocation of D's probation); Carter, 706 N.E.2d 552 (no error in admitting urinalysis evidence during probation revocation proceeding, notwithstanding claim that State failed to qualify lab technician as expert & urinalysis equipment as reliable).

TITLE: Craig v. State
INDEX NO.: O.9.a.
CITE: (03-11-94), Ind., 630 N.E.2d 207
SUBJECT: Statement not admissible to show reason for investigation
HOLDING: Tr. Ct. erred in allowing officer to testify as to statements made by complaining witness (CW) and his mother, but error was harmless due to other evidence; granting transfer of decision at 613 N.E.2d 501. In child molesting and incest trial, CW testified that D placed his penis in CW's mouth and tried to use restroom. CW also said he told mother and officer of incident, but did not relate what he said. Officer was allowed to testify that CW's mother told him CW had told her D put his penis in CW's mouth. He was also allowed to testify that CW told him D had pushed his head onto CW's wee-wee.

Although Ct. App. found statement admissible to rebut charge of recent fabrication, S. Ct. found this was not basis of Tr. Ct.'s ruling. Statement given by mother was neither consistent nor inconsistent with her trial testimony, and so would not have been admissible on this ground. Ct. also found statements were not admissible to show that it was made and to explain conduct of police in interviewing CW. Ct. noted confusion in this area and set forth test to use.

Tr. Ct. should first determine whether testimony describes out-of-court statement asserting fact susceptible of being true or false. If not, testimony does not contain hearsay and should be admitted. If it does contain assertion of fact, Tr. Ct. must next consider evidentiary purpose of proffered statement. If purpose is to prove fact asserted, and statement does not qualify under IRE 801(d), objection should be sustained unless statement fits in exception to hearsay rule. If proponent of statement urges purpose other than proof of fact asserted, Tr. Ct. must consider whether fact to be proved under suggested purpose is relevant and whether danger of prejudice outweighs its probative value. If fact is not relevant, or danger of unfair prejudice substantially outweighs probative value, hearsay objection should be sustained.

Here, alleged hearsay contained assertion of facts, and State alleged it was being offered to prove report was made and explain police investigation. Ct. found that specific content of report of mother was not contested issue, nor was propriety of police investigation questioned. Therefore, neither statement had any conceivable relevance apart from proving facts asserted in statements, and so were inadmissible hearsay and erroneously admitted. Due to testimony from CW himself, however, error was harmless, and reversal was not required, Givan, J., dissenting as to hearsay.

RELATED CASES: Blount, 22 N.E.3d 559 (Ind. 2014) (D's girlfriend's hearsay statement to officer providing the nickname of the shooter was erroneously admitted to show the course of investigation; harmless error); Corbally, 5 N.E.2d 463 (Ind. Ct. App 2014) (investigator's testimony relating C.W.'s hearsay statements was not admissible as "course of investigation" evidence; State introduced this improper bolstering evidence to counteract D's contention that police acted too hastily in apprehending him; see full review at O.9.b); T.H. v. Ind. Dept. of Child Svcs., 989 N.E.2d 355 (Ind. Ct. App. 2013) (DCS caseworker's progress reports were hearsay and not admissible to show why DCS filed TPR petition; prejudice from reports outweighs any probative value under Ind. Ev. Rule 403); Hernandez, App., 785 N.E.2d 294 (police officer's testimony re: genesis of investigation of D was highly prejudicial and not relevant to contested issue in case; see full review at O.9.a); Ortiz, 741 N.E.2d 1203 (State did not

explain how steps of police investigation were relevant to contested issue at trial); Maxey, 730 N.E.2d 158 (Craig's rationale is applicable in analyzing admissibility of any otherwise inadmissible evidence that State argues is admissible because it merely describes course of police investigation).

TITLE: Dausch v. State

INDEX NO.: O.9.a.

CITE: (06-29-93), Ind., 616 N.E.2d 13

SUBJECT: Subsequently repudiated Patterson statement sufficient to support conviction - battered woman syndrome of victim

HOLDING: Although at trial alleged victim (AV) repudiated earlier taped statement; where she admitted making statement & was cross-examined concerning its contents, it was sufficient to support D's conviction for rape & criminal confinement. Five days after incident AV gave statement to police indicating D physically abused & raped her. In subsequent defense deposition she acknowledged prior statement, but testified in direct opposition to it. At trial she denied truthfulness of statement, & explained that she had given earlier statement because she was mad at D & had been threatened by her family. Ct. found statement admissible as substantive evidence under Patterson, (1974) 324 N.E.2d 482, & that despite AV's in-Ct. & deposition testimony to contrary, it was sufficient to support conviction. Expert presented opinion testimony concerning battered woman syndrome & described cluster of symptoms that were typical, including inability to terminate relationships because of fear of violence. Expert did not personally interview or observe victim, but had read both pre-trial statement & deposition, & concluded that victim fell within purview of battered spouse syndrome. Ct. rejected D's argument that jury disregarded in-Ct. testimony in favor of earlier unsworn testimony, finding instead that reasonable jury could have found beyond reasonable doubt that D committed offenses. Held, convictions affirmed, DeBruler & Krahulik, JJ, concurring, but dissenting on sufficiency of evidence for rape & criminal confinement convictions, finding lack of substantial evidence of probative value.

TITLE: Garcia-Barrios v. State
INDEX NO.: O.9.a.
CITE: (4/17/20), Ind. Ct. App., 147 N.E.3d 339
SUBJECT: Defendant opened door to hearsay testimony
HOLDING: During murder and battery with deadly weapon trial, a detective was asked why certain individuals had been eliminated as suspects in the case and he explained that he had been in possession of a recorded conversation between Defendant's two accomplices. In the recording, the detective noted that one accomplice said that he and a person by the name of Angel were at the homicide scene.

On appeal, Defendant argued that trial court improperly admitted this hearsay testimony regarding contents of the recording, that it resulted in a violation of his right to confrontation and resulted in fundamental error. Court disagreed, noting that Defendant opened the door to detective's hearsay testimony linking Defendant to homicide scene by questioning him about eliminating other suspects. Further, detective's limited testimony on redirect examination did not make a fair trial impossible. Court also held that State presented sufficient probative evidence that Defendant was a member of a criminal gang while committing the offenses and committed the felony offenses in affiliation with a criminal gang.

TITLE: Grimes v. State
INDEX NO.: O.9.a.
CITE: (7/6/83), Ind., 450 N.E.2d 512
SUBJECT: Hearsay - credibility of testifying witness
HOLDING: Tr. Ct. did not err in admitting Hall's testimony regarding Loy's statement because "veracity of Hall's testimony was not determined by credibility of Loy but by credibility of Hall who testified about what she personally heard & observed. The fact that Loy was not in Ct. & subject to cross-examination did not make Hall's testimony inadmissible & improper in this context." See McClain, 410 N.E.2d 1297. Hearsay evidence is in-Ct. testimony about an extra-judicial statement offered to prove truth of matters asserted therein. Bray, 430 N.E.2d 1162; Morris, 406 N.E.2d 1187. Here, Hall drove Loy & D to vicinity of victim's trailer. Hall drove home. Loy & D returned to Hall's house 20 minutes later. Loy looked at Hall & commented: "What are we going to do with her?" D made no comment. D objected to Hall repeating Loy's comment on hearsay grounds. Ct. holds Hall's recall of Loy's statement is not hearsay. Held, no error.

RELATED CASES: Polk, App., 783 N.E.2d 1253; Martin, 736 N.E.2d 1213 (State was entitled to offer State witness's unsworn prior inconsistent statement for impeachment purposes to challenge her credibility); Dixon, 621 N.E.2d 1152 (Tr. Ct. did not err in allowing officer to testify as to witness' prior inconsistent statement, because testimony was offered to impeach witness after he testified to contrary in Ct. Extrinsic proof of prior inconsistent statements can be admitted for impeachment over hearsay objection, Collins, Ind., 521 N.E.2d 682. Decision in Modesitt, Ind., 578 N.E.2d 649, *overruling* Patterson, 324 N.E.2d 482, did not change well-established rule allowing use of prior inconsistent statements for impeachment).

TITLE: Grove v. State
INDEX NO.: O.9.a.
CITE: (4th Dist. 6/9/83), Ind. App., 449 N.E.2d 1122
SUBJECT: Hearsay - purpose for which admitted
HOLDING: Tr. Ct. did not err in permitting witness to testify concerning phone conversations with D. Here, D objected to testimony of auction owner that D requested him to sell furniture (stolen) as unauthenticated & hearsay. State contended conversations were offered to set stage for later testimony. Tr. Ct. agreed with state & also noted conversation could be part of modus operandi. Ct. holds conversations were admissible to provide background facts, explain subsequent acts of witness' employees & to give legal significance to D's knowledge that items were sold in his name for which he accepted payment. Ct. *cites* as authority Kolb, 282 N.E.2d 541 & 2 CA7 cases admitting contents of telephone conversations. Witness' testimony was not offered to evidence truth of telephone conversations, thus hearsay rule inapplicable. Held, no error.

RELATED CASES: Phillips, 25 N.E.3d 1284 (Ind. Ct. App 2015) (warning labels on infant crib that made factual assertions were not hearsay because labels were not admitted to prove truth of matters asserted in labels); Carter, 490 N.E.2d 288 (Crim L 419(6); witness' testimony re phone conversation with murder victim was properly admitted to prove victim's state of mind & reason for going to D's house); Komyatti, 490 N.E.2d 279 (Crim L 419(3); testimony re reason victim changed will was hearsay & not admissible as probative of attorney's reason for changing will or as evidence of victim's state of mind, in other words, it was irrelevant to issues in this case); Stout, 479 N.E.2d 563 (although officer's testimony contained statements from third parties, its purpose was to explain why officer took particular course of action, rather than to establish truth of statements made by third parties, *citing* Morris, 406 N.E.2d 1187, McNew, 391 N.E.2d 610 & Roberts, 375 N.E.2d 215); Smith, 468 N.E.2d 512.

TITLE: Grove v. State
INDEX NO.: O.9.a.
CITE: (4th Dist. 6/9/83), Ind. App., 449 N.E.2d 1122
SUBJECT: Hearsay - no limiting instruction
HOLDING: Where D failed to submit limiting instruction (that testimony concerning witness' phone conversations with D was not offered to prove truth of conversations), evidence was available for consideration for all purposes. Franklin v. Duckworth, (N.D. Ind. 1982), 530 F.Supp. 1315; Turentine, App., 384 N.E.2d 1119. Here, D challenged sufficiency of evidence (theft), contending testimony regarding phone conversations could not be used to sustain verdict. He had orally requested cautionary instruction, but Ct. finds failure to tender written instruction waived error in failure to give instruction. Ct. holds contents of telephone conversations, although hearsay, could be considered. Ct. notes evidence was sufficient to support conviction even without telephone conversation. Held, conviction affirmed.

TITLE: Grund v. State
INDEX NO.: O.9.a.
CITE: (8/7/96), Ind., 671 N.E.2d 411
SUBJECT: Hearsay defined - legitimate non-hearsay purposes
HOLDING: Hearsay is out-of-court statement offered to prove truth of matter asserted. IRE 801(c); Hughes, 546 N.E.2d 1203. Here, testimony of police officer regarding statements made to him by owner of stolen gun used to commit murder, regarding owner's whereabouts on night of murder & where owner may have fired his gun prior to it being stolen, was not objectionable on hearsay grounds; statements were not admitted for truth of matter asserted, but for purpose of demonstrating source of bullets which proved to be ballistic match to one recovered from murder scene. Held, no reversible error.

RELATED CASES: Gilbert, 954 N.E.2d 515 (Ind. Ct. App. 2011) (detective's out-of-court statement to D that he wanted oral sex was not introduced for its substantive truth, but to provide context for D's response, which was to ask how much money officers had; moreover, Confrontation Clause does not apply to non-hearsay statements, even if those statements are testimonial); For other cases noting legitimate non-hearsay purposes, see Anderson, 718 N.E.2d 1101 (non-hearsay statements admissible to show concern about victim); Hughes, 546 N.E.2d 1203 (requests, commands and questions); Williams, 669 N.E.2d 956 (statements offered to show effect on D and prompt him to speak); Shepard, 451 N.E.2d 1121 (threats made to accused to show state of mind in self-defense case not inadmissible hearsay); Chinn, 511 N.E.2d 1119 (writing exemplars admissible for purpose of handwriting analysis); Lafary, App., 522 N.E.2d 916 (verbal acts or operative facts); Utley, App., 663 N.E.2d 229 (statements offered to prove notice).

TITLE: Hernandez v. State
INDEX NO.: O.9.a.
CITE: (5th Dist., 3-19-03), Ind. App., 785 N.E.2d 294
SUBJECT: Police officer testimony - explanation of course of investigation; inadmissible hearsay
HOLDING: Tr. Ct. committed reversible error by allowing police officer to testify that investigation of D began due to complaints about prostitution connected with her business. Officer was permitted to testify over D's hearsay & relevancy objections that he received complaints about prostitution with regard to D's place of business. Applying test set forth in Winbush v. State, 776 N.E.2d 1219 (Ind. Ct. App. 2002), court found that officer's statement contained fact susceptible of being true or false, & evidentiary purpose of evidence was to show course of investigation despite fact that D never questioned propriety of police's investigation. Therefore, genesis of investigation was not relevant to any contested issue in case & evidence was highly prejudicial because statement in question asserted her business was engaged in prostitution. Because she was on trial for promoting prostitution & evidence that business was known as a place of prostitution certainly contributed to jurors' conclusion that D was guilty, Tr. Ct. committed reversible error in admitting testimony. Held, convictions reversed & remanded for new trial on one count.

RELATED CASES: Thrash, 88 N.E.3d 198 (Ind. Ct. App. 2017) (in resisting law enforcement prosecution, harmless error to admit police officers' hearsay testimony regarding D's ex-girlfriend's statement that he possibly had a pending warrant of arrest).

TITLE: In Matter of J.L. v. State
INDEX NO.: O.9.a.
CITE: (4th Dist. 09/02/92), Ind. App., 599 N.E.2d 208
SUBJECT: Inadmissible hearsay - Confidential Informant (CI) not testifying
HOLDING: Tr. Ct. erred in allowing officer to testify as to statements made to him by CI who was not present or testifying at proceeding. D was passenger in car from which cocaine was being sold. At adjudication hearing, officer testified that CI said that after he exchanged money with driver of car, passenger opened false bottom of can on his side of car & gave driver five packets of crack cocaine. Criminal rules apply to delinquency proceedings if not in conflict with juvenile code, & child has right to confront & cross-examine witnesses. Ct. found hearsay evidence had no bearing on officers' course of action, & examined other evidence to support judgment. Other evidence supported reasonable inference that D was aware of presence of cocaine, but it did not establish that D had physical or practical capability to exercise control over cocaine, or that he knowingly or intentionally aided, induced, or caused driver to possess cocaine. While evidence established D's presence at crime, it did not support inference that he knowingly or intentionally participated in possessing cocaine. Because possession is inherently LIO of dealing, & constitutes material element of that crime, determination that properly admissible evidence did not support possession, also precluded conviction for dealing. Held, judgment reversed, Miller, J., dissenting in part.

TITLE: Kelley v. State
INDEX NO.: O.9.a.
CITE: (4th Dist. 7/2/90), Ind. App., 555 N.E.2d 1341
SUBJECT: Hearsay - opening door; false or misleading impression
HOLDING: Tr. Ct. erred in determining that D had opened door to admission of police informant's hearsay statements, where D did not create false or misleading impression in minds of jurors. D was charged with dealing in cocaine based on transaction with informant. Evidence showed that informant was arrested for possession of marijuana & cocaine, & that during interrogation he named D as his source & agreed to set up transaction with D under police surveillance. Informant made several calls to beeper number, & eventually spoke with D, agreeing to meet him later that evening. Telephone conversation was recorded, but contained no specific mention of reason for meeting. Police waited with informant at site of meeting, keeping informant in handcuffs until D arrived. When they allowed informant to go out on porch to talk with D, he yelled "cops," & both men ran. Bags containing cocaine were found in alley through which both ran, & police later searched D's apartment pursuant to warrant & found grinder commonly used to mix cocaine, bags with white residue, many small plastic bags, & bottle of substance commonly used to dilute cocaine. Informant was still fugitive at time of D's trial & was not available to testify, & D was granted motion in limine as to any statements made by informant. During direct exam of officers, reference was made to statements, & Tr. Ct. sustained D's objections. However, during cross-examination of officer who was at scene of transaction with informant, D asked him if informant had told him he would stay with police. State argued at trial that this opened door to all statements made to police by informant, & Tr. Ct. overruled D's objections to their admission. On appeal, D argues that this was error, & state again argues that D had opened door. During cross-examination of officer, D had questioned him about his efforts to keep informant from escaping, by blocking his path, handcuffing him, & maintaining physical contact with him. D asked officer whether he trusted informant to stay with him, & also asked him whether he had said he would stay with police. Questions may "open door" to admission of otherwise inadmissible evidence if subject is incompletely touched upon so as to leave trier of fact with false or misleading impression of facts related. See Gilliam, 383 N.E.2d 297. Here, D's questioning did not leave jury with false impression. Instead, it suggested informant's unreliability, an inference born out by his flight. State itself had put credibility of informant in issue by referring at least twice to his statements, despite motion in limine. Ct. App. fails to see how evidence of informant's other uncorroborated statements could correct impression that was not false or misleading initially. Evidence does not indicate that statements were related to each other in any way. Tr. Ct. erred in admitting this evidence, & error was not harmless, since evidence in case was all circumstantial. Held, reversed & remanded for new trial. Chezem, J., DISSENTS, arguing that error was harmless.

TITLE: Lane v. State

INDEX NO.: O.9.a.

CITE: (10/25/2013), 997 N.E.2d 83 (Ind. Ct. App. 2013)

SUBJECT: D did not open the door to admission of testimonial hearsay evidence - "clear & intentional waiver" required

HOLDING: In murder prosecution, Tr. Ct. erred in concluding that D opened the door to admission of evidence of phone number, which was testimonial hearsay. During trial, evidence was admitted that one of the shooting victims called a number with a (678) area code four times on the night of the shooting, but that number was not initially linked a particular person. But evidence linking D to that number was introduced through detective, who said that number beloned to D's cousin, whom he had interviewed shortly after the shooting. The issue arose during defense counsel's cross-examination of detective.

Tr. Ct. erroneously concluded that D had opened the door to this hearsay evidence linking him to the (678) phone number. Court found D's cousin's statement to police regarding the number was testimonial. A D can open the door to admission of evidence otherwise barred by the Confrontation Clause, but that waiver must be "clear and intentional," which was not the case here. Because of overwhelming evidence placing D at the scene of shooting, Court concluded that admission of hearsay was harmless beyond a reasonable doubt.

TITLE: Lytle v. State
INDEX NO.: O.9.a.
CITE: (2/25/87), Ind., 503 N.E.2d 1222
SUBJECT: Hearsay - self-serving declaration
HOLDING: Tr. Ct. did not err in refusing to permit D to call FBI agent to testify that D denied committing rape. Self-serving declarations are not admissible. Marts, 432 N.E.2d 18. Held, no error. Dickson CONCURS IN RESULT without opinion.

TITLE: Mason v. State
INDEX NO.: O.9.a.
CITE: (12-29-97), Ind., 689 N.E.2d 1233
SUBJECT: Hearsay - police testimony about informant's tips
HOLDING: Admission of officer's testimony regarding confidential informant's tips prejudiced D's substantial rights & was reversible error. Content of informant's tip should not be communicated to jury as evidence that fact asserted therein is true. Glover, 251 N.E.2d 814. Although informant's tip is admissible when introduced primarily to explain police's investigation, that exception was not relevant to this case. Ct. concluded that there was unacceptable risk that jury might have treated informant's statements as evidence that D was dealing heroin. Hearsay directly implicated D in more serious crime with which he was charged, facts asserted in hearsay were not already in evidence, & evidence of D's guilt on dealing charge was not overwhelming. Held, conviction reversed & remanded.

RELATED CASES: Winbush, App., 776 N.E.2d 1219 (hearsay statement lacked relevance to any contested issue at trial & probative value was substantially outweighed by unfair prejudice).

TITLE: Miles v. State
INDEX NO.: O.9.a.
CITE: (11-1-02), Ind. App., 777 N.E.2d 767
SUBJECT: Information on caller identification (id) box not hearsay - exclusion harmless error
HOLDING: Tr. Ct. improperly excluded information from caller id box as hearsay, but error was harmless because D was able to place defense before jury & there was overwhelming evidence against him. D was convicted of battery resulting in serious bodily injury, rape, criminal deviate conduct, criminal confinement, & attempted armed robbery. Ct. excluded information shown on caller id box of D's girlfriend, which indicated that she had received call from D's residence, where he lived with roommate. Call was made around time crimes were taking place. There is no Indiana case law that addresses admissibility of information from caller id box. Appellate Ct. in Virginia found that information from caller id box is not hearsay because there is no out-of-court asserter. Caller id box is based on computer-generated information & is not simply repetition of prior recorded human input or observation. Tatum v. Commonwealth, 440 S.E.2d 133 (1994). Thus, Ct. found that evidence was improperly excluded. Nonetheless, error did not warrant reversal because evidence against D was overwhelming. Further, excluded evidence would have had little, if any, impact on evidence against D due to fact that record indicated D lived around corner from victim & D had already claimed he was home & had called his girlfriend, which girlfriend confirmed in her testimony. Held, judgment affirmed.

TITLE: Miller v. State
INDEX NO.: O.9.a.
CITE: (07/25/91), Ind., 575 N.E.2d 272
SUBJECT: Hearsay testimony - medical results
HOLDING: It was reversible error to admit one physician's testimony regarding telephone conversation he had with another physician concerning second physician's diagnosis of D's girlfriend. D was convicted of Class B felony child molesting. Routine urinalysis had revealed victim had trichomonas vaginalis, sexually transmitted disease. One physician testified that another physician, who did not testify at trial, told him over telephone that he had treated D's girlfriend for same disease. Ct. found that this was classical hearsay & did not fit within hearsay exception for expert testimony because it was not used as basis of testifying physician's opinion, but was simply relating another's statement as conclusory answer to ultimate fact at issue. Ct. also found error was not harmless, because admission of statement served to enhance credibility of victim & was crucial to State's case. Held, reversed & remanded for new trial, J. Givan dissenting on finding of reversible error.

TITLE: Nuerge v. State
INDEX NO.: O.9.a.
CITE: (3/13/97), Ind. App., 677 N.E.2d 1043
SUBJECT: Offered as proof of matters asserted - reason for investigation
HOLDING: In child molesting prosecution, D claimed counsel was ineffective for failing to object to investigating officer's testimony that he talked with alleged victim's mother & she stated that allegations of molestation were true as far as she was concerned. Hearsay is out-of- court statement offered for truth of matter asserted. IRE 801(c). Ct. found that officer's testimony was elicited by State as part of his explanation of how he became involved in case. Officer provided foundation for how he came to talk to victim & how he learned of allegations. Officer did not address substance of victim's allegation during this portion of his testimony, but merely recited steps he took as he began his investigation. Ct. concluded that officer's testimony was not offered to prove truth of matter asserted but was offered to set foundation of officer's involvement in case. Held, no error.

RELATED CASES: Fleener, App., 648 N.E.2d 652, summarily *aff'd* 656 N.E.2d 1140 (child molest victim's mother's testimony that her daughter's revelations of abuse precipitated her divorce from D, was offered to explain to jury why her marriage to D had ended); Heck, 552 N.E.2d 446 (officer's testimony about information he received during investigation was not hearsay because it was offered to show why officer's investigation took turn that it did).

TITLE: Powell v. State
INDEX NO.: O.9.a.
CITE: (7-20-99), Ind., 714 N.E.2d 624
SUBJECT: Hearsay - question containing factual allegation
HOLDING: Verbal conduct intended to assert fact but phrased as question is capable of being "statement" for purposes of hearsay rule. In murder prosecution, State's witness testified on direct examination that one of three men involved in shooting "said something about, what, you think we ain't got guns, too, or whatever." State argued that this was report of question, which by its very nature contained no assertion of fact & was not hearsay. Ct. disagreed, noting that if report of question or command in effect transmits questioner's claimed observations, need for cross examination is as great as if witness reported direct statement. Utterance in this case asserted that men in group confronting witness & victim were carrying guns, which was susceptible of being true or false. Although utterance was offered for truth of matter asserted & was therefore hearsay, erroneous admission of this utterance was harmless because fact asserted in question, that men had guns, was established beyond doubt when men opened fire. Held, conviction affirmed.

RELATED CASES: Smith, 114 N.E.3d 540 (Ind. Ct. App. 2018) (harmless error to admit police officer's hearsay testimony that no one at an address D said he had been visiting knew him; police officer did not repeat declarant'statement, per se, but the information the officer testified about could only have been obtained by statements made by out-of-court declarant); Stewart, 945 N.E.2d 1277 (Ind. Ct. App. 2011) (because command and question at issue were being offered for the truth of the matter asserted, i.e., the identity of the person referenced, they were hearsay and properly excluded); Lampitok, App., 817 N.E.2d 630 (implicit in declarant's command or request to witness to find gun & dispose of it is factual assertion that there was, in fact, a gun used in course of offense, which was contested issue of fact at trial; & therefore constituted hearsay).

TITLE: Ramiez v. State
INDEX NO.: O.9.a.
CITE: 114 Nev. 550, 958 P.2d 724 (Nev. 1998)
SUBJECT: Hearsay -- Officer's References to Examination by Non-testifying Doctor
HOLDING: In child molest case, police officer's references to examination by non-testifying doctor were hearsay and their admission violated D's confrontation rights. At time of investigation, victim lived out of state, and was examined there by doctor whose results were inconclusive as to whether she had been molested. Doctor did not testify at trial, nor was his written report offered into evidence. Officer in charge of investigation testified at trial that, after reviewing report of medical examination and report of fellow officer, he concluded that victim had been molested and that D was chief suspect. During recess, juror submitted question regarding whether victim had been examined by a doctor. Trial judge answered that victim had been given complete physical and mental examination by doctor who had conducted other physical and mental exams of sexually abused persons. On appeal, state argues that officer's references to medical exam were not hearsay, but were offered merely to explain officer's investigation. Nevada S. Ct. disagrees, finding that only relevance of these references was to demonstrate that doctor's findings confirmed that victim had been molested, although findings were in fact inconclusive. Judge's vouching for doctor compounded problem. Because this hearsay was damaging and severely prejudicial, its admission was not harmless. Held, conviction reversed.

TITLE: Russell v. State
INDEX NO.: O.9.a.
CITE: (7/29/85), Ind., 480 N.E.2d 921
SUBJECT: Hearsay - harmless error
HOLDING: Tr. Ct. erred in overruling D's motion in limine & objection to officer's testimony re statements made to her by owner of vacant house. D & co-D broke window to enter vacant house where they'd taken victim but left quickly for fear of discovery & took victim to another location where they sodomized her. Officer's testimony was hearsay requiring reversal unless other competent evidence on same subject is admitted without objection/contradiction. Moody 448 N.E.2d 660. Here, victim said that when men took her to rear of vacant house, window was broken before they entered, & so subsequent admission of hearsay evidence was harmless. Held, conviction affirmed.

RELATED CASES: Robinson, App., 634 N.E.2d 1367 (Although in drug trial where entrapment was raised, statement of CI, restating another's belief that D had been involved in prior drug transaction was hearsay, error did not require reversal because there was substantial independent evidence to establish D's predisposition to deliver illegal drugs.); Vance, 620 N.E.2d 687 (Officer's testimony of what surviving victim told him in emergency room did not require reversal. Case was controlled by Patterson, 324 N.E.2d 482, because trial was held prior to Modesitt, 578 N.E.2d 649. Remarks were not acknowledged by declarant & she had no recollection of what she had said, but they were merely cumulative of other evidence, & so admission did not require reversal.); Pruitt, 622 N.E.2d 469 (three ordinarily hearsay statements found admissible for various reasons); Carter, 501 N.E.2d 439 (officer's statement that co-D told him he didn't have any cocaine, but his brother [D] did, was hearsay, but cocaine itself was in evidence & direct testimony showed that D had it & sold it, so error was harmless).

TITLE: State v. Decoteau
INDEX NO.: O.9.a.
CITE: 2007 Vt. 94, 940 A.2d 661 (Vt. 2007)
SUBJECT: Hearsay improperly allowed in probation revocation hearing
HOLDING: Vermont Supreme Court held the admission at a probation revocation proceeding of a conclusory discharge summary provided by the probationer's treatment program as well as hearsay allegations made by program staffers violated the probationer's right to due process. State evidence rules do not categorically bar hearsay in probation revocation proceedings, but the Fourteenth Amendment's due process guarantee gives Ds facing probation revocation a right to confront adverse witnesses. Court has previously made it clear that reliability is a key factor in determining the admissibility of hearsay at a probation revocation proceeding. In present case, Court found that the discharge-summary report and the PO's testimony did not bear sufficient indicia of reliability to be admissible. First, there was no evidence to corroborate the hearsay allegations regarding D's misbehavior. The PO testified about what he had heard from D's caseworker, but no nonhearsay testimony supported the accounts of D's behavior or the measures that the staff took to address it. Furthermore, Court noted the evidence consisted of judgments and conclusions, not objective facts. It added that a treatment report is subjective and less inherently reliable than other kinds of reports, such as lab reports. Also, the allegations contained in the hearsay statements were general, not factually detailed. Compare to*:* Reyes v. State, 868 N.E.2d 438 (Ind. 2007)

TITLE: Stoddard v. State

INDEX NO.: O.9.a.

CITE: 389 Md. 681, 887 A.2d 564 (Md. Ct. App. 2005)

SUBJECT: Statement that Unintentionally Implies Fact is Hearsay If Offered to Prove Implied Fact

HOLDING: Maryland Court of Appeals holds that evidence of an out-of-court statement from which the jury could infer a fact at issue qualifies as hearsay. Maryland's Rule of Evidence 801 is identical to Federal Rule of Evidence 801). Although the Federal Rules Advisory Committee noted that admitting out-of-court statements to prove the truth of a fact that is unintentionally implied does not carry the risks generally associated with admitting out-of-court assertions, the Maryland Supreme Court joins those jurisdictions that have held that such statements should be excluded as hearsay. The Court reasons that the intent of the declarant is irrelevant to a determination of whether the statement is hearsay when offered to prove the truth of an unintentional assertion. Here, a child's question, "Is [the D] going to get me?" was offered to prove that the child had seen the D attack another child.

TITLE: Thornton v. State
INDEX NO.: O.9.a.
CITE: (2/5/2015), 25 N.E.3d 800 (Ind. Ct. App. 2015)
SUBJECT: Detective's general summary of accomplice's interview - inadmissible hearsay
HOLDING: A witness summarizing the content of an out-of-court statement constitutes "hearsay evidence in its classic form." Tessely v. State, 432 N.E.2d 1374 (Ind. 1982). Here, in rape and criminal confinement prosecution, Tr. Ct. erroneously admitted alleged accomplice's out-of-court, testimonial statements in violation of D's confrontation rights under the U.S. and Indiana Constitutions. Detective who took statements from both D and accomplice testified that their version of events did not match. He said there were a few similarities in their statements, but also some major differences. He did not go into detail, and accomplice was not available for testimony or cross-examination. Court rejected State's argument that because the detective did not describe the substance of accomplice's statements, his testimony was not prohibited under the Confrontation Clause. If anything, the testimony in question here is worse than specific facts, as it implied to jury that D was being dishonest, based solely on pure speculation regarding the nature and extent of the alleged inconsistencies. To permit the State to hint at the substance of a conversation so long as specific details are not mentioned would violate both the U.S. and Indiana Constitutions, inasmuch as it would permit the State to bootstrap in evidence that is otherwise inadmissible and permit a witness to make his own determination of a declarant's reliability. Court concluded that error was not harmless, noting the jury's inability to reach a verdict on all but one of the charges. Held, conviction reversed and remanded.

TITLE: Troutner v. State
INDEX NO.: O.9.a.
CITE: (07-18-11), 951 N.E.2d 603 (Ind. Ct. App. 2011)
SUBJECT: Erroneous exclusion of testimony - harmless error
HOLDING: In robbery prosecution, Tr. Ct. abused its discretion when it prevented D's niece from testifying that she had heard D call victim a child molester and had heard D make a comment to victim "about buying his niece." Statements were not hearsay because they were not being offered for truth of the matter asserted but, rather, to show that D acted out of passion rather than knowingly or intentionally. Court disagreed with State's argument that niece's proferred testimony was merely cumulative to D's testimony. Testimony was offered to corroborate D's testimony, and D's credibility was a central issue in the case. In such circumstances, additional testimony is not merely cumulative. Littler v. State, 871 N.E.2d 276 (Ind. 2007). However, in light of all the evidence before the jury, error was harmless because excluded portion of niece's testimony would have had a minor impact on the jury. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: United States v. Hearn
INDEX NO.: O.9.a.
CITE: 500 F.3d 479 (6th Cir. 2007)
SUBJECT: Admission of hearsay evidence violated confrontation right
HOLDING: The Sixth Circuit Court of Appeals held the admission at a drug-trafficking trial of extensive testimony by police officers concerning confidential informers' statements about D's intent to distribute large quantities of drugs, ostensibly to illustrate why the police had D under surveillance in the first place, violated D's Sixth Amendment right to confront witnesses. District court allowed government to use statements to show why authorities had their eye on D at the time and why they stopped his car. Officers testified, however, testified as to the large amounts of several different drugs that the informant said D had moved from his residence into his car in order to sell them at a rave party. The officers' testimony went far beyond explaining the reason D was under surveillance and enabled the government to establish that informers had told police that he intended to sell the drugs and personally moved the drugs from his residence to his car. Court said it would have sufficed to apprise the jury that officers followed D pulled him over because of "some illegal activity." Court also found that the error was not harmless as no other evidence so directly demonstrated D's possession of the drugs with intent to distribute.

TITLE: U.S. v. Williams
INDEX NO.: O.9.a.
CITE: 133 F.3d 1048 (7th Cir. 1998)
SUBJECT: Officer's Testimony That Informer Identified D
HOLDING: Government agent's testimony that confidential informer identified D as suspect in charged crime constitutes inadmissible hearsay, and is also so prejudicial that it fails balancing test of Fed. R. Ev. 403. Although eye-witness picked D's photo out of photo array, she could not identify him at trial. An agent was then permitted to testify that he had received information from a confidential informant identifying D as suspect. Government argued this testimony was admissible to explain investigatory procedures undertaken in case, but Court rejects this argument. Further, even if testimony were not hearsay, it is so prejudicial as to fail balancing test of Fed. R. Ev. 403.

TITLE: Whited v. State
INDEX NO.: O.9.a.
CITE: (1st Dist., 1-31-95), Ind. App., 645 N.E.2d 1138
SUBJECT: Hearsay - effect of statements on D's state of mind
HOLDING: Tr. Ct. erred in excluding complaining witness's statements, offered by D to show effect they had on him. During trial for rape & criminal confinement, D attempted to relate CW's statements made during night of offense. Tr. Ct. sustained State's hearsay objections & excluded statements. On appeal, D argued that statements were offered to support his state of mind in concluding that CW consented to sex. Out-of-Ct. statement offered to show its effect on hearer's state of mind is not hearsay, U.S. v. Hanson, (7th Cir. 1993), 994 F.2d 403. However, Ct. found error in this case harmless because it did not impinge upon D's right to present defense & evidence of guilt was overwhelming. Held, conviction affirmed.

RELATED CASES: Stewart, 167 N.E.3d 367 (Ind. Ct. App. 2021) ((harmless error in excluding D's testimony recounting "very aggressive" statements that victim made to her at a party before she shot him; statements were relevant to show her fearful state of mind as it related to her self-defense claim); Sylvester, 698 N.E.2d 1126 (erroneously excluded statements made by victim were relevant in establishing basis for D's own statements & behavior); Allen, 686 N.E.2d 760 (statements made by victim which are offered to show reasons why person acted in manner he/she did are not hearsay); Isaacs, 659 N.E.2d 1036 (Tr. Ct. committed harmless error in excluding victim's statements made to D, which were offered by D to describe circumstances presented to D which resulted in victim's death).

TITLE: Williams v. State
INDEX NO.: O.9.a.
CITE: (10/4/89), Ind., 544 N.E.2d 161
SUBJECT: Hearsay - police testimony regarding investigation
HOLDING: Admission of officer's testimony that informant had told him D was involved in robbery was reversible error. Hearsay rule generally does not apply to exclude police testimony containing hearsay statements introduced primarily to explain why particular course of action was taken during criminal investigation. Johnston, 530 N.E.2d 1179; Rhoton, 486 N.E.2d 495. Reviewing Ct. requires reasonable level of assurance that testimony was not offered or received as evidence of truth of hearsay statement. In Johnston, that assurance was provided by Tr. Ct.'s immediate admonition limiting jury's use of testimony. In Head, 443 N.E.2d 44, assurance was provided by officer's description of anonymous tip as merely playing part in decision to include D's photograph in array. Here, officer testified that he received tip from informant, whom he named, that D was involved in particular robbery charged, & that this tip was basis for including D's photograph in array. Testimony was sufficiently specific & detailed to provide jury with basis for inference that informant had knowledge that D committed offense & was therefore guilty as charged. It also tended to support credibility of victim's identification of D. There is inadequate assurance that statement was not received for purpose of proving matter asserted. Held, reversed & remanded for new trial. Givan & Pivarnik, JJ., DISSENT.

RELATED CASES: Sims, App., 771 N.E.2d 734 (although Ct.'s direct appeal opinion was at odds with Williams, issue was foreclosed by res judicata, & hearsay evidence was cumulative at best of other evidence identifying D as perpetrator of crimes); Patton, App., 725 N.E.2d 462 (statements were not hearsay, but were relevant to explain sequence of events in officer's investigation of alleged burglary of store; statements were relevant to explain why officer changed his course of action from approaching his squad car to leave premises & end investigation to walking to back of store to continue investigating); Spencer, 703 N.E.2d 1053; Owens, 659 N.E.2d 466 (harmless error in permitting police officer to testify about content of conversations he had with State's witnesses); Clark, 648 N.E.2d 1187 (statements properly admitted to explain why particular course of action was taken during criminal investigation); Touchstone, App., 618 N.E.2d 48 (Error in admitting officer's testimony as to what others said at scene was harmless, but better rule is that fact of complaints is admissible, but content of complaints should be excluded as hearsay unless content is necessary to explain why or how officers proceeded, Ketcham, 162 N.E.2d 247; Newbauer, App., 569 N.E.2d 759.); Bates-Smith, 108 N.E.3d 399 (Ind. Ct. App. 2018) (detective's testimony relating verbal and non-verbal statements made by CI was not offered for truth of matter asserted, but was based on information gained from CI offered solely to explain the course of the investigation).

TITLE: NONE
INDEX NO.: O.9.a
CITE: NONE
SUBJECT: Patterson Hearsay Exception Decisions (law prior to 9/26/91)
HOLDING: The following decisions previously in the Case Bank have been deleted due to the Ct.'s ruling abolishing the Patterson hearsay exception, but may be useful in delineating the parameters of the decision in Modesitt, 578 N.E.2d 649. B.M.P., 446 N.E.2d 17, Brewster, 450 N.E.2d 507, Crafton, 450 N.E.2d 1042. Edwards, 500 N.E.2d 1209, Fletcher, 442 N.E.2d 990, Gaunt, 457 N.E.2d 211, Harden, 441 N.E.2d 215, Hendricks, 562 N.E.2d 725, Hodges, 524 N.E.2d 774. Holmes, 480 N.E.2d 916. Jackson, 485 N.E.2d 144, James, 481 N.E.2d 417, LaBine, 447 N.E.2d 592. Laswell, 494 N.E.2d 981. Oldham, 467 N.E.2d 419. Ruel, 500 N.E.2d 1274, Smith, 465 N.E.2d 702. Steele, 475 N.E.2d 1149, Stone, 536 N.E.2d 534. Thurston, 472 N.E.2d 198, Traver, 568 N.E.2d 1009.

O. EVIDENCE

O.9. Hearsay

O.9.b. Hearsay statements under Modesitt and progeny - generally (IRE 801)

TITLE: Alva v. State
INDEX NO.: O.9.b.
CITE: (01-04-93), Ind., 605 N.E.2d 169
SUBJECT: Violation of previously existing Patterson rule
HOLDING: Admission of mother's testimony as to what testifying child told her was violation of previously existing Patterson rule, because although child acknowledged talking to mother at some point, he could not remember what he told her or when conversation took place; (granting transfer & reversing memorandum Ct. of Appeals decision). D's trial for child molesting occurred prior to abolition of Patterson rule in Modisett, 578 N.E.2d 649. Although child gave some information about showers he took with D, mother's testimony about what child told her was much more explicit & detailed than child's in-Ct. testimony. Ct. found child's testimony fell short of previous requirement that before hearsay testimony could be admissible, in addition to declarant being present & available for cross-examination, declarant must acknowledge making statement & offer live testimony consistent with it. Error in admitting testimony required reversal, because D's intent to gratify sexual desires was at issue, & mother's testimony as to what child said went far beyond what child testified to in this regard, Givan, J., dissenting.

TITLE: Anderson v. Scott
INDEX NO.: O.9.b.
CITE: (3/14/94), Ind. App., 630 N.E.2d 226
SUBJECT: IRE 801(d)(1)(A) - Impeachment with prior statement
HOLDING: In personal injury case, Tr. Ct. committed harmless error by permitting Ds to impeach their own witness with her alleged prior statements concerning Plaintiffs' bribery. There is no point to contradicting or impeaching witness who has not testified adversely to proponent of witness. If testimony of witness is innocuous, as it was in present case, it makes no difference whether trier of fact believes witness. Only point to introducing prior statement of witness would be to suggest truth of statement favorable to proponent, i.e., to use prior statement substantively in manner previously allowed in Patterson, 324 N.E.2d 482, but later rejected in Modisett, 578 N.E.2d 649. Prior statement will not be deemed hearsay when declarant testifies at trial or hearing, subject to cross-examination concerning statement, & statement is inconsistent with declarant's testimony, & was given under oath subject to penalty of perjury at trial, hearing, or other proceeding, or in deposition. IRE 801(d)(1)(A). Here, because witness' prior inconsistent statements were not made under oath as required by Modisett, they were inadmissible as substantive evidence. Also, since witness's testimony was not otherwise averse to Ds, there was no basis upon which to seek to impeach her testimony. However, error deemed harmless under circumstances.

RELATED CASES: Hilton, 648 N.E.2d 361 *overruled on other grounds by* State v. Wilson, 836 N.E.2d 407 (Ind. 2005) (D failed to establish proper foundation for impeachment of witness with his allegation that he shot victim pursuant to IRE 613(b) & 801(d)(1); D did not cross-X witness about admission, & witness thus made no statement that might be inconsistent with recollection of witness who would have testified about prior inconsistent statement).

TITLE: Bassett v. State
INDEX NO.: O.9.b.
CITE: (10-28-08), Ind., 895 N.E.2d 1201
SUBJECT: Prior consistent statements - when admissible for rehabilitation vs. substantive evidence
HOLDING: Tr. Ct. did not abuse its discretion by allowing prior consistent statements into evidence. In situations where there is no evidence tending to implicate the declarant in the crime, the question of when the motive to fabricate arose is a sufficiently fact-sensitive inquiry that Court will defer to Tr. Ct.'s decision whether or not to admit the statement (in contrast to situations in which declarant is implicated in the crime when a motive to fabricate likely arises immediately upon the commission of the crime) Stephenson v. State, 742 N.E.2d 463, 475 (Ind. 2001). Here, the jail informant testified that D asked him to kill the prosecutor and was cross-examined on the allegation. The jail informant's wife testified that her husband told her about D's request. This testimony rebutted the express charge that the informant was lying. Even though the motive to fabricate may have occurred before the informant's statement to his wife, there is no evidence implicating the jail informant in the crimes. Thus, his statements to his wife were admissible under Rule 801 as substantive evidence. Held, judgment affirmed.

RELATED CASES: King, 61 N.E.3d 1275 (Ind. Ct. App 2016) (portions of testimony by a civilian witness and a police officer were not hearsay because it qualified as prior consistent statement under Rule 801(d)(1)); there was no improper vouching for the civilian witness's truthfulness because challenged testimony simply reported the prior statements).

TITLE: Birdsong v. State
INDEX NO.: O.9.b.
CITE: (9-4-97), Ind., 685 N.E.2d 42
SUBJECT: Written prior statements used to impeach or rehabilitate
HOLDING: In murder case, D claimed Tr. Ct. erred by admitting witness' grand jury testimony because it is hearsay & impermissibly bolstered witness' credibility. Once witness has been impeached on cross-X by reference to prior inconsistent written statement, party may rehabilitate its witness on redirect by introducing other pertinent portions of statement. Evans, 643 N.E.2d 877; Hudgins, 451 N.E.2d 1087. After witness' credibility has been attacked using portions of prior statement, the fact finder "must be permitted to determine for itself extent of inconsistencies in context." This proposition is true when alleged discrepancies relate to small details while majority of statements are consistent. Id. When prior statements are used to impeach & rehabilitate witness' they are not hearsay because they are not used to prove truth of matter asserted. Humphrey, 680 N.E.2d 836.

Here, D used grand jury testimony several times to impeach witness' testimony. State could respond to these attacks on witness' credibility by introducing testimony to put isolated inconsistencies in context. Tr. Ct. did not err in admitting testimony. Held, no error.

TITLE: Bouye v. State
INDEX NO.: O.9.b.
CITE: (7-20-98), Ind., 699 N.E.2d 620
SUBJECT: Improper admission of prior consistent statement - harmless error
HOLDING: Tr. Ct. erroneously allowed detective to read State witness's statements, as they appeared in probable cause affidavit, as evidence of witness's prior consistent statements. D challenged witness's credibility by contending that statement was made to conceal or minimize witness's involvement in murders. Because statement was made after witness's motive to fabricate arose, statement did not qualify under Indiana Evidence Rule 801(d)(1) for exclusion from definition of hearsay evidence. However, admission of statements was merely duplicative of properly admitted evidence. Thus, probable impact on jury was sufficiently minor so as not to affect substantial rights of parties. Held, conviction affirmed.

RELATED CASES: Garber,___/___ (Ind. Ct. App 2020) (because C.W.'s statements to police and emergency room physician were admitted as excited utterances, they do not qualify for any of the hearsay exclusions mentioned in Modesitt and Evidence Rule 801(d) and there was no harmful or fundamental error in admitting them).

TITLE: Brim v. State
INDEX NO.: O.9.b.
CITE: (1st Dist., 11-23-93), Ind. App., 624 N.E.2d 27
SUBJECT: Hearsay evidence admissible under Modesitt
HOLDING: In trial for battery, statement of victim (V) identifying D as her assailant, was admissible even though V could not actually remember beating or details related in statement at trial. After beating, V was in coma & suffered permanent brain damage with severe short-term memory impairment. At trial, she could not remember beating, but had no doubt D was perpetrator. When defense suggested she had no independent knowledge identifying D & that others had influenced her to identify him, State was allowed to introduce V's recorded statement given to police 10 months after beating, wherein she gave details of beating & identified D. She remembered making statement but could not actually remember beating or details she had given previously. Ct. rejected argument statement was inadmissible because witness' memory was so impaired she could not be effectively CXed. F.R.E. 801(d)(1), allows for admissibility of prior statement if declarant testifies at trial, is subject to CX about statement, & statement meets one of three additional criteria. Ct. looked to U.S. v. Owens (1988), 484 U.S. 544, where Ct. held F.R.E. 801(d)(1)(C) CX requirement is satisfied where declarant is on stand, under oath, & responds willingly to questions. Effect produced by declarant's assertion of memory loss was often very result sought to be elicited on CX & could be effective in destroying force of prior statement, so admission of statement did not deny right to confrontation. Here, Ct. found Owens persuasive, because V was available for CX in same way, & D effectively attacked her credibility on CX by demonstrating her severe memory impairment. Statement was admissible to rebut charge of improper influence, & to establish identity. Held, judgment affirmed.

TITLE: Brown v. State
INDEX NO.: O.9.b.
CITE: (8/7/96), Ind., 671 N.E.2d 401
SUBJECT: IRE 801(d)(1)(B) - prior consistent statements
HOLDING: Fact that co-D did not recall very clearly conversation in which, according to witness, co-D implicated himself & D in murder, did not preclude witness' testimony concerning those prior statements, offered to rebut charge of recent fabrication. Opportunity to cross- examine declarant is requirement for prior statement to be admissible under IRE 801(d)(1). When witness (out-of-court declarant) denies having any made statement in question or denies having any memory of having done so, statement is inadmissible as substantive evidence, because it obviously cannot be then cross-examined. Watkins, 446 N.E.2d 949. Since co-D did not deny making statements but stated that he did not remember exactly what was said, he is deemed available for cross-examination regarding those statements as required for their admissibility.

D also claimed prior statements made by co-D were not admissible because they were not "consistent" with witness' testimony & therefore did not fall within IRE 801(d)(1)(B). Trial testimony & prior statement need not be entirely consistent for purposes of admission of prior statement under IRE 801(d)(1)(B). Willoughby, 660 N.E.2d 570. Here, assuming admission of co-D's prior out-of-court statement that he & D did not kill murder victims was erroneous because of statement's inconsistency with co-D's trial testimony as State's witness that he & D acted alone in killing, D's substantial rights were not affected so as to require reversal of convictions; inconsistencies actually benefitted D by casting doubt on co-D's credibility & by indicating D did not do killing. Held, conviction affirmed.

RELATED CASES: Thomas, App, 749 N.E.2d 1231 (Ct. declined to hold that every lapse of memory by witness amounts to fabrication under IRE 801(d)).

TITLE: Cooley v. State
INDEX NO.: O.9.b.
CITE: (6/27/97), Ind., 682 N.E.2d 1277
SUBJECT: Abrogated Patterson Rule - present & available witness
HOLDING: D claimed his girlfriend's statement to police that D had bought drugs to sell was inadmissable hearsay. Because girlfriend's statement was one made to police on prior occasion out of court & offered to prove matters contained in that statement, Ct. concluded that it fell within definition of hearsay. See IRE 801(c).

At one time, prior statements made by witnesses who were available to testify in court under oath were excepted from hearsay. Patterson, 324 N.E.2d 482. In 1991, after recognizing many concerns brought about by application of Patterson doctrine, Ind. S. Ct. abandoned Patterson Rule & adopted Fed. Rule 801(d), which applies to prior statements by witnesses. Modisett, 578 N.E.2d 649; See now IRE 801(d), which governs admissibility of prior statements made by witnesses.

State argued that girlfriend's statement fell under IRE 801(d)(2)(A), a statement by D offered against D, & therefore excluded from hearsay. Rejecting this argument, Court held that statement was hearsay where witness was testifying about her prior unsworn statements, even if her prior statements purported to relate what D told her, & were offered against D. However, error in admitting hearsay was harmless. Held, conviction affirmed.

TITLE: Corbally v. State

INDEX NO.: O.9.b.

CITE: (3/19/2014), 5 N.E.3d 463 (Ind. Ct. App 2014)

SUBJECT: Prior consistent hearsay statements inadmissible hearsay - vouching; course of investigation

HOLDING: In burglary, rape, and criminal deviate conduct prosecution, Tr. Ct. improperly allowed police investigator to testify to consistent out-of-court statements made by the complaining witness (C.W.). Investigator testified as to what C.W. had told her about the attack during an interview conducted the day after it occurred. D's attorney objected, arguing the State was asking investigator to relate hearsay, but withdrew the objection after she told the court she could not stipulate to C.W.'s credibility.

Tr. Ct. erred in telling defense attorney that any challenge to C.W.'s credibility allowed the State to introduce prior consistent statements by her. Where, as here, there has only been a general impeachment of a witness's credibility, then prior consistent statements by the witness are hearsay and not admissible as substantive evidence. D did not make any express or implied charge that C.W. fabricated her testimony or that she was acting under improper influence or motive. See Ind. Evidence Rule 801(d)(1).

Court also rejected State's argument that investigator's testimony relating C.W.'s statements was admissible as non-hearsay "course of investigation" evidence, introduced to counteract D's contention that police acted too hastily in apprehending him. While the need for this type of evidence is slight, the likelihood of misuse is great. Kindred v. State, 973 N.E.2d 1245 (Ind. Ct. App 2012). Investigator almost completely rehashed the grisly details of the crimes as already testified to by C.W. Such evidence was entirely irrelevant to the course of the investigation, and it was not admissible as "course-of-investigation" evidence. But erroneous admission of this improper bolstering evidence was harmles, as there is overwhelming independent evidence of D's guilt. Held, judgment affirmed in part, reversed in part on other grounds.

RELATED CASES: Townsend, 33 N.E.3d367 (Ind. Ct. App 2015) (phone calls consistent with victim's trial testimony should not have been admitted but the error was harmless; there was no allegation victim fabricated her testimony, so criteria for admission under Evid. Rule 801(d)(1)(B) weren't met and the statements were inadmissible hearsay).

TITLE: Davis v. State
INDEX NO: O.9.b.
CITE: (8/6/2014), 13 N.E.3d 939 (Ind. Ct. App 2014)
SUBJECT: Prior inconsistent statement concerning identification admissible
HOLDING: In attempted murder and robbery prosecution, Tr. Ct. did not abuse its discretion in admitting State witness's prior statements to police identifying D as one of two individuals who robbed and assaulted victim. A juvenile told the police she witnessed D commit a brutal robbery, but at trial she could not recall the event. Her statement to police was admissible under Ind. Evid. Rule 801(d)(1)(C), which provides that out-of-court statements are not hearsay when the declarant testifies at trial and is subject to cross-examination concerning the statement, which is "one of identification of a person made shortly after perceiving the person. Here, witness testified at trial, was subject to cross-examination concerning her out-of-court statements, and Tr. Ct. was free to believe or disbelieve her testimony and assess her credibility. Held, judgment affirmed.

RELATED CASES: Beasley, 30 N.E.3d 56 (Ind. Ct. App 2015), sum. aff'd 46 N.E.3d 1232 (Ind. 2016) (State witness's prior statements to police identifying D as one of two individuals who shot him was admissible under IRE 801(d)(1)(C).

TITLE: Evans v. State
INDEX NO.: O.9.b.
CITE: (11-23-94), Ind., 643 N.E.2d 877
SUBJECT: Prior statements - Rule 801(d)(1)(b)
HOLDING: Ct. held that statement to police, but not deposition, was admissible as prior consistent statement offered to rebut charges of improper motive, F.R.E. 801(d)(1)(b). Declarant must have made prior consistent statement before alleged improper motive arose. Here, statement to police came before witness reached plea agreement with State & was admissible under Rule 801(d)(1)(b). However, witness was deposed after making deal with State, thus his deposition was admissible only under doctrine of completeness. Where witness is accused of having improper motive for testifying, evidence that witness said same thing out-of-court with same improper motivation has little probative value & should not be admitted. Held, Tr. Ct. affirmed.

TITLE: Garber v. State
INDEX NO.: O.9.b.
CITE: (8/4/20), Ind. Ct. App., 152 N.E.3d 642
SUBJECT: Trial court's admission of out-of-court statements and other testimony affirmed
HOLDING: In Defendant's trial for rape and battery, trial court did not abuse its discretion in admitting testimony regarding out-of-court statements made by complaining witness (C.W.), who also testified. The evidence at issue was bodycam footage of C.W.'s statement to police at the scene and testimony from one of the officers that C.W. yelled she had been raped as well as emergency room physician's testimony that C.W. told her she was digitally penetrated. The physician additionally testified that she believed people seeking medical care were honest for the most part and did not really have a reason to lie. In Modesitt v. State, 578 N.E.2d 649 (Ind. 1991), the Indiana Supreme Court surveyed law from other states and Federal Rule of Evidence 801(d)(1) to hold that a prior statement of a testifying declarant is admissible under a few specified circumstances and also clarified its decision "did not affect the existing, recognized hearsay rule and its exception." The Court of Appeals held that because C.W.'s statements were admitted as excited utterances, they do not qualify for any of the hearsay exclusions mentioned in Modesitt and Evidence Rule 801(d) and there was no harmful or fundamental error in that regard. The Court further held that while the emergency-room physician's testimony came close to crossing the line into impermissible vouching, it did not quite rise to that level because rather than specifically opining that C.W. was telling the truth, she offered only a general observation on how emergency room patients behave based on her experience.

TITLE: Horan v. State
INDEX NO.: O.9.b.
CITE: (6/27/97), Ind., 682 N.E.2d 502
SUBJECT: I.R.E. 801(d)(1)(B) - prior consistent statements not hearsay
HOLDING: State called witness & questioned him regarding D's role in murder. State also elicited testimony that State had furnished witness with lodging, food, & transportation in connection with his trial testimony. On cross-examination, D questioned witness regarding State's furnishing him lodging & food. State later recalled witness & sought to introduce transcript of his interview with police shortly after victim's death. Tr. Ct. permitted State to question witness as to his answers to questions during police interview. Party calling declarant as witness cannot trigger its own right to present prior consistent statements; opponent must take some line of attack that implies motive to fabricate. D claimed State's direct examination of witness "triggered" use of prior consistent statement, which is impermissible pursuant to I.R.E. 801(d)(1). Ct. believed Tr. Ct. might have found D's line of questioning to suggest State was providing something more than just lodging, food & travel in connection with trial. It was within Tr. Ct.'s discretion to conclude that this line of questioning at least implicitly charged witness with motive to fabricate his testimony.

D claimed his line of questioning only minimally impeached witness without implying recent fabrication or improper motive. To require judge to admit all records purporting to be prior consistent statements when party minimally impeaches witness & when there is no clear charge of recent fabrication would undermine very purpose of excluding prior consistent statements. Christmas, 759 F.2d 1284. However, issue is extent to which questions which impeach witness for lack of credibility also imply charge of recent fabrication. Also, fact that counsel may not have intended to imply that witness' story was fabricated is irrelevant if that inference fairly arises from line of questioning, he pursued. Once implied charge of recent fabrication is made, adversary is entitled to present prior consistent testimony as substantive evidence. Owens, 659 N.E.2d 466. Held, no abuse of discretion.

RELATED CASES: Holsinger, 750 N.E.2d 354 (hearsay statement was admissible under 801(d)(1)(B) because it was consistent with declarant's trial testimony; Ct. does not automatically find that participant in crime has motive to fabricate).

TITLE: Kielblock v. State
INDEX NO.: O.9.b.
CITE: (2nd Dist., 1-18-94), Ind. App., 627 N.E.2d 816
SUBJECT: Tape of prior conversation not inadmissible hearsay
HOLDING: In trial for child molesting, it was not error, nor violation of hearsay rule adopted in Modesitt, 578 N.E.2d 649, to admit tape of conversation between complaining witness (CW) and welfare worker. After CW testified and was excused, witness testified that she had recorded conversation with CW, and tape and transcription of conversation were both admitted. D argued exhibits contained issues not covered on direct exam, precluding CX on those issues, and that exhibits were merely cumulative. He also argued evidence was admitted for single purpose of bolstering D's credibility by repetitive testimony, and that CW was unavailable for CX when it was admitted. Ct. distinguished Moran, App., 604 N.E.2d 1258, trans. denied, that held admission of statements bolstered CW's credibility through drumbeat of repetition and denied D's right of confrontation. Tr. Ct. here specifically found evidence was admitted to rebut D's expressed or implied charge of recent fabrication or improper influence or motive, although opinion does not address how this charge arose. Welfare worker did not repeat any of conversation with CW but testified only that she had recorded conversation. While exhibits were admitted after CW testified, she was still under subpoena and was not in courtroom due to separation of witnesses. Because CW was subject to CX concerning statement, and because consistent statement was offered to rebut implied charge of recent fabrication or improper influence or motive, it was not error to admit tape and transcript.

RELATED CASES: Norris, 53 N.E.3d 512 (Ind. Ct. App 2016) (no fundamental error or impermissible "drumbeat of repetition" by letting two witnesses testify about matters related to child's abuse where child's videotaped statement was played after the witnesses testified; testimony confirmed but did not elaborate on child's statement nor embellish the child's allegations); Steward, App., 636 N.E.2d 143 (Six statements about when, where, and how they learned about allegations of molestation by D were not impermissible "drumbeat repetition" of CW's prior statements, because witnesses did not repeat allegations, but merely explained actions and events taking place after they were informed of them.

TITLE: Lovitt v. State
INDEX NO.: O.9.b.
CITE: (5th Dist., 11-04-09), (Ind. App. 2009) 916 N.E.2d 1040
SUBJECT: Defense witness's prior consistent statements inadmissible
HOLDING: Tr. Ct. did not abuse its discretion in excluding defense witness's testimony offered to bolster D's girlfriend's testimony concerning the events that led to traffic stop and D's arrest. Indiana Evidence Rule 801(d)(1)(B) provides that prior statements consistent with trial testimony are admissible if offered to rebut an express or implied charge of recent fabrication or improper influence or motive and made before motive to fabricate arose. Here, State did not imply that D's girlfriend fabricated her testimony, only that she might not recall the events accurately due to her consumption of alcohol. Challenging a witness's recall of events due to faulty memory is not necessarily an "implied charge of recent fabrication" under Evidence Rule 801(d)(1)(B). Thomas v. State, 749 N.E.2d 1231 (Ind. Ct. App 2001). Moreover, given girlfriend's personal relationship with D, her motive to fabricate arose before she spoke with witness about events leading to D's arrest. Court concluded that if there was any error in excluding this testimony, such error was harmless. Held, judgment affirmed.

TITLE: Marshall v. State
INDEX NO.: O.9.b.
CITE: (1st Dist., 12-8-94), Ind. App., 643 N.E.2d 957
SUBJECT: Prior statements - rebutting charge of recent fabrication
HOLDING: Prior consistent statement given by victim to her friend was admissible at trial to rebut D's charge of recent fabrication. Statement complied with Modesitt v. State, Ind., 578 N.E.2d 649, to extent that declarant testified at trial, was available for cross examination concerning statement, & was consistent with declarant's testimony, offered to rebut charge of recent fabrication. However, Ind.Evidence Rule 801(d)(1)(b) also requires that statement must have been made before motive to fabricate arose, Evans v. State, 643 N.E.2d 877. Here, evidence supported conclusion that victim had uttered her consistent statement to friend before she allegedly had motive to fabricate her testimony. Declarant's alleged absence for purpose of cross examination on prior statement was attributable to D's failure to recall her for re-cross to explore content of her statement to friend & circumstances under which statement had been made. Held, conviction affirmed.

RELATED CASES: Willoughby, 660 N.E.2d 570 (although initial statement to police was not completely consistent with his testimony at trial, statement was sufficiently consistent to rebut inference of fabrication in exchange for lenient treatment).

TITLE: Modesitt v. State
INDEX NO.: O.9.b.
CITE: (09/26/91), Ind., 578 N.E.2d 649
SUBJECT: Patterson hearsay exception overruled
HOLDING: Prior statement is admissible as substantive evidence only if declarant testifies & is subject to cross-examination, & statement 1) is inconsistent with trial testimony & was previously given under oath; or 2) is consistent but offered to rebut charge of recent fabrication or improper influence or motive by declarant; or 3) is one identifying person & made after perceiving person; overruling long-standing hearsay exception created in Patterson 324 N.E.2d 482. At D's trial for child molesting, alleged victim's (AV)'s mother, caseworker & psychologist all testified as to what AV had told them about molest. Witnesses all testified in some detail, & when child took stand, she corroborated majority, but not all, of acts described, & was not asked where she made prior statements or whether they were true.

Ct. found that simple rule first set forth in Patterson had been modified beyond recognition, but goal of exception was desirable. Ct. found Federal Rule of Evidence 801 to be well-reasoned approach, & adopted portions, leading to rule above. Ct. also held that opinion would not be retroactive for any pending or previously determined cases, & would not affect existing, recognized hearsay rule & its exceptions.

RELATED CASES: Appleton, 740 N.E.2d 122 (after State witness testified that D had not even been present at scene of crime, Tr. Ct. erred in permitting prosecution to impeach this witness by reading line-by-line from prior inconsistent pretrial statement in which witness described D's participation; see full review at O.6.a); Moran, App., 604 N.E.2d 1258, (Statement of AV given to welfare worker, admitted through welfare supervisor after AV had testified both during State's case & on rebuttal & had been excused, was inadmissible under Modisett because once witness has left stand & not is in Ct. Room, he/she is "unavailable" for purposes of analysis).

TITLE: Sturgeon v. State
INDEX NO.: O.9.b.
CITE: (11-18-99), Ind., 719 N.E.2d 1173
SUBJECT: Prior consistent statement admissible - no motive to fabricate
HOLDING: Tr. Ct. did not abuse its discretion in admitting State witness's statement given to police as evidence of prior consistent statement. D argued that testimony was inadmissible under Indiana Evidence Rule 801(d)(1)(B) because at time witness made statement, he had motive to fabricate. Witness bought drugs for victim prior to murder & drove victim's car to get drugs. Following murder, witness helped move victim's body. Police informed witness that he could be charged in connection with victim's murder before he gave statement.

In cases where declarant was D or Co-D, motive to fabricate likely arises immediately upon commission of crime. Bouye, 699 N.E.2d 620. Where, as here, declarant became involved in crime after it was committed, role of timing is not as clear. While acknowledging possibility of motive to fabricate on witness's part since he knew he could be charged in connection with murder & since he participated in certain criminal acts surrounding murder, Ct. found no evidence which tended to implicate witness in murder & therefore no evidence he had motive to lie about D's involvement when questioned. Held, no error.

RELATED CASES: Bullock, App., 903 N.E.2d 156 (where the declarant knew he was in just as much trouble as the D at the time he gave his statement to the police, his motive to fabricate and shift blame had already arisen and his statement was inadmissible as a prior consistent statement; error harmless).

TITLE: Tome v. U.S.
INDEX NO.: O.9.b.
CITE: 513 U.S. 150; 115 S.Ct. 696; 130 L. Ed. 2d 574 (1995)
SUBJECT: Evidence - prior consistent statements - FRE 801
HOLDING: Under Fed.R.Ev. 801(d)(1)(B), a witness' prior consistent statements are admissible to rebut charge of recent fabrication or improper influence or motive only if they were made before the alleged fabrication, improper influence, or motive arose. Prior consistent statements that predate existence of influence or motive to fabricate provide square rebuttal of charge that testimony was contrived as consequence of that motive. If rule were interpreted to permit introduction of prior statements to rebut every implicit charge that witness' in-court testimony results from recent fabrication, improper influence or motive, whole emphasis of trial could shift to out-of-court statements rather than in-court evidence. Breyer, Rehnquist, O'Connor & Thomas, JJ., DISSENT.

O. EVIDENCE

O.9. Hearsay

O.9.b.1. Prior Patterson exceptions (see also O.9.b)

TITLE: Carr v. State

INDEX NO.: O.9.

CITE: (7/23/2018), 106 N.E.3d 546 (Ind. Ct. App 2018)

SUBJECT: D's wrongdoing made statement of unavailable declarant admissible under 6th Amendment and Indiana Rules of Evidence

HOLDING: Holding: D forfeited his 6th Amendment right to confront his victim at trial because his wrongdoing procured her absence from trial. That same wrongdoing made her statement also admissible under the Indiana Rules of Evidence. D stabbed S.G., his former girlfriend, in the eye with a steak knife. At the hospital, S.G. told Detective Tobi Cobain that D was the perpetrator. The State charged D with, inter alia, battery resulting in serious bodily injury, a Level 5 felony, and criminal confinement while armed with a deadly weapon, a Level 3 felony. The trial court entered a no-contact order. Over the next several months, D violated the order by writing letters of apology to S.G. and attempting 384 phone calls to her, 46 of which were completed. In these communications, D asked S.G. to change her story and to not appear at trial. He promised her $20,000, and also said his parents would support her financially if she was "loyal." In November of 2017, the State personally served S.G. with a subpoena to appear at trial. However, the State soon lost contact with her, so in the six weeks leading up to trial, the State called her several times, contacted her parents, and visited her last known address, all to no avail. S.G. did not appear at trial. At trial, S.G.'s statement to Detective Cobain were admitted. D forfeited his right to confront S.G., and thus her statements to Detective Cobain were admissible, because of his wrongdoing. See Crawford v. Washington, 541 U.S. 36, 62 (2004) (relying on Reynolds v. United States, 98 U.S. 145, 158-59 (1878)). He tried to influence her testimony through letters of apology and promises of financial support. The same behavior allowed admission of the statement through Indiana Rule of Evidence 804(b)(5), which provides that a statement from an unavailable witness is admissible if the party against whom it is offered "intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying." Held, judgment affirmed.

TITLE: Ridenour v. State
INDEX NO.: O.9.b.1.
CITE: (4th Dist., 08-15-94), Ind. App., 639 N.E.2d 288
SUBJECT: Statements to welfare worker not inadmissible hearsay
HOLDING: Statements of two complaining witnesses given to welfare worker were properly admitted in D's trial for child molesting, because both children testified at trial & were available to be cross-examined regarding statements, & they were admissible under Rule 801 to rebut charge of recent fabrication. Children were interviewed by welfare worker who tape-recorded statements. Both complaining witnesses were deposed by defense counsel, & when they testified at trial & at second deposition, they conceded that first deposition was read through with foster-mother & answers to several material questions were changed. Witnesses also admitted trial testimony differed from original responses. After each girl testified & was cross-examined (CX), she was excused by Tr. Ct. Defense did not CX either about tape-recorded statements they gave to welfare worker. After children testified, welfare worker testified as to interviews & tape-recording. State then offered taped statements, made before depositions, as prior statements consistent with trial testimony under Modesitt, Ind., 578 N.E.2d 649. Ct. rejected D's argument that statements were admitted in error because witnesses were not then available for CX about them. Rule 801(d)(1) allows admission of statements if declarant testifies at trial & is subject to CX concerning statement, statement is consistent with trial testimony & is offered to rebut charge of recent fabrication. In Moran, App., 604 N.E.2d 1258, prior consistent statement was ruled inadmissible because witness had been dismissed & was no longer available for CX. Ct. distinguished Moran because, even though statements were admitted after witnesses were excused, both witnesses testified that they had given statements containing essentially same information as that testified to at trial. D had opportunity to CX witnesses about statements when they were on stand, & chose not to. Held, statements properly admitted & convictions affirmed.

O. EVIDENCE

O.9. Hearsay

O.9.b.2. Availability of Declarant (IRE 803 and 804)

TITLE: Crawford v. Washington
INDEX NO.: O.9.b.2.
CITE: 541 U.S. 36 (2004)
SUBJECT: Hearsay, Confrontation Clause, Cross-examination
HOLDING: The Confrontation Clause of the 6th Amendment requires that an unavailable witness' out-of-court statements may not be admitted against a D unless the D has the opportunity to confront and cross-examine the witness.

Testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the D has had a prior opportunity to cross- examine. Other "indicia of reliability" are not an adequate substitute for cross-examination. The Confrontation Clause commands "that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

The Court overturned Ohio v. Roberts, 448 U.S. 56 (1980), which held that an unavailable witness's out-of-court statements could be admitted so long as the statement has adequate indicia of reliability, either falling within a firmly rooted hearsay exception or bearing particularized guarantees of trustworthiness. The Court noted that lower courts have applied Ohio v. Roberts to reach inconsistent results, finding "indicia of reliability" in contradictory circumstances. The Roberts test, allowing a jury to hear evidence untested by the adversarial process, based on a judicial determination of reliability, "replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one."

"Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a D is obviously guilty. This is not what the Sixth Amendment prescribes."

RELATED CASES: Ohio v. Clark, 135 S. Ct. 2173 (2015) (child's statement to teacher, i.e., non-law enforcement personnel, was non-testimonial; see full review, this section); Beldon, App., 906 N.E.2d 895 (doctor's busy work schedule was not sufficient to circumvent the constitutional right to confrontation; admission of deposition in lieu of testimony was harmless error).

TITLE: McCandless v. Vaughn
INDEX NO.: O.9.b.2.
CITE: 172 F.3d 255 (3d Cir. 1999)
SUBJECT: Unavailability -- State's Failure to Follow Up on Leads
HOLDING: When prosecution seeks to admit prior testimony of key witness, Confrontation Clause requires showing that state took affirmative and real steps to secure the witness for trial before asserting unavailability. Even remote possibility, as long as it is genuine, of securing witness is sufficient to trigger duty to pursue him. The more important the witness' testimony to the state and the more damaging to the defense, the greater the state's duty to secure witness' attendance at trial. Here, witness was alleged accomplice for whom state had facilitated release on bail, and for whom state had not sought change in bail conditions despite two previous failures to appear. Authorities checked police and prison records for signs of witness, and visited his home twice, once slipping a subpoena under the door. Witness' wife told authorities she had met with witness in another state two weeks before trial, and they asked phone company to turn over her phone records, but when phone company refused to do so without warrant, no warrant was sought. State did not pursue witness in other state, nor contact family, including father, who served as surety for witness' bond. Court finds these "half-hearted efforts" and failures to act insufficient to make showing of unavailability so as to justify admission of witness' prior testimony.

TITLE: Sapp v. Commonwealth
INDEX NO.: O.9.b.2.
CITE: 263 Va. 415, 559 S.E.2d 645 (Va. 2002)
SUBJECT: Unavailability of Witness - Vague Fears & Refusal
HOLDING: A Tr. Ct. abused its discretion by finding two state's witnesses who said they were afraid to testify to be unavailable, where court did not inquire into nature and character of alleged threats and did not use "appropriate judicial pressure" to test witness' resolve by ordering them to testify and considering use of contempt power. Here, witnesses testified they did not feel safe testifying because of "hearing talk here and there on the street." Rather than questioning them further, the Court remarked, "I can understand where you're coming from," and assured them that he would not put them in jail for refusing to testify.

TITLE: U.S. v. Torrez-Ortega
INDEX NO.: O.9.b.2.
CITE: 184 F.3d 1128 (10th Cir. 1999)
SUBJECT: Prior Inconsistent Statement -- Availability for Cross-Examination
HOLDING: Immunized witness who asserts illegitimate claim of privilege and refuses to answer questions at trial is not sufficiently available for cross-examination to satisfy 6th Amendment confrontation clause and Fed. R.Ev. 801(d)(1)(A). Fact that witness was immunized, so that his assertions of privilege were invalid, does not make him legally available for cross-examination, since he refused to answer any questions. Tr. Ct. should hold in camera hearing to determine whether witness will refuse to testify and submit to cross- examination. If the answer is no, court should determine whether prior statement has sufficient indicia of reliability to be admissible under confrontation clause pursuant to Ohio v. Roberts, 448 U.S. 56 (1980), and qualifies for admission under firmly rooted hearsay exception.

O. EVIDENCE
O.9. Hearsay
O.9.b.3. Other

TITLE: Lambert v. State
INDEX NO.: O.9.b.3.
CITE: (2/23/89), Ind., 534 N.E.2d 235
SUBJECT: Patterson - failure to acknowledge
HOLDING: Hearsay statements which declarant did not acknowledge were improperly admitted as substantive evidence. D was convicted of rape & criminal deviate conduct, & his conviction affirmed on appeal. On petition for rehearing, D argues that his conviction resulted from evidence erroneously admitted under Patterson. Where hearsay evidence is sought to be admitted under Patterson, declarant must acknowledge having made statements. [Citations omitted.] However, declarant's denial of truth of matters asserted in out-of-Ct. statement does not preclude its admission. [Citations omitted.]

Identification of D as victim's attacker substantially rested upon police testimony: 1) that victim declared after incident that she had seen D inside nearby van shortly after assault; & 2) that upon being taken to D's home, victim said, "that's him, & he still has the shirt on that he had on when he raped me." However, at no time did victim acknowledge having made these statements to police. She testified that she was not able to see who was driving van & denied telling police that she could. Furthermore, she testified that when she was taken to D's home, she did not personally observe D, but identified his picture when shown his driver’s license. Because victim did not acknowledge statements related by police, they were erroneously admitted. Error is not harmless, because of nature of testimony & D's presentation of strong alibi defense. Held, rehearing granted, reversed & remanded for new trial.

O. EVIDENCE
O.9. Hearsay
O.9.c. Exceptions

TITLE: Price v. State
INDEX NO.: O.9.c.
CITE: (05/28/92), Ind., 591 N.E.2d 1027
SUBJECT: Victim's statements to others not inadmissible hearsay
HOLDING: Witnesses' testimony as to victim's statements that D shot her was not inadmissible hearsay & did not violate D's constitutional right to confrontation. At D's trial for attempted murder, several witnesses testified as to victim's statements. Statements were apparently made immediately after incident, & Tr. Ct. ruled that they fell within excited utterance or res gestae exceptions to hearsay. Prior to trial, victim submitted affidavit that if forced to testify, she would claim privilege not to answer. She was present during most of trial, but at end, she was admitted to psychiatric hospital. Psychiatrist testified she was suffering from post-traumatic stress disorder, had amnesia regarding shooting, was sent into panic when reminded of episode, & would not be able to testify in foreseeable future. Hearsay could be introduced against criminal D without giving him right to confrontation if: (1) hearsay possesses sufficient indicia of reliability, & (2) either declarant is unavailable despite government's good faith effort to secure attendance, or utility of confrontation is remote. Ct. found first requirement was met because excited utterance falls within group of "firmly rooted hearsay exceptions." Ct. also found both alternatives of 2nd requirement were met. Victim was "unavailable" both because of her anticipated assertion of 5th Amend., & because her mental illness prevented her from testifying. Utility of confrontation was also found minimal because issue in case was intent to kill, not identity, & D didn't contest statements' accuracy & affirmed them in his confession. Held, statements properly admitted & conviction affirmed.

TITLE: Webb v. State
INDEX NO.: O.9.c.
CITE: (07/9/20), Ind. Ct. App., 149 N.E.3d 1234
SUBJECT: Defendant's self-serving hearsay properly excluded
HOLDING: In burglary prosecution, trial court did not abuse its discretion in excluding an affidavit by investigating officer containing statements Defendant had made to him during the search of her apartment. Specifically, Defendant told officer she had permission from her employer's ex-boyfriend to take personal items from the employer's home as compensation for lost wages resulting from the employer's failed business. Defendant argued she was unavailable under Indiana Evidence Rule 804(a) because she exercised her right not to testify at trial. Additionally, she alleged she was entitled to present her statement from the affidavit under Evidence Rule 804(b)(3)' statements against interest hearsay exception because the statement was inculpatory and exculpatory — i.e, she admitted she "was there, but [she] had permission." Trial court properly excluded the hearsay, finding it was not against her interest and thus was not admissible under Evidence Rule 804. The Court of Appeals agreed with the State's argument that Defendant "is attempting to have her cake and eat it too," because her supposed statement against interest balances farther towards purely exculpatory rather than evenly exculpatory and inculpatory, and because she wishes to introduce an unsubstantiated hearsay claim without allowing the State a fair opportunity to cross-examine her about her claim of consent."

O. EVIDENCE

O.9. Hearsay

O.9.c.1 Present Sense Impression

TITLE: Fischer v. State

INDEX NO.: O.9.c.1.

CITE: 252 S.W.3d 375 (Tex. Crim. App. 2008)

SUBJECT: Officer's taped comments during stop not 'present sense impression'

HOLDING: Texas Court of Criminal Appeals held, in a 5-4 decision, that a, law enforcement officer's factual observations of a suspect contemporaneously dictated on his patrol-car videotape recorder, are not admissible pursuant to the "present sense impression" exception to the hearsay rule. State trooper used his dashboard-mounted video camera and body microphone to dictate observations that led to his arrest of D for driving while intoxicated. For example, after administering field sobriety tests, trooper stated into microphone that D had started too soon, lost his balance while being given instructions, stepped off the line two times, and used his hands for balance. Majority held Tr. Ct. should have excluded audio portion of the video containing trooper's narrative. Majority emphasized that the hearsay exception for present-sense impressions is "predicated on the notion that 'the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes" and that the rationale behind the exception is that "the contemporaneity of the statement with the event that it describes eliminates all danger of faulty memory and virtually all danger of insincerity." Court contrasted this foundation for the exception with the circumstances in the typical traffic stop: "[O]n-the-scene observations and narrations of a police officer conducting a roadside investigation into a suspected DWI offense are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime. . . . An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative."

TITLE: Jones v. State
INDEX NO.: O.9.c.1.
CITE: (12-20-02), Ind., 780 N.E.2d 373
SUBJECT: Present sense impression exception to hearsay rule
HOLDING: Indiana Evidence Rule 803(1) describes present sense impression to hearsay rule as "a statement describing or explaining a material event, condition, or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter." This rule requires statement to describe or explain event or condition during or immediately after its occurrence, & it must be based on declarant's perception. Here, in murder prosecution, D argued that Tr. Ct. erroneously excluded statement made by victim shortly before she was killed. Night before victim's body was found in her apartment, a friend had walked her home. As they were walking, victim's landlord drove by. Upon seeing her landlord, victim remarked to her friend that he was her landlord & that she was afraid of him. Ct. concluded that exclusion of victim's assertion identifying person driving by as her landlord satisfied Rule 803(1) exception & was harmless error. However, victim's assertion in which she expressed fear of her landlord did not satisfy this hearsay exception because it did not describe event, condition, or transaction contemporaneously perceived. Thus, Tr. Ct. did not err in excluding second statement. Held, convictions affirmed.

Note: While second statement may arguably have qualified under then-existing mental, emotional, or physical condition exception of Indiana Evidence Rule 803(3), Tr. Ct. did not abuse its discretion in finding that statement was not material.

RELATED CASES: Hurt, 151 N.E.3d 809 (Ind. Ct. App. 8/21/2020) (present sense impression exception inapplicable where C.W. did not make her statements to police either during or immediately after she was injured, and given her multiple explanations for how she suffered the injuries to her nose and mouth, C.W. had time to deliberate before she spoke to police; also her ability to deliberate was hindered by her state of intoxicationbut she was still able to consider her responses to the officer's question); Minor, 36 N.E.3d 1065 (Ind. Ct. App 2015) (murder victim's statement that he had a gun not admissible as present sense impression because statement did not describe or explain an event or condition); Heinzman, 970 N.E.2d 214 (Ind. Ct. App 2012) (letter written by alleged child molest victim to D regarding his feelings was admissible as statement of condition; victim also testified to the accusations of molest); Amos, App., 896 N.E.2d 1163, (victim's statement to her sister over the telephone that the person on the other line was the D who told her that he wanted money and that if she did not give him some, he would kill her was admissible as a present sense impression).

TITLE: Mundy v. Angelicchio
INDEX NO.: O.9.c.1.
CITE: (11/22/93), Ind. App., 623 N.E.2d 456
SUBJECT: Present sense impression exception to hearsay rule
HOLDING: Current present sense impression rule, which is not changed by proposed IRE 803(1), provides: Under concept of res gestae, statements accompanying & describing or explaining litigated, material event, act, condition, or transaction at heart of case are admissible under present sense impression exception. To render expression or declaration of another admissible, party making it must have been so related to occurrence as to make his declaration part of it. Test seems to be that to render utterance or declaration of another admissible, it must flow from one of actors, or from one sustaining some relation to the transaction, & be so intimately connected with litigated act as to be act speaking of itself through witness, & not witness speaking words of another, employed concerning act. Spears, 401 N.E.2d 331.

Here, statement of chairman of medical review panel that doctors on panel believed that surgeon was operating on wrong side of nerve was not admissible under exception to hearsay rule for present sense impression because statement was attempt to summarize statements by other panel members & other members' statements were made while panel was reviewing written submissions.

TITLE: Stott v. State

INDEX NO.: O.9.c.1.

CITE: (8/31/21), Ind. Ct. App., 174 N.E.3d 236

SUBJECT: Erroneous admission of radio traffic recording and surveillance footage - hearsay and insufficient authentication

HOLDING: In resisting law enforcement prosecution, trial court abused its discretion in admitting an audio recording of police-officer radio traffic that began after the truck fled the traffic stop, in which anonymous witnesses spoke with law enforcement, and police officer's cellphone photographs of a restaurant's surveillance footage. Law enforcement officers were surveying an area of Indianapolis due to a "recent uptick in violence" when they saw an exchange of a handgun between two drivers at a local gas station. Officers followed the vehicles as they left to an apartment and then to a McDonald's, where the officers stopped to watch them. Eventually they conducted a traffic stop when one of the vehicles turned left with its right turn signal on. The car stopped but sped off and later crashed into a tree, with two men running out of the vehicle, including Defendant. An officer viewed the McDonald's surveillance footage, taking several pictures of the video on a cellphone. He "believed" that a man depicted in the footage, who appeared to be wearing an all-denim outfit like the driver, was Defendant. That belief was based on a picture of Defendant the officer had previously received via "an e-mail communication."

Court of Appeals held that the radio traffic audio recording constituted inadmissible hearsay and State failed to demonstrate that the present sense impression hearsay exception applied. It was unclear whether the witnesses made the statements to police during or immediately after the events described or whether the witnesses personally perceived those events. And at least one anonymous declarant had time to deliberate. These circumstances distinguish the police-radio evidence here from the properly admitted hearsay evidence in the cases relied on by the State.

Further, the State did not satisfy the silent-witness theory's requirement on the issue of the admitted cellphone photographs of the McDonald's surveillance footage. The State here did not produce any evidence about the McDonald's security system or how it operated. Noting that it is "increasingly easier in today's digital age to manipulate or distort images," Court reiterated "that it is the proponent's burden to establish the strong showing of authenticity and competency for the admissibility of photographs used as substantive evidence under the silent-witness theory. The State did not do so here." Error in admission of these two pieces of evidence was not harmless, as the identity of the all-denim-wearing driver of truck was the critical issue in this case. Thus Court reversed and remanded for a new trial.

TITLE: Truax v. State
INDEX NO.: O.9.c.1.
CITE: (1st Dist., 11-06-06), Ind. App., 856 N.E.2d 116
SUBJECT: Officer's negotiation notes admissible as present sense impression
HOLDING: In attempted murder prosecution, Tr. Ct. did not abuse its discretion in admitting police officer's notes that he wrote while negotiating with D during a police standoff. D argued that notes were inadmissible hearsay pursuant to Evidence Rule 803(8) because an investigative police report is inadmissible hearsay unless introduced by the D. Even assuming officer's written notes constituted an investigative report under Rule 803(8), Ct. held that notes were admissible as a present sense impression under Evidence Rule 803(1), i.e., "a statement describing or explaining a material event, condition, or transaction, made while the declarant was perceiving the event, condition, or transaction, or immediately thereafter."

Previous Indiana criminal cases that have held evidence to be admissible under present sense impression hearsay exception have dealt with verbal statements by a declarant. However, contemporaneous nature of the event & the written report make the report admissible because it is a reliable form of hearsay. U.S. v. Santos, 201 F.3d 953 (7th Cir. 2000). Here, contemporaneous nature of officer's notes with his telephone negotiations makes notes admissible as a present sense impression pursuant to Indiana Evidence Rule 803(1). Held, judgment affirmed.

RELATED CASES: Mack, (Ind. Ct. App 2014) (informant's statement to police about what D told him inside of home was not "immediately after" the informant's perception and thus did not constitute a present sense impression).

TITLE: U.S. v. Parker
INDEX NO.: O.9.c.1.
CITE: 936 F.3d 950 (7th Cir. 1991)
SUBJECT: Statement admissible under present sense impression exception
HOLDING: D claimed that baggage handler who told officers that beige bag containing cocaine was one D had given him was inadmissible hearsay. When baggage handler responded to officer's inquiry about whether he had any luggage for D, he pointed to beige bag. Then, when D denied bag was hers, baggage handler stated: "That's the bag you gave me."

Statement was admissible under present sense impression exception to hearsay rule. FRE 803(1). Underlying rationale of exception is that substantial contemporaneity of event & statement minimizes unreliability due to defective recollection or conscious fabrication. There is no per se rule indicating what time interval between event and statement is too long under Rule 803(1). U.S. v. Blakey, 7th Cir., 607 F.2d 779. Here, interval between time when D directed baggage handler to pick up her bag on train platform & declarant's statement concerning event was extremely short & baggage handler's testimony was intrinsically reliable under circumstances. Held, no error.

RELATED CASES: Blakey, supra. (contemporaneity satisfied though time lapse may have been as long as 23 minutes).

O. EVIDENCE

O.9. Hearsay

O.9.c.2. Excited utterance

TITLE: Corder v. State
INDEX NO.: O.9.c.2
CITE: (8/20/84), Ind., 467 N.E.2d 409
SUBJECT: Hearsay exception - excited utterance
HOLDING: Admission of deceased victim's statements to neighbor that "D went crazy, beat us with a baseball bat" "I'm shot" "Stomach" was proper under excited utterance exception to hearsay rule. Exception requires: (1) startling/exciting event rendering reflective thought inoperative; (2) statement is spontaneous result of event/not result of reflective thought. Ferrier 361 N.E.2d 150; McCormick, Evidence ' 297 (2d ed. 1972). Tr. Ct. has discretion to determine whether statement is excited utterance. Walker 349 N.E.2d 161. Ct. finds statements were result of extremely traumatic event/not result of reflective thought. Held, no error.

RELATED CASES: Hammon, 829 N.E.2d 444 (if an "utterance" is "testimonial" it is admissible only if "the declarant is unavailable, & only where the D has had a prior opportunity to cross-examine; see full review at J.9); Williams, App., 782 N.E.2d 1039 (victim's statements made in emergency room after he was shot multiple times were inherently reliable, despite fact that some time had passed since he was shot); Cox, App., 774 N.E.2d 1025 (it was clear that victim was still upset by startling event, which she had reported in 911 call only minutes before. It is also reasonable to infer that startling event which caused her visible distress was physical altercation with D); Burdine, App., 751 N.E.2d 260 (CW was still under stress of startling event when she made statement implicating D, notwithstanding argument that CW's quiet demeanor, interaction with other people & nap showed that CW was no longer feeling stress); Gordon, App., 743 N.E.2d 376 (in battery prosecution, Tr. Ct. did not err in admitting testimony of police officer relating what complaining witness had told him; it was reasonable to infer that startling event that caused CW's visible distress was physical altercation with D that she described to officer); McGrew, App., 673 N.E.2d 787, summarily affirmed, 682 N.E.2d 1289 (declarant's statements to her friends, made after she traveled some distance, ordered a drink, & calmed herself, were not necessarily bereft of reflective thought; excited utterance exception inapplicable); Gye 441 N.E.2d 436 (length of time between occurrence/excited utterance & fact excited utterance made in response to inquiries are simply 2 factors to consider in determining spontaneity).

TITLE: Mathis v. State
INDEX NO.: O.9.c.2.
CITE: (2nd Dist., 01-18-07), Ind. App., 859 N.E.2d 1275
SUBJECT: Excited utterance hearsay exception - harmless error
HOLDING: In battery prosecution, trial Ct. did not err in admitting police officer's testimony regarding what complaining witness (CW) told him. For a statement to be admitted under excited utterance hearsay exception, Indiana Rule of Evidence 803(2), three elements must be shown: 1) a startling event; 2) a statement made by a declarant while under stress of excitement caused by the event; & 3) that the statement relates to the event. Fowler v. State, 829 N.E.2d 459 (Ind. 2005). The ultimate issue is whether the statement is deemed reliable because of its spontaneity & lack of thoughtful reflection & deliberation. Id. Here, D argued that CW was not under stress of excitement because CW left the house to call police, returned to the house where D was already gone, & had another person at the house with her during the time between the event & her statement to police officer. State argued that excited utterance exception was met because D was still under influence of startling event despite officer's testimony that CW began to calm down upon his arrival to the house. Ct. did not decide whether CW's testimony qualified as an excited utterance, because police officer's challenged testimony was cumulative of CW's testimony. D's conviction was supported by substantial independent evidence of guilt to satisfy Ct. that there was no substantial likelihood that alleged hearsay evidence contributed to the conviction. Thus, admission of hearsay testimony was harmless error. Held, judgment affirmed; Kirsch, C.J., dissenting, believes that admission of bolstering testimony, especially by a police officer, cannot be "harmless beyond a reasonable doubt where the entire case turns upon the credibility of two witnesses[.]"

TITLE: Porter v. State
INDEX NO.: O.9.c.2.
CITE: (2nd Dist., 10-20-98), Ind. App., 700 N.E.2d 805
SUBJECT: 911 tape properly admitted under excited utterance exception to hearsay rule
HOLDING: Tr. Ct. did not err in admitting into evidence audiotape of 911 telephone call made by victim from her home while burglary was in progress. Indiana Evid. R 803(2) specifically contemplates admission of statements relating to startling event or condition made while declarant was under stress of excitement caused by event. Yamobi, 672 N.E.2d 1344. Although admissibility under this hearsay exception is determined on case-by-case basis, it appears that 911 calls generally would fit within definition of "excited utterance" as set forth in Evid.R. 803(2). Held, judgment affirmed.

RELATED CASES: McMillen, 169 N.E.3d 437 (Ind. Ct. App. 2021) (C.W.'s recorded statements to officer that she and D "got into it" and he "abused her" were admissible under the excited utterance exception);Also RC to Wisehart, O.9.c.6 (harmless error to admit probable cause affidavit and law enforcement investigative reports in proving D's prior battery); Stinson, 126 N.E.3d 915 (Ind. Ct. App. 2019) (witness's statements pertained to the events of the stabbing, were made while the witness was under the stress caused by the stabbing and were related to the stabbing and thus admissible under excited utterance exception).

TITLE: Rogers v. State
INDEX NO.: O.9.c.2.
CITE: (4th Dist., 9-10-04), Ind. App., 814 N.E.2d 695
SUBJECT: Confrontation - hearsay; excited utterance exception
HOLDING: In battery & criminal recklessness prosecution, victim's hearsay statement to police following bar altercation fell under "excited utterance" hearsay exception & as "non-testimonial" statement to police, did not encroach on D's right to confront witnesses against him under Crawford v. Washington, 124 S.Ct. 1354 (2004). Ct. found that police officer's statement that victim was "'visibly shaking' & 'on the verge of tears' suggests he was still under the stress of the event" for excited utterance purposes. Ct. also found it "reasonable to infer" that police responded promptly to the dispatch, noting that amount of time passing between a startling event & the utterance is "relevant but not dispositive." Burdine, App., 751 N.E.2d 260.

Ct. also analyzed the victim's statement under Crawford to determine if its admission violated D's right to confrontation. Noting Crawford's vagueness in defining what constitutes "testimonial" statements, Ct. relied on Hammon, App., 809 N.E.2d 945, which held that informal questioning by police at scene of incident was not testimonial & that by its very nature an excited utterance cannot be testimonial as it is not reflective or deliberate. Ct. concluded that "an unrehearsed statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial." *Citing* Crawford at 1364. Held, judgment affirmed in part & reversed in part on other grounds.

RELATED CASES: Wallace, App., 836 N.E.2d 985 (testimony of witnesses pertaining to victim's answers identifying D as shooter, were not "testimonial" statements; no evidence to suggest that EMT & emergency room nurse's inquiries of victim were taken with an eye toward trial).

TITLE: State v. Harrell
INDEX NO.: O.9.c.2.
CITE: 348 Md. 69; 702 A.2d 723 (Md.Ct. App. 1997)
SUBJECT: Excited Utterance -- Relation to Event
HOLDING: To be admissible under excited utterance exception to hearsay rule (see Ind. R. Ev. 803(b)), statement must pertain to, be associated with, or concern the startling event that prompted it. It is not enough that it is the result of or caused by the startling event. Here, officer interrupted the beating of a woman who, a few minutes later, told him that the D had beaten her up and the car he was driving was stolen. The Maryland Court of Appeals holds that the statement about the car theft was not sufficiently related to the beating which caused the victim's excited utterance. The purpose of the relationship requirement is to ensure that the statement was truly spontaneous and not the product of reflection, which could inject such factors as self-interest, anger, or vindictiveness.

TITLE: State v. Lopez
INDEX NO.: O.9.c.2.
CITE: 122 N.M. 459; 926 P.2d 784 (N.M.Ct. App. 1996)
SUBJECT: Excited Utterances -- Another State Rejects White
HOLDING: Although the U.S. Supreme Court, in White v. Illinois, 520 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), held that excited utterances may be admitted without a showing that the declarant is unavailable, New Mexico joins states which have rejected this holding on state constitutional grounds. See State v. Ortiz, 845 P.2d 547 (Hawaii S.Ct. 1993); State v. Storch, 612 N.E.2d 305 (Ohio S.Ct. 1993). In White, the Court held that, because excited utterances fall within a firmly- rooted hearsay exception, they have sufficient guarantee of reliability. The New Mexico Court, however, was concerned that the White holding did not give sufficient value to the interests protected by the confrontation clause. As an example, it pointed to the potential for the government to distort the search for truth "by substituting a high-performance witness to the declarant's statement for a low-performance declarant." **Note:** This provides further support for Indiana attorneys who seek to persuade Indiana courts to reject White on the basis of the Indiana constitution, which explicitly requires "face-to-face" confrontation. The Indiana Supreme Court recently decided its first "excited utterance" case under the Indiana Rule of Evidence 803(2) in Yamobi v. State, 672 N.E.2d 1344. This case, however, did not address the White v. Illinois issue because the declarant- victim in Yamobi had died.

TITLE: Teague v. State
INDEX NO.: O.9.c.2.
CITE: (12/5/2012), 978 N.E. 2d 1183 (Ind. Ct. App 2012)
SUBJECT: Multiple hearsay - caller's relaying of victim's answers to 911 operator
HOLDING: In Class A felony burglary prosecution, Tr. Ct. did not err in admitting a 911 recording involving statements by a caller that were relayed from a victim. The victim had personal knowledge of the underlying incident but the caller did not. Pursuant to Ind. Evidence Rule 805, victim's statements to caller and caller's statements to 911 operator must both fall within a hearsay exception to be admissible.

Here, a bloodied victim came to neighbor/caller's house in middle of night distraught and screaming that her mother had been beaten up. Caller could also hear victim's mother screaming from her own porch next door. Neighbor immediately called 911 and answered the operator's questions. Applying excited utterance exception to hearsay rule, Court concluded that victim's arrival at caller's home was a startling event and that caller made her statements regarding the incident to the 911 operator while she was under the stress of this event. Moreover, caller had personal knowledge of, and was responding to, the startling event or condition that came to her home in the middle of the night in the person of a bloodied victimand victim's mother screaming for help. The 911 call confirms that caller was assiduous in relaying the operator's questions to victim and victim's answers in return. Even if Tr. Ct. erred in admitting 911 call into evidence, error was harmless in light of substantial independent evidence of guilt. Held, judgment affirmed.

RELATED CASES: Wallace, 79 N.E.3d 992 (Ind. Ct. App 2017), (911 call admissible under excited utterance exception, as it is apparent throughout the call that witness was not reflecting prior to making any of his statements, but was speaking in the heat of the moment in response to the excitement of an unfolding altercation).

TITLE: White v. Illinois
INDEX NO.: O.9.c.2.
CITE: 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992)
SUBJECT: Confrontation - excited utterance; no "unavilability" showing required
HOLDING: Confrontation Clause does not require, as condition for admission of out-of-court statements qualifying under hearsay exception for spontaneous declaration or statements made in course of securing medical treatment, that proponent of statements either show that declarant is unavailable or produce declarant at trial. Although Ohio v. Roberts (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, contained language that "might suggest" such a per se rule, this was negated by U.S. v. Inadi (1986), 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390. Inadi, which concerned co-conspirator hearsay, made clear that unavailability analysis was necessary only for hearsay statements made in course of prior judicial proceeding. Inadi court looked at 2 considerations which apply to present case. First, some kinds of out-of-court statements are made in contexts which provide indicia of reliability & which cannot be recreated by later in- court testimony. Because of this, unavailability requirement would do little to improve accuracy of fact-finding process while imposing considerable burdens. Where proffered hearsay has sufficient guarantees of reliability to come within firmly rooted hearsay exception, Confrontation Clause is satisfied. Court should reconsider how Confrontation Clause pertains to hearsay.

TITLE: Williams v. State
INDEX NO.: O.9.c.2.
CITE: (12/4/89), Ind., 546 N.E.2d 1198
SUBJECT: Hearsay exception - excited utterance; statement by 3-year-old child
HOLDING: Testimony about statement made by 3-year-old child to paramedics who arrived to transport child's mother to hospital was admissible under excited utterance exception to hearsay rule. D was charged with murder in shooting death of his wife. Evidence showed that D had awakened neighbors & ambulance attendants seeking help for his wife, stating that he had accidentally shot her. When ambulance personnel entered home, D's 3-year-old daughter said, "Are you here to help my mommy? I think my mommy's dead. My daddy shot her," & witnesses testified to this at trial. D argues on appeal that this testimony should not have been allowed, because child herself would not have been competent to testify due to her age. In determining whether statement fits excited utterance exception, focus is on spontaneity of utterance, not on declarant's competence as witness. McCormick, Sec. 297. Statement must be spontaneous result of event rather than result of reflective thought. Corder 467 N.E.2d 409. It is doubtful that 3-year-old left alone with mortally wounded mother would have engaged in independent thought sufficient to fabricate statement to be made to others. Even if Tr. Ct. erred in admitting testimony, D was not prejudiced. D did not dispute that he shot wife, & child's statement did not indicate that shooting was intentional or otherwise contradict D's account. Held, conviction affirmed. Shepard, C.J., CONCURS SEPARATELY; DeBruler & Dickson, JJ., CONCUR IN RESULT SEPARATELY, arguing that testimony re child's statement was erroneously admitted, but that error was harmless.

TITLE: Yamobi v. State
INDEX NO.: O.9.c.2.
CITE: (10-29-96), Ind., 672 N.E.2d 1344
SUBJECT: Hearsay exception - excited utterance & IRE 803(2)
HOLDING: For hearsay statement to be admitted as excited utterance, proponent must show that: 1) startling event occurs; 2) statement is made by declarant while under stress of excitement caused by event; & 3) statement relates to event. Ind.Evidence Rule 803(2). In applying these criteria, heart of inquiry is whether statement is inherently reliable because declarant was incapable of thoughtful reflection. Teague, 379 N.E.2d 418. Here, shooting victim's identification of D, made 30 minutes to one hour after shooting, was properly admitted as excited utterance under Ind.Evidence Rule 803(2). It was reasonable for Tr. Ct. to infer that victim-declarant was still under stress of shooting when police officer went to investigate incident. In so holding, Ct. noted that fairness to D requires assessment of whether declarant's statement was product of reflective thought.

Ct. also rejected D's argument that statements were untrustworthy because they were initiated by police officer. While form of any questioning is also factor in admissibility equation, in this case victim's response was to officer's first & only question, i.e.: "Who shot you?" Officer did not interrogate victim or otherwise suggest particular answer. Held, conviction affirmed.

RELATED CASES: Michigan v. Bryant, 131 S.Ct. 1143 (U.S. 2011) (mortally wounded crime victim's out-of-court statement identifying and describing shooter and location of shooting were not testimonial statements because they had a primary purpose to enable police assistance to meet an ongoing emergency rather than producing evidence of the crime; see full review at J.9); Hurt, 151 N.E.3d 809 (Ind. Ct. App. 8/21/2020) (although C.W. suffered a startling or stressful event, she was not under stress from that event when she spoke to police at least 15 minutes after 911 call and therefore the statement was not admissible under the excited utterance exception; she also made statements to officer in response to his questioning and was deliberating - albeit drunkenly—about how to respond to repeated questioning over the course of several minutes); Chavez, 956 N.E.2d 709 (Ind. Ct. App 2011) (declarant's statements were not admissible under excited utterance hearsay exception because there was no indication of how much time had passed between the deaths and declarant's statements); Newbill, App., 884 N.E.2d 383 (rape victim's 911 call about five hours after rape was excited utterance); D.G.B., App., 833 N.E.2d 519 (despite fact CW had undergone surgery & been put under anesthesia, Ct. determined the statement to her mother was still under the stress of excitement caused by earlier molestation); Jones, App., 800 N.E.2d 624 (while the exact time of battery could not be established, fact that child was crying when he spoke to his mother & looked like he had been crying & was upset when speaking with the officer made it reasonable to infer that child was still under stress from the startling event when he spoke to them both); Davis, App., 796 N.E.2d 798 (despite delay between battery & statements, victim was still under excitement of event given her distraught nature of crying & shaking); Marcum, App., 772 N.E.2d 998 (statement was given to police 2 2 days after alleged battery & was obviously not made under stress of excitement caused by event); Noojin, 730 N.E.2d 672 (excited utterance must be based on declarant's personal knowledge, not conjecture or speculation); Hernandez, App., 716 N.E.2d 948 (no error in allowing police officer to testify as to statements that battery victim had conveyed to him shortly after D beat her); Lieberenz, App., 717 N.E.2d 1242 (because rape incident encompassed number of hours, it is reasonable to conclude that stress caused by event could very well continue for number of hours following incident); Love, App., 714 N.E.2d 698 (victim's statement to police that D hit her was admissible even though she was given a few minutes to calm down); Taylor,

697 N.E.2d 51 (no abuse of discretion in finding that victim was under stress of excitement when she made statements); Montgomery, 694 N.E.2d 1137 (no error in admitting into evidence under excited utterance exception testimony of police officer & witness that shooting victim had identified D as assailant; declarant's statement was not product of reflective thought); Carter, Ind., 686 N.E.2d 834 (victim's statements to officer at emergency room immediately after her attack were admissible under excited utterance exception to hearsay rule); Carter, App., 683 N.E.2d 631 (statements made by D's three-year-old son shortly after shooting were admissible under IRE 803(2)); Brown, App., 683 N.E.2d 600 (no abuse of discretion in admitting victim's statement to police officer on night of battery).

O. EVIDENCE

O.9. Hearsay

O.9.c.3. Then existing mental/ emotional/physical condition

TITLE: Angleton v. State
INDEX NO.: O.9.c.3.
CITE: (10/9/97), Ind., 686 N.E.2d 803
SUBJECT: IRE 803(3) - then-existing state of mind
HOLDING: Then-existing state of mind is recognized exception to hearsay rule under IRE 803(3). Ross, 676 N.E.2d 339. If statement, the substantive content of which does not directly assert declarant's state of mind, is admitted to show only declarant's state of mind, it is not hearsay. Dunaway, 440 N.E.2d 682. Such statement is admissible, & admonishment to jury not to use statement for truth is appropriate. Bacher, 686 N.E.2d 791. Victim's statement telling seller of dogs for personal protection that she was soon to be alone was admissible hearsay under state-of-mind exception; statement expressed intent to leave her situation. Held, no error.

RELATED CASES: Jones, 780,373 (although victim's statement may arguably have qualified under then-existing mental, emotional, or physical condition exception of IRE 803(3), Tr. Ct. did not abuse its discretion in finding that statement was not material); Hicks, 690 N.E.2d 215 (statement by D's girlfriend during phone conversation that she had yelled at D so hard during argument four hours earlier that she had wet her pants did not reflect girlfriend's then-existing state of mind; testimony regarding statement was not admissible under state of mind exception); Wrinkles, 690 N.E.2d 1156 (testimony concerning phone call that witness received from victim few days before victim's murder was hearsay to extent it was offered to prove victim was fearful of D & did not fall within state of mind exception because victim's state of mind was irrelevant in prosecution).

TITLE: Bacher v. State
INDEX NO.: O.9.c.3.
CITE: (10-9-97), Ind., 686 N.E.2d 791
SUBJECT: Hearsay - state of mind exception
HOLDING: Testimony from two witnesses that murder victim had told them that she was afraid of D because her gun was missing & she suspected D had taken it, fell within state of mind exception to hearsay rule. Evidence of fear is evidence of state of mind of victim, which is not excluded by hearsay rule. Lock, 567 N.E.2d 1155. When out-of-Ct. statement is offered for two reasons, Tr. Ct. must weigh prejudicial effect of admission of statement for former purpose against value of admission of statement to jury in proving latter. Id. Here, one reason statement offered was to show fear of victim. However, another reason statement offered was to show truth of matter stated, that D took victim's gun. Although second reason was impermissible & Tr. Ct. did not permit witness to testify as to part of statement about gun, Ct. held that whole statement would have been admissible to show victim's fear of D. Held, conviction affirmed, remanded for resentencing; Boehm & Dickson, JJ., dissenting, on grounds that victim's fear of D was irrelevant to any issue.

RELATED CASES: Mull, 770 N.E.2d 308 (hearsay testimony that victim thought D was "strange," "weird," & that victim complained about D's watching her & his repeated attempts to engage her in conversation was admissible because D put victim's state of mind in issue by claiming sexual activity was consensual & that victim admitted D in her apartment); Pierce, 705 N.E.2d 173 (victim’s letters fell within Rule 803(3) state of mind exception because they showed victim was apprehensive about her relationship with D & because they were offered to controvert defense evidence that D & victim were getting along well at time of murder).

TITLE: Camm v. State
INDEX NO.: O.9.c.3.
CITE: (6-26-09), Ind., 908 N.E.2d 215 (Ind. 2009)
SUBJECT: Hearsay - state-of-mind declarations cannot be used to prove third party's conduct
HOLDING: Tr. Ct. abused its discretion by admitting victim's friend's testimony that victim said she expected her husband, the D, home between 7:00 and 7:30. A victim's hearsay statement illustrating his or her state of mind is admissible to show the intent of the victim to act in a particular way. While state-of-mind declarations are admissible under Rule 803(3) when offered to prove or explain acts or conduct of the declarant, they are not admissible when offered to prove a third party's conduct. Here, D was charged with the murders of his wife, son and daughter. It was undisputed that the murders occurred around 7:30 pm., while D was playing basketball. But, the State's theory was that D snuck out of basketball to murder his family without being noticed. In support of this theory, the State presented testimony from the wife's friend that on the day of the murders, during a normal, every day-type conversation about how busy life was, the wife claimed she expected her husband home between 7:00 and 7:30. The State repeatedly manipulated the wife's expectation as to D's arrival time into her intent to meet D at 7:30 p.m. For instance, the State argued D told her to meet him at the house. Because the wife's statement expressed a belief about D's future plans, and was used as evidence of what D in fact did, the admission of the wife's hearsay statement was an abuse of discretion. In view of D's alibi evidence, the admission was reversible error. Held, judgement reversed; Shepard, C.J., dissenting.

TITLE: Commonwealth v. Smith
INDEX NO.: O.9.c.3.
CITE: 545 Pa. 487; 681 A.2d 1288 (Pa. 1996)
SUBJECT: Medical Care Hearsay Exception - Child's Identification of Abuser
HOLDING: Pennsylvania Supreme Court holds that the medical treatment hearsay exception (cf. IRE 801(4)) does not justify the admission of an injured child's statements as to who caused his or her injuries even if the person named is a member of the child's family. In order to be admissible under medical treatment exception, statements must have been necessary and proper for medical diagnosis and treatment. Majority did not find identity of perpetrator pertinent to child's treatment for burns. Further, court found that consideration of statement's value to child's emotional recovery would so extend exception as to destroy it. Dissenting justices argued that child abuse differs from other injuries, and so does its treatment.

TITLE: Drummond v. State
INDEX NO.: O.9.c.3.
CITE: (9/6/84), Ind., 467 N.E.2d 742
SUBJECT: Hearsay exceptions - state of mind
HOLDING: Testimony of police officer that murder victim (who turned state's evidence against D on burglary charges) expressed fear of D was admissible under state of mind exception to hearsay rule. See Dunaway, 440 N.E.2d 682. Here, D contends testimony was irrelevant. Ct. finds testimony relevant on issue of motive. In homicide case, state may introduce prior threats/assaults on victim by D to prove state of mind. Romine, 445 N.E.2d 911. Held, no error.

RELATED CASES: Carter, 501 N.E.2d 439 (statement by co-D that he "would have to check with his brother . . . to see if [cocaine] was available" made to officer who testified at trial fell under state of mind exception because it was introduced to show co-D's intention to do further act, i.e., call his brother); Fox, 497 N.E.2d 221 (witness' testimony that threats against his family led him to make prior inconsistent statement re his identification of D was hearsay, properly admitted for limited purpose of establishing witness' state of mind at time he made prior statement).

TITLE: Fleener v. State
INDEX NO.: O.9.c.3.
CITE: (1st Dist., 3-22-95), Ind. App., 648 N.E.2d 652
SUBJECT: Hearsay - statements pertinent to medical diagnosis or treatment
HOLDING: Child-victim's statements made to psychologist were reasonably pertinent to diagnosis or treatment under hearsay exception found in Ind. Evid. Rule 803(4). While such statements usually will be made to physician, they may be made to someone other than physician where out-of-court declarant subjectively believes that she is making statement in contemplation of receiving medical diagnosis or treatment. U.S. v. Newman, 7th Cir., 965 F.2d 206. Here, psychologist testified that child was referred to her by county welfare department because mother sought counseling & child stated she wanted help. Challenged testimony concerned physician's nonspecific references to statements made by child that she could not exclude thoughts of molestations from her mind. Tr. Ct. did not err in admitting these statements, which described past or present symptoms as contemplated by Rule 803(4). Held, judgment affirmed.

Note: This issue summarily affirmed at 656 N.E.2d 1140; for expert testimony issue, see Steward card at O.7.a.1.

RELATED CASES: Perry, 956 N.E.2d 41 (Ind. Ct. App. 2011) (nurse's report that contained C.W.'s identification of D as perpetrator was relevant for potential treatment of STD's, counseling, and deciding how to discharge the patient); Velasquez, 944 N.E. 2d 34 (Ind. Ct. App. 2011) (any statements made by child to the social worker, upon which the social worker, or another therapist, would have reasonably relied to provide treatment, including therapy to the child, were admissible; Tr. Ct. erred in excluding child's statements to the social worker accusing the D of molest); Dowell, App., 865 N.E.2d 1054, *sum. aff'd,* 873 N.E.2d 59 (victim's statement that she intended to prosecute was irrelevant to treatment & inadmissible; however, victim's statements about nature of attack & identity of attacker in domestic case was relevant to treatment & admissible); Nash, App., 754 N.E.2d 1019 (statement of identity of domestic sexual abuser was reasonably pertinent to effort of emergency room staff in treating victim, to identifying underlying cause of sexual abuse & in seeking to prevent further domestic abuse); Thomas, App., 656 N.E.2d 819 (victim's statements to physician re: cause of injuries were made for purpose of diagnosing & treating her injuries).

TITLE: Hatcher v. State
INDEX NO.: O.9.c.3.
CITE: (10-5-00), Ind., 735 N.E.2d 1155
SUBJECT: Hearsay -statement concerning fear of victim is inadmissible to show motive
HOLDING: Tr. Ct. erred in admitting testimony regarding deceased victim's statement that she feared that D would kill her. Exception to hearsay rule permits admissibility of statement of declarant's then existing state of mind, emotion, or physical condition. Ind. R. Evid. 803(3). There are three situations where such testimony is admissible: (1) show intent of victim to act in particular way, (2) when D puts victim's state of mind in issue, & (3) sometimes to explain physical injury suffered by victim. Taylor, 659 N.E.2d 535. Here, State invited Ct. to extend this list to include admissibility of victim's state of mind to show nature of relationship between victim & D. Because nature of relationship is only relevant to motive & motive does not constitute exception to hearsay rule, testimony regarding victim's belief that D was going to kill her was inadmissible hearsay. However, because of overwhelming evidence to support conviction, error was harmless. Held, conviction affirmed.

RELATED CASES: Camm, App., 812 N.E.2d 1127 (D did not put victim's state of mind in issue, thus her hearsay statement that "history is repeating itself" was inadmissible); Bassett, 795 N.E.2d 1050 (hearsay testimony re: threats & fact that victim was afraid of D was inadmissible, because D did not put his relationship with victim into issue & victim’s fear was not logically relevant to D’s motive).

TITLE: Lock v. State
INDEX NO.: O.9.c.3.
CITE: (03/21/91), Ind., 567 N.E.2d 1155
SUBJECT: Foundation for admission of telephone conversation & hearsay admissibility
HOLDING: Evidence presented that witness overheard telephone caller make statements from which jury could infer caller possessed knowledge of certain facts that only D could possess, was sufficient to satisfy foundational requirement for admission of contents of call. Various telephone conversations between deceased & witnesses, although hearsay, were admissible to rebut D's evidence as to benign relationship between the 2. Witness who had been in victim's beauty shop & overheard telephone conversation, apparently between victim & D, testified that she heard voice on other end of phone make certain threats to victim & that at conclusion, victim was crying. While caller's identity must be established as part of foundation, this may be done circumstantially, i.e. showing that caller possessed certain knowledge only particular person would possess. Witness heard caller demand $500 from victim & threaten not to bring baby over anymore if she didn't get the money. Given evidence that victim frequently babysat for D's child, jury could reasonably infer D was caller. Deceased's brother & sister testified as to various telephone calls from deceased, wherein deceased was upset about relationship with D. D argued that testimony was inadmissible hearsay & violated her right to confront witnesses against her, because it was purposefully used to establish incriminating fact. State argued that evidence was not offered for truth of matter, but to show victim's state of mind as being fear of D. Ct. held evidence was clearly hearsay, but that Ind. has held statements offered to show victim's state of mind prior to crime are admissible. In this case Ct. found declarations could serve 2 possible purposes, 1 tending to prove incriminating fact, & 1 proving that victim was fearful of D. Ct. weighed prejudicial effect of admission for former purpose against value of admission in proving latter, & found latter purpose prevailed because declarations were offered to prove victim was apprehensive & fearful & generally "having trouble" with D. Held, convictions affirmed, with instructions to modify sentence on issue of fines. **NOTE:** Ct. noted in dicta that had D requested limiting instruction to disregard evidence going to truth of matter, it should have been given. (While Ct. stated it wasn't necessary to decide whether victim's state of mind is legally relevant because of dual rationale for admissibility, it seems that victim's state of mind was very basis for admission of evidence.)

TITLE: Matter of A.F.
INDEX NO.: O.9.c.3.
CITE: (2/14/2017), 69 N.E.3d 932 (Ind. Ct. App. 2017)
SUBJECT: Child's statement admissible as one seeking medical diagnosis
HOLDING: Trial court did not abuse its discretion in admitting testimony of therapist who recounted statements made to her by ten-year-old A.F. because A.F.s statements were made in the context of seeking medical diagnosis or treatment. See Ind. Evidence Rule 803(4). To admit a child's statements under this rule, there must be evidence the child understood the therapist's role to trigger the child's motivation to speak truthfully. Because the therapist explained to A.F. that the purpose of therapy was to work through A.F.'s problems, and that A.F. understood this, the State established an adequate foundation to admit the child's statements under Evidence Rule 803(4). Held, termination of father's parental rights affirmed.

RELATED CASES: Shoda, 132 N.E.3d 454 (Ind. Ct. App. 2019) (C.W.'s statements to a forensic nurse and therapist were properly admitted at trial under Rule 803(4)); Perryman, O.9.c.17 (video recording of C.W.'s interview was properly admitted because she was present and subject to cross-examination at the protected persons hearing).

TITLE: McClain v. State
INDEX NO.: O.9.c.3.
CITE: (12-26-96), Ind., 675 N.E.2d 329
SUBJECT: Hearsay - statements pertinent to medical diagnosis or treatment
HOLDING: Tr. Ct. erred in permitting family therapist to testify regarding statements child victim made to her. Indiana Evidence Rule 803(4) establishes hearsay exception for statements made for purposes of medical diagnosis or treatment. In cases where there is proper showing of reliability, statement to family therapist or non-physician may be admissible. This hearsay exception requires two-step analysis for evaluating whether statement is properly admitted pursuant to Indiana Evid. R. 803(4): 1) is declarant motivated to provide truthful information in order to promote diagnosis & treatment; & 2) is content of statement such that expert in field would reasonably rely on it in rendering diagnosis or treatment. United States v. Barret, 8 F.3d 1296 (8th Cir. 1993); Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990). To satisfy requirement of declarant's motivation, declarant must subjectively believe that he was making statement for purpose of receiving medical diagnosis or treatment. Where this inference is not obvious, there must be some evidence that declarant understood professional's role in order to trigger motivation to provide truthful information.

In this case, requisite indicia of reliability were missing, as record was devoid of any evidence showing that victim sought therapist's help or that he believed he was receiving treatment for emotional or psychological injuries. Child testified that therapist was his "counselor" & that he talked to her about what D did to him. Because declarant's motive to promote treatment or diagnosis is crucial to reliability, therapist's testimony was not shown to be within medical diagnosis or treatment hearsay exception. However, error in admission of testimony was harmless, thus reversal was not required. Held, transfer granted, conviction affirmed; Sullivan & Selby, JJ., concurring in result.

RELATED CASES: Mastin, 966 N.E.2d 197 (Ind. Ct. App. 2012) (statements made by a child to her grandmother on the car ride home from a medical examination and without a health professional present were not made to advance her medical diagnosis or treatment); Newbill, App., 884 N.E.2d 383 (sexual assault nurse's testimony about forced versus rough sex injuries was not for purposes of medical diagnosis or treatment, because she was collecting evidence, not treating victim; however, there was no fundamental error in admitting this as expert testimony); Cooper, App., 714 N.E.2d 689 (where nurse's testimony as to conversation she had with child victim made clear that child knew she was in emergency room for exam by doctor because of alleged molestation and child understood professional roles of nurse & doctor, statements made by child to nurse were admissible under statements pertinent to medical diagnosis or treatment exception to hearsay).

TITLE: McGrew v. State
INDEX NO.: O.9.c.3.
CITE: (5th Dist., 11-27-96), Ind. App., 673 N.E.2d 787, summarily affirmed, 682 N.E.2d 1289
SUBJECT: State of mind hearsay exception inapplicable
HOLDING: Statements concerning declarant's then existing state of mind may be admitted under exception recognized under Indiana Evid.R. 803(3). This includes hearsay statements offered to show victim's state of mind prior to crime if legally relevant. Taylor, 659 N.E.2d 535. In criminal deviate conduct prosecution, Tr. Ct. erroneously admitted testimony by victim's friends regarding statements made by victim shortly after crime. State offered hearsay to show victim's state of mind after incident. Although such testimony is not per se inadmissible, in this case State failed to show any legal relevance, as victim's state of mind was not probative as to whether D acted knowingly or intentionally. Further, even if it were relevant as to whether D "forced" victim to engage in sexual act, D did not raise issue of consent. Thus, statements could only have been offered to show that D committed crime. State-of-mind exception does not include statements of memory or belief to prove fact remembered. Indiana Evid.R. 803(3). Admission of this hearsay testimony did not require reversal, because testimony was brief, cumulative, & consistent with victim's later testimony. Held, reversed & remanded on other grounds.

Note: Although State did not seek to admit hearsay statements under Indiana Evid.R. 803(2), excited utterance exception, Ct. noted that exception was likewise inapplicable to this case.

RELATED CASES: Simmons, App., 760 N.E.2d 1154 (hearsay testimony that victim had told witnesses that she was fearful D would kill her inadmissible; victim's state of mind or fear of D was never put at issue in case because main defense was alibi); Jester, 724 N.E.2d 235 (victim's statement that she thought D was having affair was inadmissible because D never put victim's state of mind into evidence); Smith, 721 N.E.2d 213 (victim's statement that he needed money to pay his dealer for drugs he had taken was irrelevant to any issue in case; no issue in case turned on victim's state of mind).

TITLE: Simmons v. State
INDEX NO.: O.9.c.3.
CITE: (5th Dist., 3-15-01), Ind. App., 746 N.E.2d 81
SUBJECT: Hearsay - declarant's then existing physical condition
HOLDING: Although Ind. Evidence Rule 803(3) permits evidence of declarant's then existing physical condition, it does not allow declarant to offer statement concerning past events remembered or believed by declarant. Here, in child molesting prosecution, complaining witness's (CW's) stepmother was permitted to testify to declarant's reference to any physical pain she was experiencing in her vaginal area. However, she should not have been allowed to testify that CW stated that D caused her pain. While Rule 803(3) allows statements of existing pain, whether to physicians or others, it should prohibit narratives of manner in which injuries were received or pain inflicted. Miller, 13 Indiana Practice § 803.103B at 622 (2d ed. 1995). Reversal was not required in this case because jury was presented with overwhelming evidence of D's guilt. Held, conviction affirmed, remanded with instructions to modify sentence.

TITLE: Stewart v. State
INDEX NO.: O.9.c.3.
CITE: (04-18-11), 945 N.E.2d 1277 (Ind. Ct. App. 2011)
SUBJECT: Statement admissible under state of mind hearsay exception
HOLDING: Hearsay statements may be admissible under "state of mind" exception when the statements are offered to show the intent of the declarant to act in a particular way and as circumstantial evidence of the declarant's future conduct. Camm v. State, 908 N.E.2d 215 (Ind. 2009). Here, State witness's testimony regarding statement by co-D that he wanted to find D after the murders before police found him was properly offered to show co-D's intent to act in a particular way. Moreover, co-D's state of mind was relevant to a material issue at trial, specifically the identity of his accomplice. Evidence that co-D was looking for D shortly after the crimes because he wanted to deal with D to prevent D from putting the blame on co-D makes it more probable that D was the second man involved in the crimes. See Evid. R. 401.

Because the statements were being offered for the truth of the matter asserted, i.e., the identity of the person referenced, they were hearsay and properly excluded. Held, judgment affirmed in part and vacated in part on other grounds.

TITLE: Thomas v. State
INDEX NO.: O.9.c.3.
CITE: (5/4/90), Ind., 553 N.E.2d 825
SUBJECT: Hearsay - murder victim's statements about D's prior threats & assaults
HOLDING: Tr. Ct. did not err in admitting hearsay statements of murder victim that D, her husband, had injured her & that she feared that he would kill her. Victim had filed petition for dissolution of marriage & obtained restraining order against D, & nearly 3 months later, victim filed sexual battery charge against D, which was pending at time of her death. At trial, several witnesses testified that victim told them she feared D would kill her. Some testified as to victim's physical condition after incident leading to sexual battery charge & testified further that victim told them D had injured her. In Drummond, 467 N.E.2d 742, such statements were held to show D's state of mind & attitude toward victim, which is relevant in homicide cases. D argues that such statements are inadmissible hearsay, *citing* Komyatti, 490 N.E.2d 279. Ct. simply discusses without clearly explaining what hearsay exception applies. Ct. concedes that victim's state of mind is not in issue, & further acknowledges that many jurisdictions have rejected special exception for statements by murder victims. See 40 Am. Jur.2d Homicide Sec. 334. Ct. notes that statements here "were made in conjunction with severe personal injuries & were demonstrated to have been made in explanation of appellant's actions in a short-term highly volatile situation." Finally, Ct. expresses reluctance to seal lips of victim & keep from jury evidence that D had abused her. Dissent by DeBruler, joined by Shepard, correctly points out that in Drummond, D did not challenge victim's statements as hearsay, only as irrelevant.

TITLE: VanPatten v. State

INDEX NO: O.9.c.3.

CITE: (5/2/2013), 986 N.E.2d 255 (Ind. 2013)

SUBJECT: Nurse's statements erroneously admitted under medical diagnosis/treatment hearsay exception

HOLDING: In child molesting prosecution, Tr. Ct. abused its discretion in admitting statements two six-year-olds made to nurse regarding alleged molestation. The morning after E.R. spent the night at her friend's home, she and S.D. claimed that D (S.D.'s father) molested them. The children were interviewed by a DCS caseworker and later by a nurse at a sexual assault treatment center. E.R. claimed she was molested that night, while S.D. said she had been previously molested. A biological sample was able to be collected from only E.R. After S.D. took the stand and recanted her previous allegations, Tr. Ct. permitted nurse to testify as to what E.R. and S.D. told her during their examinations pursuant to Indiana Evidence Rule 803(4), statements made for purpose of medical diagnosis or treatment.

On appeal of convictions relating to D's daughter, Court reiterated that the two-step analysis outlined in McClain v. State, 675 N.E.2d 329 (Ind. 1996) should be used to determine whether the nurse's statements should be admitted under Rule 803(4): 1) whether the declarant is motivated to provide truthful information in order to promote diagnosis and treatment; and 2) whether the content of the statement is such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.

Here, when testifying at trial, nurse had no specific memory of what she said to S.D. and E.R. prior to interviewing them, and there was no testimony to establish the girls understood the nurse's professional role, knew what telling the truth meant or that they knew that they were being interviewed for the purpose of medical diagnosis. Without that firm indication of reliability in the record, Court cannot infer that the children were motivated to speak truthfully to the nurse. Thus, their hearsay statements should not have been admitted under Rule 803(4). Held, transfer granted, Court of Appeals' memorandum opinion vacated, convictions for molesting S.D. reversed and remanded for new trial; Massa and Rush, JJ., concurring in result with separate opinion to note that nurse's statements can and should be evaluated under Protected Person Statute, Ind. Code 35-37-4-6, rather than Rule 803(4). On remand, if prosecutor wants to admit statements under the statute, Tr. Ct. will have to conduct a hearing to determine whether those statements have sufficient indications of reliability.

Note: Concurring opinion failed to address Tyler v. State, 903 N.E.2d 463 (Ind. 2009) (Protected Persons Statute only applies when child does not testify).

RELATED CASES: Walters, (Ind. Ct. App. 2017) (distinguishing VanPatten and holding that forensic nurse's testimony about what 11 year-old child molesting victim told her during examination was admissible under Evid. R. 803(4)); Steele, 42 N.E.3d 138 (Ind. Ct. App. 2015) (statements made by victim and victim's daughter to forensic nurse that D punched victim were admissible under hearsay exception for statements relevant for purposes of medical treatment); Burton, 23 N.E.3d 49 (Ind. Ct. App. 2014) (nurse's testimony about what child molesting victim told her during examination was admissible under Evid. R. 803(4) because the testimony provided adequate foundation to show that child was motivated to tell the truth).

TITLE: Walters v. State
INDEX NO.: O.9.c.3.
CITE: (1/20/2017), 68 N.E.3d 1097 (Ind. Ct. App. 2017)
SUBJECT: Nurse's statements admissible under medical diagnosis/treatment hearsay exception
HOLDING: Distinguishing VanPatten v. State, 986 N.E.2d 255 (Ind. 2013), Court held that forensic nurse's testimony about what 11 year-old complaining witness (C.W.) told her during examination was admissible under Evid. R. 803(4) hearsay exception for statements made for medical diagnosis or treatment. Nurse had not attended any of the previous interviews with C.W. and examined C.W. on a different day than the other interviews. Nurse was able to recall exactly what and how she explained her role to C.W., who was able to articulate that she was "a nurse or doctor." Nurse was dressed in scrubs and explained that medical practitioners wear them, the building was situated separate from law enforcement agencies, and the decor of the office mimicked that of a regular doctor's office. Held, judgment affirmed.

RELATED CASES: Chambless, 119 N.E.3d 182 (Ind. Ct. App. 2019) (identification of an attacker in a statement to a medical professional is normally not admissible under Rule 803(4), but C.W.'s identification of her live-in boyfriend as her attacker in this case was relevant to the medic's diagnosis and treatment of her).

TITLE: Willey v. State
INDEX NO.: O.9.c.3.
CITE: (6-17-99), Ind., 712 N.E.2d 434
SUBJECT: Hearsay - threats inadmissible to prove state of mind
HOLDING: Hearsay dealing with D's threats to victim was irrelevant to any issue in murder trial. Victim's state of mind is relevant when it has been put in issue by D. Angleton v. State, 686 N.E.2d 803 (Ind. 1997). Hearsay statements have been admissible to show victim's state of mind, in part because relationship between victim & D was one of contested issues at trial. Lock v. State, 567 N.E.2d 1155 (Ind. 1991). Here, several witnesses testified that deceased victim told them that D threatened to kill her. State claimed that these statements were not hearsay because they were not offered to prove truth of matter asserted, but rather to prove D's motive & intent. In addition to holding that State clearly introduced testimony to prove that D threatened victim, Ct. held that testimony dealing with threats was irrelevant because D did not put into evidence his relationship with victim. D did not dispute that he & victim were divorced & their relationship was strained. Although D did testify that he did not threaten victim, D's testimony did not place victim's state of mind in issue because hearsay concerning threats occurred in State's evidence which was prior to D's testimony. Because victim's fear of D was irrelevant to any issue in case & D did not place victim's state of mind in issue, Tr. Ct. abused its discretion by allowing witnesses to offer hearsay regarding D's threats & victim's fear of D. However, because there was overwhelming evidence of D's guilt, error was harmless. Held, conviction affirmed.

RELATED CASES: Camm, App. 812 N.E.2d 1127 (State improperly attempted to "boot strap" otherwise inadmissible evidence regarding D's affairs into trial by arguing about it during opening statement and introducing out-of-Ct. statements made by D wherein he discussed his relationship with wife).

TITLE: Wolfe v. State
INDEX NO.: O.9.c.3.
CITE: (8/28/87), Ind., 512 N.E.2d 185
SUBJECT: Videotapes admitted to show physical condition
HOLDING: Tr. Ct. did not err in admitting videotape of child victim in D's trial for neglect of a dependent resulting in serious bodily injury. D argues tape is out-of-Ct. statement & cannot be admitted unless declarant is available for CX. Here, videotape was not entered for purpose of eliciting testimony from victim, but to demonstrate his physical condition. Although victim's mother & police detective made statements on the tape, both were available for CX. Videotape that corroborates testimony of state witness is admissible. Newland, 459 N.E.2d 384. Here, victim's mother & police detectives had testified as to victim's condition.

O. EVIDENCE

O.9. Hearsay

O.9.c.4. Recorded recollection

TITLE: Ballard v. State
INDEX NO.: O.9.c.4.
CITE: (4th Dist., 12-12-07), Ind. App., 877 N.E.2d 860
SUBJECT: Recorded recollection- witness must vouch for accuracy
HOLDING: In battery prosecution, Tr. Ct. abused its discretion by admitting the victim's prior statement into evidence as a recorded recollection. The recorded recollection exception, Indiana Rule of Evidence 803(5), applies when a witness has insufficient memory of the event recorded, & the witness vouched for the accuracy of the prior statement. Here, the victim/witness made a statement to a detective a few days after her boyfriend allegedly beat her. However, the victim refused to vouch for the accuracy of the statement which she claimed not to remember. The victim claimed she probably said a lot of things to the detective that were not true & that her daily habit of drinking gin causes her memory to lapse. D was prejudiced by the erroneous admission of the statement. Although State admitted into evidence the victim's identification of D as the person who caused her injuries, State did so not to prove the truth of the matter but rather to show the course of the investigation. Held, judgment reversed.

RELATED CASES: Hurt, 151 N.E.3d 809 (Ind. Ct. App. 8/21/2020) (erroneous admission of C.W.'s statement where at trial she did not vouch for the accuracy of her statement to police, she. was heavily intoxicated when she gave the statement and could not recall speaking to the officer).

TITLE: Baran v. State
INDEX NO.: O.9.c.4.
CITE: (09-01-94), Ind., 639 N.E.2d 642
SUBJECT: Admission of probable cause (PC) affidavit as past recollection recorded
HOLDING: Tr. Ct. properly admitted officer's PC affidavit under past recollection recorded exception to hearsay rule. Additionally, affidavit was admitted, to prove results of field sobriety tests, & because such results were relevant only to OWI charge for which D was acquitted, any error would have been harmless. In concurrence in result of decision, DeBruler, J., expressed concern about admissibility of PC affidavits. He set forth I.R.E. 803(5), dealing with past recollection recorded, & noted it allows Ct. to obtain important & reliable evidence that would otherwise be lost due to memory deficits. Such evidence, however, also carries attendant risks. When officer makes notes or routine reports, there are built-in incentives for veracity due to use of writings in investigation, but PC affidavits present contrary incentives. Justice DeBruler noted that while conscious dishonesty would be unusual, officers have every reason to be selective or to exaggerate in affidavit because purpose of document is to persuade judicial officer that arrest was justified. While agreeing error here was harmless, DeBruler did not agree PC affidavit was admissible due to these risks. Held, conviction affirmed. Note: Concurrence may be helpful in arguing against blanket admissibility of PC affidavits, especially because of lack of discussion by majority about their admissibility as past recollection recorded & partial reliance on harmless error.

TITLE: Blinn v. State
INDEX NO.: O.9.c.4.
CITE: (2d Dist. 1/13/86), Ind. App., 487 N.E.2d 462
SUBJECT: Past recollection recorded
HOLDING: Even if evidence was admitted as past recollection recorded without establishing inadequate present recollection, any error was harmless because other evidence sustained conviction. Here, psychiatrist was asked if he recalled telling police, he was frightened of D. Witness said he could not recall but probably did. Tape of conversation was played outside jury's presence for purposes of refreshing witness' recollection. Witness said tape was accurate reproduction & it was admitted over D's objection that it was repetitive & irrelevant. Case discusses past recollection recorded & present recollection refreshed. See Richardson 266 N.E.2d 51 (grand jury foreman used transcript of grand jury testimony to refresh recollection re verbatim Q & A of D, but transcript was not admitted into evidence). Unless document fails to refresh recollection, it may not be read into evidence as substitute for direct testimony of witness re present recollection as refreshed. Richardson. Held, conviction affirmed.

RELATED CASES: Poore 501 N.E.2d 1058 (Witn 255(3,4); Tr. Ct. erred in sustaining state's objection that memorandum must be made by testifying witness; memorandum used to refresh recollection must be written by witness or another at or near time of occurrence; held, conviction reversed).

TITLE: Flynn v. State
INDEX NO.: O.9.c.4.
CITE: (1st Dist., 12-4-98), Ind. App., 702 N.E.2d 741
SUBJECT: Admissibility of statements & exhibits as past recollection recorded
HOLDING: Tr. Ct. properly admitted witness' out-of-Ct. statement to police officer under Ind. Evidence Rule 803(5), past recollection recorded exception to hearsay rule. State demonstrated that, at time of incident, witness had personal knowledge of events that occurred on night of burglary. In addition, State demonstrated witness' lack of recollection of events through her testimony at trial. Admission of statement did not violate D's constitutional rights to confrontation & cross-examination. However, admission of audio tape & transcript of witness' taped statement as exhibits violated Evid. R. 803(5) because record containing recollection may be read into evidence but may not itself be received as exhibit unless offered by adverse party. Waiver of error notwithstanding, admission of this evidence was harmless because D failed to demonstrate that substantial right had been violated. Held, conviction affirmed; Sullivan, J., concurring in result.

RELATED CASES: LeFlore, App., 823 N.E.2d 1205 (no error in admitting taped phone conversations D had with his brother while incarcerated; State was properly permitted to use transcripts of these tapes to impeach D's brother pursuant to Ind. Evidence Rule 613); Clark, 808 N.E.2d 1183 (witness statement from police interview was not properly admitted as an exhibit pursuant to Rule 803(5); however, statement was admissible under Rule 801(d)(1)(A) as substantive evidence as prior inconsistent statement made under oath).

TITLE: Horton v. State
INDEX NO.: O.9.c.4.
CITE: (11-17-10), 936 N.E. 2d 1277 *summ. aff'd* 949 N.E.2d 346 (Ind. Ct. App. 2010)
SUBJECT: Recorded recollection - videotaped interview admissible
HOLDING: In trial on nine counts of child molesting - six A felonies and three C felonies B Tr. Ct. did not err in admitting a videotaped interview of R.M. under the recorded recollection exception to the hearsay rule. Under Rule of Evidence 803(5), admission of a recorded statement is permissible if: (a) the recording relates to a matter about which a witness once had knowledge, (b) the witness has insufficient recollection at trial to enable her to testify fully and accurately, (c) the witness is shown to have made or adopted the recording, (d) the recording was adopted when the matter was fresh in the witness's memory, and (e) the recording is shown to reflect the witness's knowledge correctly. Impson v. State, 721 N.E.2d 1275, 1282-83 (Ind. Ct. App. 2000).

Here, the video satisfies factor (a) because the video shows a DCS employee interviewing R.M. about the molestation, and the trial judge and attorneys discussed what the video might reveal prior to the video's admission. Because her memory prohibited her from testifying fully and accurately about several of the charges against D, factor (b) is also satisfied. D does not dispute that R.M. was shown to have made or adopted the recording; thus factor (c) is also satisfied. Nor did D challenge the obvious fact that R.M. adopted the recording when the matter was fresh in her memory, satisfying factor (d). Finally, factor (e) is satisfied because the video filled in many gaps in R.H.'s live testimony about details she could not remember, adding specific details a child might not be expected to remember many months after the incidents. Held, judgment affirmed.

RELATED CASES: Gorby, 152 N.E.3d 649 (Ind. Ct. App 2020) (no error in allowing jury to view video of C.W.'s forensic interview during jury trial on child molesting charges, where video fell under the "recorded recollection" exception to hearsay rule because C.W. testified she could not remember the events).

TITLE: Robey v. State
INDEX NO.: O.9.c.4.
CITE: (05-20-21), Ind. Ct. App., 168 N.E.3d 288
SUBJECT: Any error in playing video recording of forensic interview harmless
HOLDING: In prosecution for child molesting, the Complaining Witness (C.W.) was able to testify fully and accurately about the essential elements of the crime. However, the trial court also permitted the publication of the C.W.'s forensic interview as a recorded recollection pursuant to Indiana Evidence Rule 803(5). The Court of Appeals held that the video recording was merely cumulative of C.W.'s testimony, and any error in its publication was harmless.

TITLE: Smith v. State
INDEX NO.: O.9.c.4.
CITE: (2nd. Dist.; 12-2-99), Ind. App., 719 N.E.2d 1289
SUBJECT: Hearsay exceptions - recorded recollection; foundation for admission
HOLDING: Tr. Ct. did not err by admitting into evidence contents of security guard's report as recorded recollection. In admitting document into evidence under Ind. R. Evid. 803(5), there is three-tiered approach: (1) unaided testimony of witness is preferred; (2) if unaided testimony is not available, law prefers refreshed recollection; & (3) if witness' recollection cannot be revived, recorded recollection exception to hearsay rule may be available to admit document which contains witness' prior knowledge of facts in question. Indiana law prior to adoption of Rules of Evidence in 1994 required that witness be shown to have no present knowledge of pertinent information before recorded recollection exception could be used; however, under new rule, witness need not be shown to be completely without present memory but need only be shown to have insufficient recollection to enable witness to testify fully & accurately. Here, complete exhaustion of security guard's memory was not required. Guard's statement that he could not remember some events which happened seven years ago was enough for Tr. Ct. to find that his memory could not be sufficiently refreshed to testify fully & accurately. Thus, Tr. Ct. properly allowed State to admit under recorded recollection exception report which guard wrote shortly after incident. Held, judgment affirmed.

RELATED CASES: Garth, 182 N.E.3d 905 (Ind. Ct. App. 2022) (Letter from boyfriend to incarcerated D not admissible as recorded recollection where D's express intent in seeking to admit the letter was to contradict her boyfriend's previous testimony regarding his motive for killing the victim; there was no testimony indicating that the boyfriend could not recall his motive); Kubsch, 866 N.E.2d 726 (where witness does not remember making statement, prior statement cannot be read into evidence as a recollection recorded); Marcum, App., 772 N.E.2d 998 (declarant's hearsay statement was inadmissible, as it was not offered to refresh her memory of events, but rather to contradict her testimony).

TITLE: State v. Sua
INDEX NO.: O.9.c.4.
CITE: 987 P.2d 959 (Haw. 1999)
SUBJECT: Grand Jury Testimony -- Past Recollection Recorded
HOLDING: The Hawaii Supreme Court has reversed a lower court ruling that grand jury testimony is not sufficiently reliable to satisfy the state constitution's confrontation clause. Grand jury testimony of an unavailable witness was admitted against the D at his trial, pursuant to the past recollection recorded exception to the hearsay rule. The Hawaii Court of Appeals reversed, holding that, while the testimony fit within the exception, and the exception was well- rooted, the nature of grand jury testimony itself was insufficiently reliable to satisfy the state's confrontation requirement. The Hawaii Supreme Court disagreed, finding sufficient indicia of trustworthiness in the witness' grand jury testimony.

TITLE: U.S. v. Schoenborn
INDEX NO.: O.9.c.4.
CITE: 4 F.3d 1424 (7th Cir. 1993)
SUBJECT: Recorded recollection exception
HOLDING: Tr. Ct. abused its discretion in admitting report by FBI agent. Rule 803(5), recorded recollection exception to hearsay rule, provides that document may be read to jury if: 1) witness once had knowledge about matter in document; 2) witness now has insufficient recollection to testify fully & accurately; & 3) record was made or adopted at time when matter was fresh in witness's memory & reflected his knowledge correctly. U.S. v. Lewis, 954 F.2d 1386. Party seeking to admit record bears burden to show that notes reflect witness' own words rather than notetaker's characterization. U.S. v. Almonte, 956 F.2d 27. Third party's characterization of witness' statement "does not constitute prior statement of that witness unless the witness has subscribed to that characterization." Id.

Where person perceives event & reports it to another person who records statement, both must ordinarily testify to establish that statement is past recollection recorded under Rule 803(5). Person who witnessed event must testify to accuracy of his oral report to person who recorded statement. Recorder must also testify to accuracy of his transcription. Where witness differs with recorder regarding whether recorder's transcription of witness's statement is correct, Rule 803(5)'s requirement that report be made or adopted by witness has not been satisfied. Here, witness differed with recorder in regard to whether transcription of witness' statement was correct. However, Ct. concluded that it could not say that jury's decision was substantially swayed by error. Held, conviction affirmed.

TITLE: Williams v. State
INDEX NO.: O.9.c.4.
CITE: (2nd Dist., 8-31-98), Ind. App., 698 N.E.2d 848
SUBJECT: Recorded recollection - admission of videotape did not violate confrontation rights
HOLDING: Admission of videotaped interview with State's seven-year-old witness did not violate D's right of confrontation under Federal & State Constitutions. During videotaped conversation with detective, witness stated that he & D entered house & D took guns from bedroom. At trial, before videotaped interview was admitted into evidence, witness testified that although he remembered talking to detective, he did not remember what he said to him, being in videotape or talking to detective in videotape. Witness further stated that he did not remember whether he was with D on date of burglary. Addressing D's claim under U.S. Constitution, Ct. concluded that recorded recollection is firmly rooted exception to hearsay rule, & thus, use of videotaped interview as recorded recollection did not violate D's Sixth Amendment right of confrontation. Ct. could not conclude that D was denied his right to confrontation under Article I, § 13 of Indiana Constitution, which gives D right to meet witnesses face to face. Although witness was unavailable due to lack of memory, D still had opportunity to meet witness face-to- face, to cross-examine him regarding prior statement, & to allow jury to judge witness's demeanor & credibility in answering his questions. Held, judgment affirmed; Sullivan, J., dissenting.

Note: D conceded that videotaped interview was admissible under Indiana Evidence Rule 803(5), recorded recollection exception to hearsay rule. Dissenting opinion contains good discussion regarding foundational requirements of reliability & trustworthiness & concerns with admitting statements under Ind.Evid. R. 803(5).

O. EVIDENCE

O.9. Hearsay

O.9.c.5. Business records

TITLE: A.B. and J.R. v. State

INDEX NO.: O.9.c.5.

CITE: 154 N.E.3d 818

SUBJECT: Parent's drug test results in TPR case admissible under business records hearsay exception

HOLDING: Drug test records are exceptions to the hearsay rule under the records of a regularly conducted business activity (Ind. Rule Evid. 803(6)). The Indiana Supreme Court, addressing an issue that had resulted in conflicting decisions in the Court of Appeals, held a parent's drug test results were properly admitted into evidence under Indiana Evidence Rule 803(b), business records exception to hearsay in a Termination of Parental Rights (TPR) case. At TPR hearing parents objected as hearsay to the admission of their drug test results from Forensic Fluids Laboratories. The TPR court allowed the results to be admitted and, on appeal, the Indiana Court of Appeals found the tests were property admitted as an exception to hearsay under the records of regularly conducted activity exception. Affirming as correct the trial court's decision to admit the drug test results into evidence over objection as hearsay, the Indiana Supreme Court found the laboratory depends on the records to operate and there was evidence presented to establish the records as sufficiently reliable and therefore the drug test results were properly admitted, as an exception to hearsay, under the regularly conducted activity exception, Indiana Evidence Rule 803(b)(business records exception) to hearsay.

TITLE: Allen v. State

INDEX NO.: O.9.c.5.

CITE: (9/14/82), Ind., 439 N.E.2d 615

SUBJECT: Hearsay exceptions - business records; computer printouts; machine-created original entries

HOLDING: Foundation for admission into evidence of business records stored on computer & electronically printed out on demand: (1) electronic computing equipment is standard; (2) entries were made in regular course of business at or reasonably near time recorded event occurred; (3) testimony satisfies Tr. Ct. that sources of information, method & time of preparation were such as to indicate its authenticity & accuracy & justify its acceptance as trustworthy. Brandon, 396 N.E.2d 365. Here, D contended Tr. Ct. erred in admitting into evidence 2 computer printouts of OH motor vehicle registrations. Prosecutrix had given police D's OH license plate number & description of car. Using plate number, police learned D's home address & observed 2 cars at D's home, one matching earlier description. Officers testified at trial that they observed dispatcher type plate numbers into computer; resulting computer printouts indicated D owned both cars. Held, trial testimony provided adequate foundation for admission of computer printouts.

RELATED CASES: Stark, 489 N.E.2d 43 (Crim L 444; audit tape created by automatic teller machine, which recorded date, time, card number, customer account number, transaction number, & type & amount of transaction, was admissible as business record); Hatton, App., 498 N.E.2d 398 (state failed to lay proper foundation for computer printout sheet listing Medicaid monies paid to D, charged with welfare fraud; witness had no personal knowledge of computer system & did not know how/when information was entered into computer (located in different city); Ct. finds evidence was improperly admitted, *citing* Brandon, 396 N.E.2d 365).

TITLE: Cardin v. State
INDEX NO.: O.9.c.5.
CITE: (1st Dist. 6/20/89), Ind. App., 540 N.E.2d 51
SUBJECT: Hearsay - business records; markings on checks
HOLDING: Admission of checks with markings indicating they had been processed by particular bank was harmless error. D was convicted of 16 counts of theft in connection with unauthorized negotiation of employer's checks. On appeal, D argues that checks were inadmissible hearsay. Ct. App. breaks checks down into component parts. Writings on front of checks directing payment of funds are not hearsay at all, because they are imperative declarations. [Citations omitted.] Likewise, endorsements on back of checks were not offered to prove D's identity, which is all that they assert. However, markings on front & back of checks offered to prove that checks had been processed by bank were hearsay. Foundation for business records exception can be established by anyone knowledgeable about business' recordkeeping process who can testify that other foundational elements have been met. Baker v. Wagers, App., 472 N.E.2d 218. While official who testified appeared to have such knowledge, state did not elicit proper foundation from him. IN does not allow business records foundation to be based upon circumstantial evidence derived from documents themselves, [citation omitted], nor does IN allow Tr. Ct. discretion to consider inherent trustworthiness of entry & nature of business which produced it. See, e.g., Fed. R. Evid. 803(24). Tr. Ct. erred in admitting markings on checks indicating they had been processed by bank, but error was harmless in light of other evidence. Held, conviction affirmed.

TITLE: Collins v. State
INDEX NO.: O.9.c.5.
CITE: (03/07/91), Ind., 567 N.E.2d 798
SUBJECT: BMV notice of mailing - official record
HOLDING: Bureau of Motor Vehicles has duty to record mailing of notice of suspension, & therefore certification of such notice is admissible as within official records exception to hearsay rule, vacating Ct. App. memorandum decision, & overruling Harris, Ind. App., 555 N.E.2d 495, as to that issue. At trial, certification of mailing of Habitual Traffic Violator Notice of Suspension to D, was admitted to show notice. In memorandum decision, Ct. App. found case identical to Harris, 555 N.E.2d 495, where Ct. held that such certification did not qualify as official record exception to hearsay rule because there was no statutory or implied duty to maintain records of such mailing. S. Ct. approved Chambers, Ind. App., 547 N.E.2d 301, finding that proof of mailing was not actual element of offense of operating motor vehicle while suspended, but found that applying Keihn, 542 N.E.2d 963, it is permissible evidence from which necessary element of knowledge of suspension may be inferred. Ct. also found that Ind. Code 9-12-2-1, which requires BMV to mail notice & suspend violator's license 30 days after such notice is sent, creates duty to record mailing of notice. Held, transfer granted, memorandum Ct. App. decision vacated, & conviction upheld.

TITLE: Drummond v. State
INDEX NO.: O.9.c.5.
CITE: (9/6/84), Ind., 467 N.E.2d 742
SUBJECT: Hearsay exceptions - business records; certified copies of charges
HOLDING: Certified copies of Lake County burglary & robbery charges were self-authenticating & admissible in Porter County murder trial under business records exception to hearsay rule. Hudson, 443 N.E.2d 834; see TR 44(A)(1). Here, murder victim was co-D in Lake County crimes. D had expressed intent to kill victim. Tr. Ct. determined inference of motive outweighed any possible prejudice. Held, no error.

TITLE: Embrey v. State
INDEX NO.: O.9.c.5.
CITE: (5/30/2013), 989 N.E.2d 1260 (Ind. Ct. App. 2013)
SUBJECT: NPLEx Report of Precurser Purchases and Attempted Purchases Admissible as Business Record
HOLDING: National Precursor Log Exchange (NPLEx) report documenting purchases and attempted purchases of ephedrine and pseudoephedrine by D in month preceding his arrest were properly admitted under the business records exception to the hearsay rule. Retailers who sell these substances are required by statute to maintain records of purchases and attempted purchases, and before completing a sale they are further required to submit this information to NPLEx. Retailers face criminal liability for knowing or intentional failure to comply with these requirements. NPLEx report was admitted through a Business Records Affidavit from the custodian of NPLEx database. D argued that this custodian did not have firsthand knowledge of the transactions themselves. Ct. App. rejects this argument, reasoning that in the Business Records Affidavit, the custodian averred that the information contained in the NPLEx report was submitted by individuals with firsthand knowledge of the transactions in the regular course of business, and that the report was an exact representation of the logs.

RELATED CASES: Montgomery, 22 N.E.3d 768 (Ind. Ct. App. 2014) (admission of precursor log tracking sudafed purchases didn't violate Confrontation Clause).

TITLE: Ground v. State
INDEX NO.: O.9.c.5.
CITE: (2nd Dist., 11-19-98), Ind. App., 702 N.E.2d 728
SUBJECT: Business records hearsay exception - proof that records are regularly made
HOLDING: In forgery prosecution, Tr. Ct. erred when it admitted exhibit containing bank records from D's account pursuant to business records exception to hearsay rule. Affidavit from bank's fraud investigation manager in support of exhibit was insufficient because: 1) it failed to aver that records were transmitted by person with personal knowledge; & 2) it failed to aver that it is bank's regular practice to make records. Affidavit's first deficiency did not render exhibit inadmissible because D failed to rebut presumption that affiant with personal knowledge prepared challenged bank documents. Lyons, 506 N.E.2d 817. However, no such presumption exists as to affidavit's second deficiency. Ind. Evidence Rule 803(6) unequivocally requires proponent of business records to establish, by testimony of custodian or other qualified witness, that records are regularly made. Without proof that records are regularly made, proponent of business records has not laid proper foundation for records under plain meaning of Rule 803(6), & they are inadmissible under hearsay rule. Because State repeatedly referred to & relied upon contents of improperly admitted hearsay exhibit, Ct. concluded that error was likely to have had prejudicial impact on fact-finder's judgment, &, thus, reversed convictions. Held, reversed & remanded for new trial.

Note: In holding that State failed to satisfy foundation requirements of Rule 803(6), Ct. rejected State's assertion that D bears burden of challenging reliability of bank's records, & that hearsay exceptions are mere "technicalities." Burden to prove unreliability does not shift until proponent has satisfied requirements of Rule 803(6). If proponent fails to establish that evidence falls squarely within exception, evidence is inadmissible hearsay. Challenger bears no additional burden of persuasion except to extent that Ind. law affords rebuttable presumption that records were made by person with personal knowledge.

RELATED CASES: Rolland, App., 851 N.E.2d 1042 (no error in admitting bank record, even though employees had access to record to change or amend record after it was initially completed); Jennings, App., 723 N.E.2d 970 (Tr. Ct. did not err in admitting inmate profile report as evidence of D's age).

TITLE: Hatton v. State

INDEX NO.: O.9.c.5.

CITE: (4th Dist. 10/8/86), Ind. App., 498 N.E.2d 398

SUBJECT: Hearsay exceptions - business records; computer printouts; machine-created original entries

HOLDING: State failed to lay proper foundation for computer printout sheet listing Medicaid monies paid to D, who was charged with welfare fraud. Here, supervisor from welfare department was called to testify about computer readout sheet. Witness had no personal knowledge of computer system used to generate amounts paid from Medicaid program. Computer readout sheet was generated in Indianapolis welfare office & witness did not know when or how information was entered into computer. Under Brandon 396 N.E.2d 365, Ct. finds evidence was improperly admitted. Held, conversion conviction reversed & remanded for new trial; conviction for welfare fraud affirmed.

TITLE: Holmes v. State
INDEX NO.: O.9.c.5.
CITE: (8-7-96), Ind., 671 N.E.2d 841
SUBJECT: Handwritten message - business records hearsay exception
HOLDING: Tr. Ct. did not err in admitting handwritten message penned by victim as night shift manager of restaurant. Exhibit was hearsay admissible under business records exception. State provided proof that this exhibit was handwritten original, made by shift supervisor as part of her routine duties to inform next shift supervisor of relevant events occurring under her supervision. D argued that admission of exhibit violated his rights to confront & cross-examine. Even assuming that business records exception is not firmly rooted hearsay exception, Ct. held that statement & circumstances under which it was made render declarant particularly worthy of belief. Idaho v. Wright, 110 S. Ct. 3139 (1990). Held, no error.

RELATED CASES: L.H., App., 682 N.E.2d 795 (admission of school attendance report pursuant to business records exception to hearsay rule did not violate D's right to confrontation).

TITLE: J.L. v. State

INDEX NO.: O.9.c.5.

CITE: (5th Dist., 6-3-03), Ind. App., 789 N.E.2d 961

SUBJECT: Admissibility of school attendance records under business records exception to hearsay rule

HOLDING: Tr. Ct. did not err in admitting juvenile D's middle school attendance records under business records exception to hearsay rule. State sought to admit records which were accompanied by affidavit of Ginger Arvin, who attested that she is cusodian/keeper of attendance records. Upon cross-examination, Arvin admitted that she did not work at middle school, that she generated reports from computerized database, & that she was not actual custodian of school's attendance records. Ct. held that although Indianapolis Public Schools (IPS) is actual custodian of D's attendance records, school corporation acts through agents such as Arvin. Indiana Evidence Rule 803(6) permits foundational requirements to be established by "custodian or another qualified witness." As appointed attendance officer for IPS, Arvin revealed her understanding of school corporation's record keeping process & thus met test of custodian or other qualified witness to authenticate the documents under Rule 803(6). L.H. v. State, 682 N.E.2d 795 (Ind. Ct. App. 1997).

Ct. also rejected D's argument that Arvin's affidavit was deficient for omitting statement that school regularly made attendance records, which is foundational requirement under Rule 803(6). However, from Arvin's testimony, it can reasonably be inferred that it was regular practice of middle school to compile attendance data & to store that data electronically so that attendance records could be printed on demand. Held, judgment affirmed.

RELATED CASES: Houston, 957 N.E.2d 654 (Ind. Ct. App 2011) (school attendance and referral records were admissible under the business records exception; the fact that the forms completed by the attendance record were provided by the Juvenile Division of the Prosecutor's Office did not matter being the forms were completed as part of the regular business of the school).

TITLE: McGill v. State

INDEX NO.: O.9.c.5.

CITE: (12-10-2020), Ind. Ct. App., 160 N.E.3d 239

SUBJECT: No abuse of discretion to exclude IQ assessment offered under business record exception

HOLDING: Trial court did not abuse its discretion in excluding the results of Defendant's IQ assessment from evidence. Defendant attempted to introduce the psychological assessment without the testimony of the psychologist who administered the test by using the business record exception to the hearsay rule. The Court of Appeals found the authentication affidavit did not identify a business entity or detail what routine business activity required performing psychological assessments and also did not explain how the maintenance of psychological records is necessary for a business purpose. Allowing the admission of the assessment into evidence without allowing the State to examine the psychologist regarding her qualifications and methodology would sidestep the safeguards set out in Ind. Evid. R. 702, which requires expert opinion testimony to be rendered by a qualified individual relying on established scientific principles.

Defendant was convicted of residential entry as a Class A misdemeanor based on evidence he and a female companion entered a stranger's home through an unlocked back door. The Court of Appeals found the State presented sufficient evidence to rebut Defendant's mistake of fact defense. Defendant testified he did not believe he had permission to enter the house when he did so and he remained in the house after realizing no one was home. Held, conviction affirmed.

TITLE: Payne v. State
INDEX NO.: O.9.c.5.
CITE: (2nd Dist., 12-8-95), Ind. App., 658 N.E.2d 635
SUBJECT: Arrest records admissible under business records exception
HOLDING: Tr. Ct. did not err during HO phase of trial in admitting certified copies of arrest records into evidence. Witness testified that he was supervisor of fingerprint unit & one of persons responsible for keeping criminal arrest records for police department. Finding no foundational deficiency in exhibits, Ct. held documents were properly qualified as business records exception to hearsay. Arrest records were part of records under witness's custody, & witness testified that police department kept records in normal course of business at or near time of transactions reflected upon record occurred. Unavailability element should not be considered significant element of business records exception, especially in absence of evidence suggesting record is not authentic. Knuckles v. State (1990), Ind. App., 549 N.E.2d 85. Held, no error.

RELATED CASES: Tate, App., 835 N.E.2d 499 (arrest record was admissible under Rule 803(6) because it was limited to biographical information & type of charge to be brought against arrestee, & did not contain any subjective assumptions, statements, interpretations, or conclusions).

TITLE: Richardson v. State
INDEX NO.: O.9.c.5.
CITE: (5th Dist., 11-20-06), Ind. App., 856 N.E.2d 1222
SUBJECT: Right to confrontation - business records are not testimonial evidence
HOLDING: In dealing in methamphetamine prosecution, Tr. Ct. did not abuse its discretion in admitting D's son's medical records. D argued that her Sixth Amendment right to confrontation was violated because medical records constitute testimonial evidence pursuant to Crawford v. Washington, 541 U.S. 36 (2004), & fails to otherwise fall within a recognized hearsay exception. Crawford drew a line between testimonial & non-testimonial hearsay without providing a definition of testimonial evidence, providing the States latitude for developing their hearsay laws in relation to non-testimonial hearsay. However, Crawford did comment on existing hearsay exceptions, stating, "[m]ost hearsay exceptions covered statements that by their nature were not testimonial-- for example, business records or statements in furtherance of a conspiracy." Crawford, 541 U.S. at 56.

Ct. found no persuasive reasoning posited by D to cause it to disagree with S. Ct.'s holding in Crawford that business records by their very nature are not testimonial. Thus, Tr. Ct. did not abuse its discretion in admitting medical records pursuant to Indiana Evidence Rule 803(6). Held, judgment affirmed in part, reversed in part on other grounds & remanded.

TITLE: Sandleben v. State
INDEX NO.: O.9.c.5.
CITE: (12/11/2014), 22 N.E.3d 782 (Ind. Ct. App. 2014)
SUBJECT: Inadequate foundation for internet service provider records
HOLDING: In public voyeurism prosecution, Tr. Ct. abused its discretion by admitting the internet service provider's (ISP's) records, because the State did not lay an adequate foundation for their admission under the business records exception to the hearsay rule. Manager of field operations for ISP testified regarding a record of subscriber information kept by ISP in the ordinary course of business. The record indicated that D was an ISP subscriber with the username "siterock@twc.com," and was admitted over D's objection.

State's witness could not provide an adequate foundation to sponsor the ISP subscriber information because he was not the custodian and did not have knowledge of the record sufficient to sponsor it. Although a sponsor need not be the custodian or creator of a proffered record, a sponsor must still testify about how the record was made, who filed it, and that the person who filed it was both authorized to do so and had personal knowledge of the transaction. Embrey v. State, 989 N.E.2d 1260 (Ind. Ct. App. 2013). Witness here did not explain how the record was created or who created it, much less that an authorized person with personal knowledge of the underlying transaction had created and filed it. However, error was harmless because the subscriber information records were cumulative of other testimony. Held, judgment affirmed.

TITLE: Serrano v. State
INDEX NO.: O.9.c.5.
CITE: (2nd Dist., 4-15-04), Ind. App., 808 N.E.2d 724, *overruled* in part by 823 N.E.2d 1187
SUBJECT: Erroneous admission of arrest report - business records hearsay exception
HOLDING: Tr. Ct. erred in admitting arrest report to prove D's age for a Sexual Misconduct with a Minor conviction. At trial, State argued admission under the business records hearsay exception, Evid. Rule 803(6), but Tr. Ct. admitted it as a public record under Evid. Rule 803(8), which make police reports inadmissible under plain language of rule. State attempted to admit report under Rule 803(6) through officer who was responsible for police department records rather than reporting officer. However, nothing in the record suggested that reporting officer had personal knowledge of the information contained therein & circumstances suggested a lack of trustworthiness. For instance, although not part of the trial record, the pre-sentence report & pre-sentence investigation listed a date of birth that would have placed D at age 17 rather than 18 when he had consensual sex with a 14-year-old. Majority determined that jeopardy attached as the only evidence of D's age was the arrest record. When evidence is admitted that is prejudicial but without which the State's case would not otherwise fail, the State may retry the D, but when the only evidence of a material element is inadmissible the State has failed in its burden of proof. Held, judgment reversed; Bailey, J. concurring in part & dissenting in part would reverse as arrest report was inadmissible but would not preclude State from retrying D.

Note: In Jaramillo, 823 N.E.2d 1187, Ct. disapproved of Serrano to extent it suggests retrial of D is barred in this situation.

RELATED CASES: Tate, App., 835 N.E.2d 499 (error was harmless because there were no hearsay concerns with remainder of documents properly admitted in exhibit).

TITLE: Short v. State
INDEX NO.: O.9.c.5.
CITE: (12/27/82), Ind., 443 N.E.2d 298
SUBJECT: Hearsay exceptions - business records; negative results
HOLDING: Tr. Ct. did not err in admitting testimony of sales & operations manager that neither D nor his corporation had been sold construction materials. Here, D contends testimony should not have been admitted over his hearsay objection. Ct. notes that negative results of a search of business records kept in regular course of business rather than business records themselves were admitted. Testimony regarding negative results of business records search is admissible. Brandon 396 N.E.2d 365. Held, no error.

TITLE: Sills v. State
INDEX NO.: O.9.c.5.
CITE: (5/14/84), Ind., 463 N.E.2d 228
SUBJECT: Hearsay exceptions - medical records used to form opinion
HOLDING: Tr. Ct. did not err in admitting prior diagnostic reports where reports were relied on by testifying psychiatrist in making diagnosis. Here, EEG (#20), diagnostic evaluation (#21) prepared before D entered Boys School & psychological & intelligence tests (#22) administered before D entered Boys School were introduced at D's murder trial. D contends exhibits were hearsay. Ct. finds exhibits were not admitted for truth of matters contained therein (thus resting on credibility of out-of-Ct. declarant), but to establish foundation for witness' diagnosis of D. "While it might have been better not to have admitted these document directly into evidence [Smith, 285 N.E.2d 275], it was not necessarily error to do so. Portrayal of D in exhibits #21 & #22 were almost identical in substance to D's psychiatric witnesses, who said D was insane. Held, no error. DISSENT by Prentice contends Weedman, 416 N.E.2d 1268; Flewallen, 368 N.E.2d 239 & Smith, establish that medical records containing observations/ interpretations/ diagnosis/opinions of one not available for cross-examination are not admissible directly into evidence. Exhibits #21 & #22 should not have been passed to jury.

TITLE: Smith v. State
INDEX NO.: O.9.c.5.
CITE: (11/17/83), Ind., 455 N.E.2d 606
SUBJECT: Hearsay exceptions - business records; foundation
HOLDING: Tr. Ct. did not err in admitting page from motel meeting reservation book as a business record. Foundation requirements are: (1) record offered consists of original entries; (2) made in regular course of business at/near time of event recorded; (3) made with first-hand knowledge of person whose business duty is to observe & report the facts; (4) witness who had knowledge of facts is unavailable. Wells, 261 N.E.2d 865. Here, on rebuttal, state introduced pertinent page of meeting reservation book through sales & catering manager to disprove D's alibi (was at a hair stylist's meeting at motel). Exhibit contained original entries, was made in regular course of business by one of 3 employees responsible for maintaining the book (identity of entry-maker not required, Jones, 369 N.E.2d 418). Prior catering manager was no longer employed at motel. Held, no error.

RELATED CASES: Holmes, 671 N.E.2d 841 (there is no requirement of unavailability under Ind.Evid.R. 803(6)); Moore, 467 N.E.2d 720 (death certificate was neither official publication nor copy attested to by coroner, thus requirements of TR 44 were not met & admission was error; held, error was harmless because it simply disclosed fact proven by other properly admitted evidence); Pitts, 439 N.E.2d 1140; Hatton, App., 498 N.E.2d 398 (foundation requirements discussed); Johnson, App., 484 N.E.2d 49 (D failed to lay foundation for admission of DPW & Board of Health Reports; held, no error in exclusion). Cf., Perkins, 483 N.E.2d 1379 (Pendleton visitor logs were properly admitted as business records, attested to by officer having legal custody of logs).

TITLE: Stahl v. State
INDEX NO.: O.9.c.5.
CITE: (9-24-97), Ind., 686 N.E.2d 89
SUBJECT: Hearsay - business records exception inapplicable
HOLDING: Affidavit supplied to bank by account owner establishing that D was unauthorized to make withdrawals from automatic teller machine ("ATM") was inadmissible hearsay. Business record exception to hearsay rule applies to record of events made at or near time of events recorded by, or from information transmitted by, a person with knowledge, if kept in course of regularly conducted business & if it was regular practice to make report. Ind. R. Evid. 803(6). Here, D took money from friend's account through ATM. Account owner went to bank to watch video tape of withdrawal & signed affidavit claiming that he did not withdraw funds, authorize their withdrawal or benefit from their withdrawal. Because account owner did not testify, State introduced affidavit into evidence to establish that D was unauthorized to make withdrawal.

Affidavit did not fall within business record exception to hearsay rule. Although owner of account had duty to report information because bank would not reimburse him or allow him to watch videotape of withdrawal without creating affidavit, bank employee, who was witness, did not have personal knowledge concerning contents of affidavit, & account owner was not acting in any regularly conducted business activity. Thus, affidavit did not meet all requirements of Ind. R. Evid. 803(6). Held, transfer granted & remanded for new trial.

RELATED CASES: King, App., 908 N.E.2d 673 (Ind. Ct. App. 2009) (where Yahoo! failed to verify the accuracy of the source of information in its user profile and login tracker for the account from which an undercover agent posing as a fifteen-year-old girl was solicited, the source of information or the method or circumstances of preparation of the user profile and login tracker indicated a lack of trustworthiness and were inadmissible; error was harmless) *sum. aff'd.,* 921 N.E.2d 1288 (Ind. 2010); Speybroeck, App., 875 N.E.2d 813 (bank manager's affidavit could not make another business' documents & the victim's & D's letters received by the bank in the course of its fraud investigation admissible under the business records exception; bank employee did not have personal knowledge of the documents nor did a bank employee create the documents).

TITLE: State v. Miller

INDEX NO.: O.9.c.5.

CITE: 144 P.3d 1052 (Ore. Ct. App. 2006)

SUBJECT: Urine analysis by state lab is testimonial, not common law business record

HOLDING: The Oregon Court of Appeals held that a report of the results of a urine analysis conducted by a police laboratory was "testimonial" for purposes of the Confrontation Clause's limits on the admission of hearsay evidence. D was charged with possession of methamphetamine and the trial judge denied prosecutors' in limine motion seeking permission to introduce lab reports from the state police lab indicating that the drug was present in a sample of D's urine. The Court said that the court in Crawford v. Washington did not have urinalysis reports in mind when it spoke of business records being nontestimonial in nature. The dictum in Crawford was part of the court's assessment of what evidence the framers of the Confrontation Clause meant to exclude, and the modern business records exception has evolved beyond the scope of the common law "shop book rule" "We conclude that a lab report that is prepared by staff at a state crime laboratory at the request of police for use in a criminal prosecution of a specific D would not fall within the shop book rule exception as the framers of the U.S. Constitution would have understood it." As in Davis v. Washington, the statements made in the lab reports were clearly intended to be used in a criminal prosecution "to prove past events potentially relevant to a later criminal prosecution."

TITLE: Vaughn v. State
INDEX NO: O.9.c.5.
CITE: (7/15/2014), 13 N.E.3d 873 (Ind. Ct. App 2014)
SUBJECT: Chain of custody report admissible under business record exception
HOLDING: Tr. Ct. did not abuse its discretion in admitting chain of custody report under business record exception. See Evid. Rule 803(6). Under this rule, a proponent of the exhibit may authenticate it by calling a witness who understands the record-keeping process of the business with respect to the specific entry, transaction, or declaration contained in the document. Houston v. State, 957 N.E.2d 654, 658 (Ind. Ct. App. 2011). The witness need not have personally made or filed the record or have firsthand knowledge of the transaction represented by it in order to sponsor the exhibit.

Here, the State offered the chain of custody report through the arresting officer, who testified that "one of the records [department] ladies" made the entries on the report, who were authorized to make the entries and had personal knowledge of the transaction. Thus, the report was admissible under Evid. Rule 803(6).

The Court rejected D's argument that the report was a police investigative record, admissible only if he offered it as evidence. However, only records that contain factual findings about a materially contested issue constitute a police investigative record. The chain of custody report did neither as it merely recorded the location of the evidence, and it did not refer to the evidence as cocaine, only as a "rock like substance." Held, judgment affirmed.

TITLE: Walters v. State
INDEX NO.: O.9.c.5.
CITE: (3/22/2019), 120 N.E.3d 1145 (Ind. Ct. App. 2019)
SUBJECT: Erroneous admission of unauthenticated phone records
HOLDING: Tr. Ct. abused its discretion by admitting evidence of phone records without proper authentication. State offered as evidence of aiding, inducing, or causing armed robbery, phone records from Verizon. D objected to the certification used to authenticate the phone records and that the records were hearsay. The State argued the phone records were admissible under the business records exception to the hearsay rule and that the records were not hearsay because they were statements made by co-conspirators.

Court of Appeals concluded the State failed to provide proper authentication of the Verizon phone records because the records contain no identifying characteristics beyond the Verizon internal case number. The certificate offered to authenticate the phone records was issued approximately eighteen months after the records were obtained, it did not contain the phone number for which the warrant was issued, it did not contain the number of pages it purported to authenticate, and it did not contain the dates of the records. Therefore, the certificate lacked indicia of reliability. And without a timeframe reference and identification of the records in some way separate from Verizon's internal case number, it is unclear what documents the certificate purports to certify. Because the authentication of the records was insufficient and records should not have been admitted into evidence, Court did not reach the question of whether the statements were admissible as coconspirator statements. Absent phone records evidence was insufficient to support aiding, inducing or causing armed robbery charge. Held, conviction reversed and remanded for new trial.

TITLE: Weis v. State
INDEX NO.: O.9.c.5.
CITE: (1st Dist., 04-20-05), Ind. App., 825 N.E.2d 896
SUBJECT: Medical report admissible as business record
HOLDING: In child molesting prosecution, a copy of a medical record, which included notes by a nurse who did not testify, was properly admitted into evidence over D's objection. The margin notes said, "Molested by step-dad [D]. [H]as been happening off + on since pt. was 3 yrs. old. [L]ast occurrence was in March...." Ct. found waiver as to doctor's reading of margins because D failed to object to his testimony, but waiver notwithstanding, the exhibit was admissible as a business record under Ind.Evid.R. 803(6). Further, the margin notes did not constitute hearsay because they were introduced to explain why the doctor conducted his physical examination, not for the truth of the statement.

Ed **Note:** But see Payne v. State, 515 N.E.2d 1141, 1144 (Ind. Ct. App1987) (while medical records are admissible as business records, any facts within a medical history given by the patient are not admissible as substantive evidence. Citations omitted*, overruled* on other grounds by Cox v. State, 706 N.E.2d 547 (Ind.1999).

Ct. also did not find improper vouching testimony under Ind. Evid. Rule 704(b), distinguishing Jones v. State, 581 N.E.2d 1256 (Ind. Ct. App.1991). Deputy testified that "after speaking with [the alleged victim] I believed we had evidence of several counts of child molesting ... [The alleged victim] had discussed force & fear & so I believed we possibly had a rape charge in there also." A case worker also testified that D had no contact with his stepdaughter since the allegations, noting "this is a person who has caused great damage, so we don't have any contact." Neither of these statements invaded the province of the jury as the deputy explained the course of investigation after speaking with the alleged victim & not her specific belief in the child's truthfulness & the case worker only explained the protocol for visitation between an alleged abuser & victim. Held, judgment affirmed

TITLE: Williams v. State
INDEX NO.: O.9.c.5.
CITE: (11/10/2016), 64 N.E.3d 221 (Ind. Ct. App 2016)
SUBJECT: Failure to authenticate toxicology report
HOLDING: In prosecution for operating vehicle with controlled substance in blood causing death, State failed to establish a chain of custody for D's blood sample so as to allow the admission of results showing positive test for methamphetamine. In order to establish the chain of custody for D's blood sample, State relied heavily on 192-page exhibit which Tr. Ct. admitted under the business-records exception to the hearsay rule. However, the State did not properly authenticate the exhibit pursuant to Evidence Rule 902(11) because its Certificate of Authenticity contained only a notary signature as a witness, not a signature of a records custodian or other qualified person. Moreover, the certification does not show that the records meet the requirements of Evidence Rule 803(6)(A)-(C), that is, they were made at or near the time by – or from information transmitted by - someone with knowledge and that they were made and kept by the lab in the ordinary course of business.

Alternatively, the sponsoring witness' trial testimony was also insufficient to authenticate the report. The witness, an analyst with lab that completed the toxicology report, testified that she did not physically produce the report, but that a computer generated it after the results of D's blood sample test were submitted through the lab's information system. Because the lab analyst's testimony only partially explained how the toxicology report was created and did not address the other components of the exhibit, her testimony did not authenticate the exhibit. Held, conviction reversed on Count II, which is based on methamphetamine, and affirmed on Count I, which is based on unchallenged marijuana evidence.

O. EVIDENCE

O.9. Hearsay

O.9.c.6. Public records

TITLE: Andrews v. State
INDEX NO.: O.9.c.6.
CITE: (1/18/89), Ind., 532 N.E.2d 1159
SUBJECT: Public records - mutilation, interlineation, erasure
HOLDING: Admission of certified copies of records of conviction during habitual phase where name & number of another person had been whited out, & D's name typed over it, was proper, on basis of State's representation that exhibits were in this form when received from Illinois Ct. which issued judgments in question. Rule excluding papers because of unexplained alteration does not apply to official documents not in custody of party to be hurt or benefited by them. 32 C.J.S. 646. No Illinois official appeared at trial. Affirmed.

TITLE: Bailey v. State
INDEX NO.: O.9.c.6.
CITE: (2nd Dist., 4-15-04), Ind. App., 806 N.E.2d 329
SUBJECT: Public housing documents admissible under public records hearsay exception
HOLDING: Tr. Ct. did not err in admitting several documents related to D's public housing under public records hearsay exception, Ind. Evid. Rule 803(8). D was convicted of theft for not reporting to the public housing authority (PHA) that her employment or income had changed within two weeks as required by HUD guidelines. The questioned records included D's housing applications, which included an addendum that informed applicants of the notification requirement & was initialed by D. These items were clearly public records, admissible through a PHA police officer's testimony that the documents are standard, required by HUD & prepared by PHA's legal department in regular course of its business, & stored in a secure location.

As to computer log of all contact between the PHA & D, D argued that this document was inadmissible under 803(8)(b) as "investigative reports prepared by or for" the government. Log showed that D failed to report her new employment to the PHA. Through the PHA officer's testimony, Ct. determined that HUD required PHAs to document any contact with residents, & thus 803(8) applied due to this "duty imposed by law." Ct. found that the document was admissible unlike a regular police report because it was not prepared for "advocacy purposes or in anticipation of litigation" under the three-part test noted in Shepherd v. State, 690 N.E.2d 318, 326 (Ind. Ct. App1997). Held, judgment affirmed.

TITLE: Dumes v. State
INDEX NO.: O.9.c.6.
CITE: (4th Dist., 11-5-99), Ind. App., 718 N.E.2d 1171
SUBJECT: Certification of public records must be made by custodian of records
HOLDING: Tr. Ct. erred in admitting D's driving records into evidence based solely on prosecutor's certification because prosecutor's office was not appropriate entity to certify driving records as true & complete. Regardless of self-authentication method used by party, either under I.C 34-37-1-8 or Indiana Evid. R 902(9), documents must be attested as true & complete by custodian of records. BMV, not prosecutor's office, is both custodian of driving records & entity statutorily empowered & responsible for certifying these public records. In this case, D's BMV records were obtained via Internet & certified by paralegal employed by prosecutor's office. Public records cannot be placed in evidence merely upon party's offering copy & claiming it to be accurate copy of original, especially where, as here, party to Ct. proceeding is certifying & authenticating documents it intends to introduce into evidence. Mott, App., 547 N.E.2d 58. Held, conviction reversed & remanded for new trial on other grounds.

RELATED CASES: Carpenter, App., 743 N.E.2d 326 (BMV can certify judgments from county courts); Dumes, App., 723 N.E.2d 460 (on rehearing, reaffirming earlier holding, Ct. noted that allowing party to certify & authenticate documents which it is introducing into evidence effectively defeats purposes of authentication requirements imposed by Indiana Trial Rules, Rules of Evidence, & Indiana Statutes).

TITLE: Ealy v. State
INDEX NO.: O.9.c.6.
CITE: (9-12-97), Ind., 685 N.E.2d 1047
SUBJECT: Public records hearsay exception - autopsy reports
HOLDING: Ind. Rules of Evidence 803(8)(c) excludes factual findings offered by government in criminal cases from public records hearsay exception. Rather than distinguishing between "factual finding" & "observation," Tr. Cts. must employ following evaluative process when called upon to determine whether piece of evidence is inadmissible under IRE 803(8)(c). First, Tr. Ct. must consider whether "findings" objected to address materially contested issue in case. If they do not, then safeguards provided by rule sufficiently protect D. If "findings" which are objected to address material & contested issue, then Tr. Ct. must consider nature of what is objected to. Second, if Tr. Ct. can clearly find that record or report contains no factual findings, then evidence is not made inadmissible by IRE 803(8)(c). However, if evidence does or may contain "factual findings," then Ct. must determine whether report was prepared for advocacy purposes or in anticipation of litigation. If it was not, then evidence is admissible unless D can show reason to doubt trustworthiness of report. If D only disagrees with conclusions, then D can challenge conclusions through expert opinion or otherwise. If, however, report was prepared for advocacy purposes, then contested findings are inadmissible hearsay.

Thus, where report's findings address materially contested issue in case & were prepared for advocacy purposes, findings are inadmissible hearsay. This evaluation respects both confrontation rights of D & purposes of public records hearsay exception. Here, autopsy report was admissible because there was nothing in autopsy report which addressed materially contested issue in case. Even if report addressed materially contested issue & contained factual findings, examiners who prepare report do so for non-advocacy purposes. They have every incentive to do proper job & their impartiality is assumed. Because autopsy report was admissible, Tr. Ct. did not err in allowing expert to base his opinion on it. Held, no error.

RELATED CASES: Ackerman, 51 N.E.3d 171 (Ind. 2016) (autopsy report was not testimonial, thus D's Sixth Amendment confrontation right was not violated when the report was admitted into evidence; See full review at J.9); Rhone, App., 825 N.E.2d 1277 (PC affidavit was inadmissible because 803(8) specifically excludes investigative reports by police from hearsay exception; affidavit addressed a materially contested issue in the case that included factual findings & was prepared for advocacy purposes); Sparkman, App., 722 N.E.2d 1259 (Tr. Ct. erred in admitting map from county surveyor's office that contained radius line showing distance between D's site of arrest & public park was less than 1,000 feet; map failed to evince requisite trustworthiness to fall within public records exception); Shepherd, App., 690 N.E.2d 318 (diagram of accident scene prepared by investigator as part of official accident report fell within hearsay exception for public documents).

TITLE: Fowler v. State
INDEX NO.: O.9.c.6.
CITE: (06-30-10), 929 N.E.2d 875 (Ind. Ct. App 2010)
SUBJECT: Public records hearsay exception permits admission of routine police records
HOLDING: In battery prosecution, where complaining witness (CW) did not testify, Tr. Ct. did not err in admitting CW's booking card from a prior, unrelated arrest under public records exception to hearsay rule, Ind. Evidence Rule 803(8). The State used certified booking information printout to help establish CW's identity, and although booking card was created by law enforcement, biographical information on printout was obtained and recorded in course of a ministerial, nonevaluative booking process. Although Rule 803(8) specifically excludes investigative reports by police from the hearsay exception, this exclusion does not bar admission of police records pertaining to "routine, ministerial, objective nonevaluative matters made in non-adversarial settings." 30B Michael H. Graham, Federal Practice & Procedure ' 7049 (Interim ed. 2006). Held, judgment affirmed.

RELATED CASES: Allen, 994 N.E.2d 316 (Ind. Ct. App 2013) (State's booking report exhibit fell within ambit of Evidence Rule 803(8) and was not subject to police records exclusion because it listed only non-adversarial information such as D's age, address, height, weight, jail where he was held, and charge on which he was arrested).

TITLE: Harwood v. State
INDEX NO.: O.9.c.6.
CITE: (12/10/91), Ind., 582 N.E.2d 359
SUBJECT: Fax copy of certification not sufficient for public record
HOLDING: Admission of copy of judgment & order from out-of-state conviction as public record was error because attached certification was facsimile copy of original. While copies of public records are admissible if authenticity is properly certified, certifications themselves are not public records & if genuine issue as to authenticity is raised, they are not acceptable. Kelly, Ind., 561 N.E.2d 771. Admission of conviction was apparently sought as evidence of prior sexual act against child, under depraved sexual instinct. S.Ct. granted transfer of Ct. App. decision to hold faxed certification inadequate to authenticate, but in light of evidence presented to support child molesting conviction, error in admission of document was harmless. Held, transfer granted, conviction affirmed.

RELATED CASES: Suggs, App., 883 N.E.2d 1188 (photocopy of certification of court records evidencing D's prior convictions did not provide certification necessary for proper authentication)

TITLE: Jaramillo v. State
INDEX NO.: O.9.c.6.
CITE: (1-26-23), Ind. Ct. App., 201 N.E.3d 1209
SUBJECT: No error in excluding victim's toxicology report as hearsay
HOLDING: Defendant was convicted of voluntary manslaughter after claiming self-defense. In support of his self-defense claim, he sought to admit toxicology report showing the victim had amphetamine and methamphetamine in his system. But the report was excluded before trial on hearsay grounds because the defense did not call the individual who prepared the toxicology report to testify. At trial, Defendant sought to introduce the toxicology report and its contents through the testimony of the State's forensic pathologist, who did not prepare the report. In response to State's hearsay objection, Defendant argued that the report was admissible under the public records exception. The Court of Appeals upheld the trial court's ruling, finding Defendant had not met his burden to prove the toxicology report fell within an exception to the hearsay rule. The toxicology report was not prepared by the Lake County Coroner's Office or any other public agency, and therefore, standing alone, was not a record or statement of a public office. The mere fact that the toxicology report was ordered by the Lake County Coroner's Office and subsequently attached to the autopsy report prepared by the forensic pathologist is of no moment. The Court acknowledged that toxicology reports are routinely relied upon by forensic pathologists in arriving at their opinions as to the cause of death, and when the factual content of such reports is presented to the trier of fact by such persons for this purpose, the testimony reflecting their content would not be hearsay. But here, there was no suggestion the forensic pathologist relied on the toxicology report in reaching his opinion as to the cause of death. In a footnote, the Court rejected Defendant's claim that excluding the report violated his right to present a complete defense. Held: judgment affirmed

TITLE: Kindel v. State
INDEX NO.: O.9.c.6.
CITE: (4th Dist., 3-31-95), Ind. App., 649 N.E.2d 117
SUBJECT: Public records hearsay exception - BMV records
HOLDING: Bureau of Motor Vehicles' determination of habitual traffic violator status is admissible "observation" within purview of hearsay exception found in Ind. Evid.R 803(8). Ct. rejected argument that BMV makes inadmissible "factual finding" constituting hearsay under Evid.R. 803(8)(c) when it determines driver's HTV status. HTV determination in BMV record is based exclusively upon matters observed pursuant to statutory duty, not subjective interpretations, & as such record was properly admitted pursuant to hearsay exception. Held, judgment affirmed.

RELATED CASES: Wilson, App., 727 N.E.2d 775, summ. aff'd 745 N.E.2d 789 (letter that stated search of records showed that D did not have gun license prior to Feb. 25, 1999 was absence of public records, which is exception to hearsay); Coates, App., 650 N.E.2d 58 (BMV records do not constitute "observations" under 803(8), but fall under Rule 803(8) hearsay exception for agency's "regularly conducted & regularly recorded activities").

TITLE: McBrady v. State
INDEX NO.: O.9.c.6.
CITE: (2/20/84), Ind., 459 N.E.2d 719
SUBJECT: Hearsay exceptions - public records; foundation
HOLDING: Tr. Ct. did not err in admitting into evidence 2 of state's exhibits under business records exception to hearsay rule. Here, D contends proper foundation was not laid for admission of arrest reports because state did not establish entrants had personal knowledge of underlying transactions. Ct. switches focus from business records exception to public records exception. Relying on TR 44(A)(1) re official records, Ct. holds official records, such as arrest reports, may be evidenced by a copy attested by officer or deputy having legal custody of record. Sponsor of exhibit is not required to have personally made it, filed it or have firsthand knowledge of transaction represented by it. Witness need only testify exhibit is part of records kept in routine course of business & placed in record by authorized person having personal knowledge of transaction represented at time of entry. Pitts 439 N.E.2d 1140; Morris 406 N.E.2d 1187; Thompson 386 N.E.2d 682; Crosson 376 N.E.2d 1136; Jones 369 N.E.2d 418. Witness' testimony was sufficient to establish foundation. Held, no error.

RELATED CASES: Bray 493 N.E.2d 310 (public records are admissible by virtue of keeper's certification that records are authentic N.E.2d accurate, *citing* TR 44, Underhill 428 N.E.2d 759 & Gilmore 415 N.E.2d 70; held, witnesses need not testify re certification); James v. State ex rel. Com'r of Motor Vehicles, App., 475 N.E.2d 1164 (signature certifying document is valid even if stamped facsimile); Mogle, App., 471 N.E.2d 1146 (Ct. record held inadmissible because certification (1) not signed by Ct. clerk & (2) attached on top of 2 Ct. records while asserting certification of "above & foregoing," see Eldridge 361 N.E.2d 155).

TITLE: Regan v. State
INDEX NO.: O.9.c.6.
CITE: (3d Dist. 04/21/92), Ind. App., 590 N.E.2d 640
SUBJECT: Constitutionality of admissibility provisions of Ind. Code 9-11-4-5
HOLDING: Provision of Ind. Code 9-11-4-5 (since recodified) which provides that certified copies of certificates regarding breath test operators, machines & techniques, are admissible in prosecutions for operating while intoxicated (OWI), does not unconstitutionally deprive Ds of right to confrontation & cross-examination of individuals who performed tests certifying equipment & operators. Ct. found Ind. Code 9-11-4-5 serves purpose similar to Trial Rule 44, allowing for admissibility of certified public records without sponsorship by preparer or custodian of records. Ct. noted that Trial Rule 44 had been considered as acceptable exception to hearsay exclusionary rule in Brady 575 N.E.2d 981, & that same rule had been found constitutional in Wilson 513 N.E.2d 653. Ct. then found rule & statute served similar purpose; both precluded D from cross-examining certifying official at trial, & shared identical indicia of reliability. Therefore, Ind. Code 9-11-4-5 does not offend Ind. Const. Ct. also found statute did not violate 6th Amend. of U.S. Const., relying on US v. Aikens (9th Cir. 1990), 946 F.2d 608, & Ohio v. Roberts (1980), 448 U.S.56. Held, conviction affirmed.

TITLE: Scott v. State
INDEX NO.: O.9.c.6.
CITE: (03-25-10), 924 N.E.2d 169 (Ind. Ct. App 2010)
SUBJECT: SVF- *nolo cotendere* plea evidence of prior conviction
HOLDING: In issue of first impression, Court found no abuse of discretion in admitting evidence of D's Florida *nolo cotendere* plea as proof he was convicted of offense that qualifies him as serious violent felon under Ind. Code 35-47-4-5(a). Plea of *nolo contendere* may be admitted under Indiana Evidence Rule 803(8) as public record proving fact of conviction, even though Indiana Evidence Rule 803(22) does not allow admission of evidence of a final judgment entered upon a plea of nolo contendere "to prove any fact essential to sustain the judgment." Rule 803(22) is designed to prevent *nolo contendere* conviction from being used in subsequent proceeding to prove actual guilt of prior offense but "does not prevent the admission under Evidence Rule 803(8) of a *nolo contendere* as a public record proving the fact of the conviction." See United States v. Adedoyin, 369 F.3d 337, 343-45 (3rd Cir. 2004), cert. denied, 543 U.S. 915. Thus, Tr. Ct. did not abuse discretion by admitting D's *nolo contendere* plea to a Florida murder charge as proof that he was convicted of offense qualifying him as serious violent felony. Held, judgment affirmed.

TITLE: Tardy v. State
INDEX NO.: O.9.c.6
CITE: (5th Dist., 5-26-00), Ind. App., 728 N.E.2d 904
SUBJECT: Erroneous admission of surveyor's map under public records hearsay exception
HOLDING: Tr. Ct. erred in admitting map from county surveyor's office that contained lines showing distance between D's site of arrest & public park was less than 1,000 feet. Map was altered for purpose of litigation & did not evince requisite trustworthiness to remain within public records exception to hearsay under Evidence Rule 803(8). Sparkman, App., 722 N.E.2d 1259. However, erroneous admission of map was harmless error because distance from site of arrest to public park was sufficiently established through park ranger's testimony. Held, conviction affirmed. Robb, J., concurring in result.

TITLE: Wilber v. State
INDEX NO.: O.9.c.6.
CITE: (3/5/84), Ind., 460 N.E.2d 142
SUBJECT: Hearsay exceptions - public records
HOLDING: Tr. Ct. did not err in allowing forensic pathologist who performed autopsy to testify re medical reports of treating physicians. Here, D contends testimony which referred directly to content of medical reports of treating physicians was inadmissible as hearsay and did not qualify for admission as public documents. Ct. does not reach public records issue. Testimony was admissible because it showed basis of pathologist's medical conclusions. Medical reports are routinely relied upon by forensic pathologists in forming opinions re cause of death. When presented to trier of fact by such persons at trial "in this form & manner & for this purpose," testimony reflecting contents of medical reports is not hearsay. Smith, 285 N.E.2d 275. Held, no error.

RELATED CASES: Ackerman, 51 N.E.3d 171 (Ind. 2016) (surrogate pathologist's testmony about information contained in autopsy report did not violate D's confrontation rights; see full review at J.9).

TITLE: Wisehart v. State
INDEX NO.: O.9.c.6.
CITE: (3/19/98), Ind., 693 N.E.2d 23
SUBJECT: IRE 803(8) - public records
HOLDING: Investigative reports by police & other law enforcement personnel are not admissible under IRE 803(8) except when offered by accused in criminal case. Bacher, 686 N.E.2d 791; IRE 803(8)(a). Here, on post-conviction, D offered police reports related to investigation of crimes, but Tr. Ct. admitted reports as business records pursuant to Indiana Rule of Evidence 803(8). However, IRE 803(8) covers public records, while IRE 803(6) covers business records. Held, judgment affirmed.

RELATED CASES: McMillen, 169 N.E.3d 437 (Ind. Ct. App. 2021) (harmless error to admit probable cause affidavit and law enforcement investigative reports in proving D's prior battery); Hardiman, 726 N.E.2d 1201 (although police report itself offered by D was admissible under IRE 803(8), Tr. Ct. could reasonably have concluded that statements of witnesses recorded in report did not fall under excited utterance hearsay exception because declarants had time for reflection & deliberation); Shively, App., 680 N.E.2d 877 (former wife was not required to show that computer printout records, offered to prove retirement pay arrearage, were accurate & product of standardized computer system in order for records to be admissible under public records or business records exceptions to hearsay rule).

O. EVIDENCE

O.9. Hearsay

O.9.c.9. Treatises/publications

TITLE: Connell v. State
INDEX NO.: O.9.c.9.
CITE: (11/16/84), Ind., 470 N.E.2d 701
SUBJECT: Hearsay - exceptions; commercial publications
HOLDING: Tr. Ct. did not err in admitting into evidence a television listing from local newspaper for day in question. Here, D's alibi witness testified that he was watching cartoons at her house from 12:30 - 2:30. On rebuttal, state introduced television listing, which impeached D's alibi witness. D objected on hearsay grounds. Tr. Ct. held exhibit was not hearsay because it was admitted only to show what was in newspaper, not what actually had been broadcast. Ct. finds exhibit was hearsay, but pronounces a new exception warranting introduction of television listings & schedules published in newspaper & periodicals on regular basis which are (1) intended to be relied upon by public & (2) shown to Ct.'s satisfaction to be authentic. Ct. finds IN law presently sanctions admission of reports of regular markets for goods (securities) published in newspapers of general circulation as proof of value. Ind. Code 26-1-2-724. Standard life tables are routinely sanctioned. McCue v. Low, App., 385 N.E.2d 1162. Hearsay statement of facts published in newspaper ads are admitted in conjunction with other non-hearsay proof of same facts. [Citations omitted.] New exception is justified because (1) viewing of TV programs is common experience; disproving particular broadcast by objective/unbiased proof is simple process; (2) TV listing is publicly announced/widely disseminated on daily/weekly basis; (3) wide successful public reliance on accuracy of listings; (4) accuracy is dictated by business interest of newspapers & TV stations; (5) they are not intended to create evidence for Ct.; & (6) they are readily available/inexpensive. Ct. notes that programs are periodically changed, rendering listings inaccurate. Ct. finds same potential in market reports published in newspapers, business entries & public records. Held, no error.

TITLE: Feliciano v. State
INDEX NO.: O.9.c.9.
CITE: (9/6/84), Ind., 467 N.E.2d 748
SUBJECT: Hearsay exceptions - newspaper article
HOLDING: Tr. Ct. erred in permitting rebuttal witness (police officer) to recount contents of newspaper story printed 2 days after second arrest warrant issued, but error was harmless. Here, Ct. finds all matters referred to in article clearly established by competent evidence. Held, conviction affirmed.

TITLE: Lindhorst v. State
INDEX NO.: O.9.c.9.
CITE: (12/27/2017), 90 N.E.3d 695 (Ind. Ct. App 2017)
SUBJECT: No error in limiting D's cross-examination about medical journal
HOLDING: In prosecution for battery resulting in serious bodily injury to a person less than fourteen years of age, Tr. Ct. did not abuse its discretion in limiting D's cross-examination of one of State's expert witness about a medical journal. State objected to D's question about an expert's study on fatal pediatric head injuries on basis that its expert was unfamiliar with the study. Indiana Rules of Evidence 803(18) requires that a treatise, periodical or pamphlet must be "established by a reliable authority" by a witness or by judicial notice, and State's expert specifically refused to agree that the Journal of Forensic Medicine and Pathology, in which the study appeared, was a reliable source. Tr. Ct. was not obligated to accept defense counsel's statement that he would demonstrate later in the case that the periodical was a reliable source. In the absence of authentication, Tr. Ct. did not err in limiting D's questioning on this subject. Regardless, any error in limiting D's cross-examination did not prejudice her defense and was harmless, because the article was established at trial as authoritative and its contents were read to the finder of fact through other witnesses. Held, judgment affirmed.

O. EVIDENCE

O.9. Hearsay

O.9.c.11. Prior statements

TITLE: Brittain v. State
INDEX NO.: O.9.c.11.
CITE: (1/31/2017), 68 N.E.3d 611 (Ind. Ct. App 2017)
SUBJECT: Admission of deposition testimony did not violate D's confrontation rights
HOLDING: In murder and attempted murder prosecution, admission of State witness' deposition did not violate Defendant's confrontation rights under Sixth Amendment and Article 1, Section 13 of Indiana Constitution. Witness, who was the victim of a shooting and who witnessed the shooting of her companion, died after defense counsel deposed her; thus she was "unavailable" as a witness at trial for purposes of Ind. Evidence Rule 804. Defendant was afforded the opportunity to and did cross-examine the witness; thus trial court's decision to admit a redacted version of the two-hour deposition at trial did not violate Defendant's right of confrontation. The Indiana right to meet witnesses face-to-face is secured where the witness' testimony at a former hearing or trial on the same case is reproduced and admitted, where Defendant either cross-examined such witness or was afforded an opportunity to do so, and the witness cannot be brought to testify at trial again. Berkman v. State, 976 N.E2d 68 (Ind. Ct. App 2012).

Because Defendant did not object at trial based upon violation of Ind. Trial Rule 30 (no review/signature and lack of proper certification by court reporter), he waived this issue on appeal. Finally, trial court did not abuse its discretion in admitting written answers the victim gave to a police officer at the hospital immediately after the shooting because this qualified as an excited utterance and, in any event, such error would have been harmless. Held, judgment affirmed.

TITLE: Brown v. State
INDEX NO.: O.9.c.11.
CITE: (8-7-96), Ind., 671 N.E.2d 401
SUBJECT: Prior statements of co-conspirator admissible under Ind.Evid.R. 801(d)(1)
HOLDING: Tr. Ct. did not err in admitting as substantive evidence prior out of Ct. statements made by co-D regarding his involvement in murders. D had ample opportunity to confront co-D & other witnesses at first trial, even though they were unavailable to testify at this trial. State v. Owings, 622 N.E.2d 948 (Ind. 1993). Co-D's former testimony revealed that he did not deny having made statements or deny remembering making statements. Rather, co-D claimed he did not remember exactly what he said to witness about his involvement in killings. Some inconsistencies between trial testimony & prior statements may not necessarily render prior statements inadmissible for purposes of Ind.Evid.R. 801(d)(1)(B). Regarding co-D's statements made to another witness, Ct. held that even if statements were not consistent with his testimony, admission of this hearsay evidence did not constitute reversible error, because D's substantial rights were not affected. D's cross-examination of co-D at least impliedly alleged that co-D's testimony was product of improper motive. Thus, co-D's prior consistent statements were admissible to rebut D's charge of improper motive under Ind.Evid.R. 801(d)(1)(B). Held, no error.

TITLE: Caley v. State
INDEX NO.: O.9.c.11.
CITE: (5th Dist., 4-28-95), Ind. App., 650 N.E.2d 54
SUBJECT: Prior consistent statements - not made before motive to fabricate arose
HOLDING: Where prior consistent statement did not comply with all foundational requirements required under Ind.Evidence Rule 801(d)(1), Tr. Ct. erred in admitting statement into evidence. In prosecution for child molesting, D expressly or impliedly charged that complaining witness (CW) resented D's harsh disciplinary measures & sought revenge against him. CW's statement to police officer was consistent with her in-court testimony, & she was subject to cross-examination concerning statement. However, although statement was offered by State for proper purpose of rebutting D's charge of recent fabrication or improper motive, statement was not made before alleged motive to fabricate arose. CW's allegedly vengeful motive would have existed prior to time that she made statement, thus admission of hearsay statement was erroneous. Ct. nonetheless found error harmless because contents of statement was merely cumulative of CW's earlier testimony, & D's substantial rights were not harmed. Held, judgment affirmed, Kirsch, J., concurring in part & dissenting in part.

RELATED CASES: Reynolds, 142 N.E.3d 928 (Ind. Ct. 2020) (recorded forensic interview was not admissible under R. 801(d) to refute D's claims that C.W. had fabricated her allegations, because C.W. already had a motive to fabricate when she made the statement).

TITLE: Guy v. State
INDEX NO.: O.9.c.11.
CITE: (2nd Dist., 9-24-01), Ind. App., 755 N.E.2d 248
SUBJECT: Admission of deposition in lieu of live testimony - no error
HOLDING: In child molesting prosecution, trial Ct. properly admitted complaining witness's (CW's) deposition testimony, because CW was clearly unavailable as witness under Indiana Evidence Rule 804(a)(2), & her former testimony was given under oath at deposition conducted by defense counsel. D argued that admission of deposition testimony violated his confrontation rights. CW's unwillingness to testify did not become known to State until CW took stand on first day of trial, when she became emotionally unstable & refused to testify. Although D himself was not present during deposition, counsel was fully able to & did effectively question CW during deposition. In addition, defense counsel had similar motive to question CW as existed at trial. Based upon facts & circumstances of this case, Ct. rejected argument that trial Ct.'s decision to admit CW's deposition pursuant to Rule 804 contravened & undermined Indiana's "protected person" statute, Ind. Code 35-37-4-6. Held, judgment affirmed; Baker, J., concurring, cited State v. Owings, 622 N.E.2d 948 (Ind. 1993), & would hold that D waived right of confrontation at trial by taking CW's deposition & actively participating in it.

TITLE: Horan v. State
INDEX NO.: O.9.c.11.
CITE: (6-27-97), Ind., 682 N.E.2d 502
SUBJECT: Prior statements admissible to rebut charge of recent fabrication
HOLDING: Tr. Ct. did not err in admitting as substantive evidence portions of State witness's consistent pre-trial statement to police. Prior statements consistent with trial testimony are admissible under Indiana Evidence Rule 801(d)(1)(B) if offered to rebut implied charge of recent fabrication or improper influence or motive, & made before motive to fabricate arose. Here, it was within Tr. Ct.'s discretion to conclude that defense counsel's line of questioning at least implicitly charged witness with motive to fabricate his testimony. Fact that State first introduced testimony that it paid for witness's accommodations does not preclude State from responding to implied charge of recent fabrication alleged during cross-examination. United States v. Brennan, 798 F.2d 581 (2nd Cir. 1986).

However, issue is extent to which questions which impeach witness for lack of credibility also imply charge of recent fabrication. Tr. Ct. concluded in its sound discretion that D's line of questioning crossed line from impeachment for credibility into realm of implicitly charging witness with fabricating his testimony. Fact that defense counsel may not have intended to imply that witness's story was fabricated is irrelevant if that inference fairly arises from line of questioning he pursued. U.S. v. Baron, 602 F.2d 1248 (7th Cir. 1979). Once implied charge of recent fabrication is made, adversary is entitled to present prior consistent testimony as substantive evidence. Owens, 659 N.E.2d 466. Held, no error.

TITLE: Jackson v. State
INDEX NO.: O.9.c.11.
CITE: (10-4-00), Ind., 735 N.E.2d 1146
SUBJECT: Erroneous admission of deposition in lieu of testimony - witness not unavailable
HOLDING: Where polygraph examiner was not unavailable, Tr. Ct. erred in admitting into evidence his deposition testimony in lieu of live testimony because it violated D's Sixth Amendment right of confrontation. Record showed that at time of trial, witness was in Washington D.C., attending Secret Service training session. Under T.R. 32(A)(3)(b), deposition testimony of absent witness is admissible at trial provided Ct. finds "[t]hat the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition." However, under Confrontation Clause, deposition testimony of absent witness must bear sufficient indicia of reliability & prosecution must either produce or demonstrate unavailability of declarant whose statement it wishes to use against D. Ct. concluded that Rule 32(A) is not applicable to claims involving violation of D's Sixth Amendment right of confrontation. Rather, inquiry is whether State has made good faith effort to obtain absent witness' attendance at trial. Although deposition in this case comported with principal purposes of cross-examination & thus provided sufficient indicia of reliability, Ct. held that State failed to demonstrate that witness was unavailable for live testimony. State made no effort to obtain officer's attendance, good faith or otherwise. Accordingly, officer was not unavailable, & admitting his deposition testimony into evidence was error because it ran afoul of D's Sixth Amendment right of confrontation. Denial of right of confrontation was harmless because evidence supporting conviction was so convincing that jury could not have found otherwise. Held, conviction affirmed.

RELATED CASES: McGaha, 926 N.E.2d 1050 (Ind. Ct. App 2010) (it is unlikely that the admission of medical examiner's deposition impacted the jury such that D's substantial rights were adversely affected); Beldon, App., 906 N.E.2d 895 (doctor's busy work schedule was not sufficient to circumvent the constitutional right to confrontation; admission of deposition in lieu of testimony was harmless error); Tiller, App., 896 N.E.2d 537 (implicitly requiring State to prove that the victim was unavailable for trial, court of appeals held that state's efforts at securing the victim's attendance at trial were sufficient to find the victim unavailable under both the US and Indiana Constitutions and to allow the victim's deposition to be read into evidence); Garner, 777 N.E.2d 721 (mere vacation is not sufficient to circumvent D's right to confrontation).

TITLE: Muncy v. State
INDEX NO.: O.9.c.11.
CITE: (4th Dist., 9-27-99), Ind. App., 716 N.E.2d 587
SUBJECT: Erroneous admission of prior inconsistent statement concerning identification
HOLDING: Erroneous admission of police officer's testimony that participant in robbery & burglary identified D as his confederate affected D's fundamental rights & required reversal. Indiana Evidence Rule 801(d)(1)(C) provides that statement is not hearsay if declarant testifies at trial or hearing & is subject to cross examination concerning statement, & statement is...one of identification of person shortly after perceiving person. Although declarant testified at trial, State called him to testify before it elicited police officer's testimony about his statement & did not ask declarant about whether he had made statement to officer identifying D. Further, when State presented officer's testimony about alleged identification statement, declarant had already been released from his subpoena & left courthouse. Thus, declarant was not subject to direct examination by State or subject to cross examination concerning statement as required by Evid.R. 801(d)(1)(C). Neither opportunity to cross-examine declarant nor performance of cross- examination regarding his ability to identify D satisfy requirement of Rule 801(d)(1)(C). D must have had opportunity to cross-examine declarant about whether he made statement to officer identifying D as his confederate. Because D did not have this opportunity, Tr. Ct. erred in allowing admission of officer's testimony about declarant's alleged identification statement. Admission of this evidence affected D's substantial rights & constituted reversible error because State emphasized officer's testimony in its closing argument, victims could not identify D as participant in robbery, no physical evidence connected D to crime, & there was no evidence that declarant knew D before robbery. Held, convictions reversed & remanded for new trial.

TITLE: Norris v. State
INDEX NO.: O.9.c.11.
CITE: (4/26/2016), 53 N.E.3d 512 (Ind. Ct. App 2016)
SUBJECT: Non-medical professional's opinion about child's unavailability to tesify
HOLDING: In deciding whether to declare complaining witness (C.W) unavailable to testify at D's trial for Level 5 battery, Tr. Ct. did not err in considering additional testimony from a person who is not a psychiatrist, physician, or psychologist ("Evaluation Professionals") because the Protected Person Statute allows a Tr. Ct. to consider "other evidence," and this evidence may include testimony from a person who is not an Evaluation Professional. See Ind. Code 35-37-4-6(e)(2)(B)(i). Thus, the State is incorrect that "other evidence" is restricted to testimony from additional Evaluation Professionals and medical records related to the assessment of a juvenile. Held, judgment affirmed.

TITLE: Robinson v. State
INDEX NO: O.9.c.11.
CITE: (3rd Dist., 6-19-97), Ind. App., 682 N.E.2d 806
SUBJECT: Admission of prior inconsistent statement concerning identification
HOLDING: Indiana Evidence Rule 801(d)(1)(C) provides that statements are non-hearsay if declarant testifies at trial or hearing & is subject to cross-examination concerning statement, & statement is...one of identification of person made shortly after perceiving person. Here, D argued that Tr. Ct. erred by allowing detective to testify that witness identified D as one of men who shot victims. Witness made his statement to detective two months & thirteen days after shooting but denied making statement at trial. Issue was whether witness's identification of D over two months after shooting qualified as identification made shortly after perceiving D. Ind. Evidence Rule 801(d)(1)(C). Witness testified that he knew & was friends with D. He literally identified D by perceiving him at time of event. To extent Rule 801(d)(1)(C) contemplates communication of identification of another person, witness's familiarity with D & his communication of identification to police within two & a half months after shootings satisfies that purpose. Because witness testified at trial & was subject to cross examination concerning statement, & because statement was one of identification made shortly after perceiving person, it was properly admitted over hearsay objection. Held, judgment affirmed.

RELATED CASES: Davis, 13 N.E.3d 939 (Ind. Ct. App 2014) (prior inconsistent statement identifying D admissible; see full review at O.9.b); Kendall, App., 790 N.E.2d 122 (Rule 801(d)(1)(c) does not require that prior statement be made under oath).

TITLE: State v. Owings
INDEX NO.: O.9.c.11.
CITE: (10-29-93), Ind., 622 N.E.2d 948
SUBJECT: Deposition of unavailable witness admissible
HOLDING: Use of deposition of unavailable witness at trial would not deny D's right of confrontation, & deposition was sufficiently reliable to be admitted; granting transfer of decision at 600 N.E.2d 568 & affirming Ct. App. As part of discovery, counsel for D deposed essential State's witness, who later died. D did not attend deposition nor request to be present, although deposition took place at prison where defense counsel indicated D had been banned from coming. D had visited her son in prison, & deponent was another inmate who testified that D's son said D had smuggled him cocaine. Deponent committed suicide prior to trial. S.Ct. reviewed general right to confrontation under both 6th Amend. of U.S. Constitution & Art. I, 13 of Ind. Constitution, & found neither provision has been interpreted to guarantee D all rights of confrontation at every trial for every witness. Prior testimony from subsequently-unavailable witnesses has been held to be admissible at trial if D had opportunity to confront witness when testimony was originally given, Atkins, 561 N.E.2d 797, Ingram, 547 N.E.2d 823, Coleman, 546 N.E.2d 827, etc. If such confrontation is missing, admission of prior testimony has been excluded, Brady, 575 N.E.2d 981, Miller, 517 N.E.2d 64. Criminal Ds generally have no constitutional right to attend depositions, Jones, 445 N.E.2d 98, because confrontation right applies only to proceedings where Ds may suffer loss of liberty or property. Although admission of deposition D was not permitted to attend, taken by State & given by unavailable witness, may violate right of confrontation, right is individual privilege relating to trial procedure, & may be waived if there is intentional relinquishment or abandonment, Phillips, App., 543 N.E.2d 646. Waiver may occur by word or deed, & where record doesn't show D is unable to attend deposition & he doesn't object to it, confrontation right is waived, even if witness is unavailable to testify at trial, Coleman, supra. Where defense counsel takes deposition & actively participates, right to confrontation is deemed waived, Ingram, supra, Abner, 479 N.E.2d 1254. For deposition to be admissible at trial, witness must be "unavailable," & statement must bear sufficient "indicia of reliability." Reliability requirement is generally satisfied where testimony is taken by defense counsel, who comprehensively questions witness about memory & perception of crime, possible bias, & veracity of testimony, Ingram, supra. Focus is not on whether witness is believed to be telling truth, but upon process by which statement was obtained. Admission of deposition pursuant to Ind. Tr.R. 32(A)(3)(a) is subject to Tr. Ct.'s discretion & will be reversed only for abuse of discretion. Ct. found that here Tr. Ct. abused discretion. Witness was definitely unavailable & although Tr. Ct. concluded deposition raised serious questions as to witness' credibility & motivation, Ct. found this was not proper test of reliability. Deposition was given under oath, subject to penalties for perjury, & recorded by Ct. reporter, & therefore had sufficient indicia of reliability. Although defense argued D had been banned from place of deposition, Ct. found no specific request was made to enter institution for deposition, or that deposition be taken elsewhere. Under circumstances, Ct. found D waived right to face-to-face confrontation, & deposition was admissible. Held, Tr. Ct. reversed, & Ct. App. affirmed, DeBruler, J., dissenting, arguing that waiver of confrontation right should be declared only when there is intelligent personal decision to forego right, without coercion, & with full awareness of right.

RELATED CASES: Mathews, 26 N.E.3d 130 (Ind. Ct. App 2015) (D waived right to confront victim face to face, whom D conceded was unavailable, because he declined State's invitation to attend the vicitm's deposition, which was conducted via Skype).

TITLE: Williams v. State
INDEX NO.: O.9.c.11.
CITE: (9-25-97), Ind. App., 685 N.E.2d 730
SUBJECT: Erroneous admission of video taped deposition - incompetency
HOLDING: During period D is found to be incompetent to stand trial, State cannot take deposition of witness which is to be used in lieu of testimony at trial. In order to use recorded testimony in lieu of live testimony in trial, State must demonstrate that declarant whose statement it wishes to use against D is unavailable, & that declarant's statement bears sufficient "indicia of reliability," usually established by D having opportunity to cross-examine declarant. Freeman, 541 N.E.2d 533. Trial & conviction of D without adequate competence is denial of federal due process as well as denial of state statutory right. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836 (1966); Brewer, 646 N.E.2d 1382.

Here, after D was found incompetent to stand trial, State took deposition of victim, who would not be available for trial. D was found competent to stand trial, & video taped deposition was admitted at trial. D argued that using deposition taken when he was incompetent denied D right to confront witnesses against him, right to due process & right to meaningful representation by counsel. Ct. noted that although D was present at deposition, he could not assist his counsel in effectively cross-examining victim because D did not understand nature of charges against him. Thus, victim's statement did not bear any "indicia of reliability," & Tr. Ct. abused its discretion by admitting statement which was taken by State with intention of introducing it at trial during period Ct. had found D incompetent to stand trial. Held, conviction reversed & remanded for new trial.

O. EVIDENCE
O.9. Hearsay
O.9.c.12. Former testimony

TITLE: Burns v. State
INDEX NO.: O.9.c.12.
CITE: (2/12/2018), 91 N.E.3d 635 (Ind. Ct. App 2018)
SUBJECT: Video deposition of out-of-state witness in lieu of live testimony
HOLDING: In burglary and robbery prosecution, Tr. Ct. did not err in admitting a video-recorded deposition from a witness who had moved to Florida and been diagnosed with brain cancer before trial. The State filed notice of testimonial video deposition due to the victim's inability to travel back to Indiana. Tr. Ct. denied D's objection to the deposition and his request to be transported to Florida for it. The video-conference deposition was conducted, with the prosecutor present with the wife in Florida, and D, his attorney and the judge all present by two-way video. At trial, the judge deemed the victim unavailable and admitted the deposition into evidence over D's objection. On appeal, Court found no abuse of discretion in finding the victim unavailable and admitting the deposition under Indiana Evidence Rule 804 (former testimony hearsay exception). Evidence from wife's doctor showed she needed to stay close to her clinical trial treatment facility and needed to avoid public places with her compromised immune system. There was no Confrontation Clause violation, as the State and Tr. Ct. "endeavored to take all necessary steps to preserve [D's] right to confront his accuser face-to-face. The deposition arrangement allowed D and victim to see each other, allowed D to communicate with his attorney, and allowed full cross-examination. Moreover, D had been on notice the deposition could be used in lieu of live testimony at trial. Held, judgment affirmed.

TITLE: Davis v. State
INDEX NO: O.9.c.12.
CITE: (8/6/2014), 13 N.E.3d 939 (Ind. Ct. App 2014)
SUBJECT: Depositions of State witnesses who made themselves unavailable for trial admissible
HOLDING: Tr. Ct. did not abuse its discretion in admitting depositions of two witnesses who were not available at trial because efforts to subpoena and serve bench warrants failed. State made reasonable means to procure their attendance. D's mother was held in contempt for not appearing, and still did not show up at trial when ordered. When police went to her home, the people inside refused to open the door. Unavailability as witness includes situations in which declarant persists in refusing to testify despite an order of the court to do so. Indiana Evidence Rule 804(a)(2).

Considering the State's efforts to serve subpoenas before trial and other prior trial dates, as well as attempts to serve bench warrants the day of trial, and their repeated and deliberate decision not to appear, Tr. Ct. did not abuse its discretion when it determined that the witnesses had made themselves unavailable. Tiller v. State, 896 N.E.2d 537 (Ind. Ct. App 2008). Held, judgment affirmed.

TITLE: Gillie v. State
INDEX NO: O.9.c.12.
CITE: (9/21/87), Ind., 512 N.E.2d 145
SUBJECT: Prior testimony - unavailable witness
HOLDING: Where state showed merely that absent witness had called to say he couldn't afford to come to trial, witness was not "unavailable" for purpose of admitting former testimony. Prior Ct. Room testimony of absent witness is admissible if that witness is shown to be unavailable & testimony shows adequate indicia of reliability. To satisfy unavailability requirement, prosecution must have made "good faith effort" to secure witness' presence. Barber v. Page (1968), 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255. If no possibility of procuring witness exists, good faith demands nothing of prosecution. OH v. Robert (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597. Lengths to which prosecution must go to procure witness are governed by reasonableness standards. Id. Here, prosecution's promise to reimburse witness for travel expense secured promise to appear. However, when witness telephoned one week later & simply said he couldn't afford the trip, no further steps were taken. Prosecutor could have sought subpoena or made further travel arrangements. These options presented more than "mere possibility" that witness' appearance could be obtained. Tr. Ct. erred in finding witness unavailable & admitting former testimony. However, due to relative unimportance of witness' testimony, error was harmless. Held, conviction affirmed.

RELATED CASES: Berkman, 976 N.E.2d 68 (Ind. Ct. App 2012) (witness's illness during trial accompanied by the fact she was hospitalized for four days the week before undergoing tests for multiple sclerosis and possibly a seizure or stroke constituted unavailability; the State's unsuccessful attempts to subpoena and telephone witness who was thought to be living in Florida in order to avoid Indiana warrant were sufficient to declare second witness unavailable also).

TITLE: Griffin v. State
INDEX NO.: O.9.c.12.
CITE: (2/10/98), Ind. App., 692 N.E.2d 468, summ. aff'd, 717 N.E.2d 73 (Ind. 1999)
SUBJECT: IRE 804(B)(1) - former testimony exception
HOLDING: Testimony of D's co-conspirator was admissible under IRE 804(B)(1), which excludes from hearsay testimony given as witness at another hearing of same or different proceeding, or in deposition taken in compliance with law in course of same or another proceeding, if party against whom testimony is now offered, or, in civil action or proceeding, predecessor in interest, had opportunity & similar motive to develop testimony by direct, cross, or redirect examination. Admission of former testimony of unavailable witness is matter of Tr. Ct.'s discretion. Lowery, 478 N.E.2d 1214. Witness' refusal to testify renders him unavailable for purposes of using his prior testimony. Kellems, 651 N.E.2d 326 (Sullivan, J., concurring in part & dissenting in part).

Co-conspirator in this case was unavailable by reason of having refused to testify. At first trial, D had full opportunity & in fact thoroughly cross-examined co-conspirator. D's motive in first trial was similar, if not identical to, his motive in second trial: present best possible defense to criminal charges against him. Tr. Ct. properly admitted transcript of former testimony.

RELATED CASES: Hughley, App.,737 N.E.2d 420 (Tr. Ct. did not abuse its discretion in admitting testimony of witness from former trial, when witness refused to testify in second trial; fact that defense counsel decided not to conduct more thorough questioning of witness at first trial was matter of inclination, not opportunity).

TITLE: Moore v. State
INDEX NO.: O.9.c.12.
CITE: (10/20/82), Ind., 440 N.E.2d 1092
SUBJECT: Hearsay exceptions - former testimony; cause of unavailability
HOLDING: Unavailable witness' recorded testimony given at prior judicial proceeding is admissible as evidence in subsequent proceeding. However, where unavailability is result of declarant's death, it is error to inform the jury why the witness is unavailable. Here, rape victim committed suicide 2 weeks before D's retrial (first trial resulted in mistrial). Tr. Ct. allowed the victim's death certificate to be admitted in order to establish predicate for using victim's testimony given in D's first trial. Death certificate bore notation of homicide investigation. Tr. Ct. prohibited D from presenting evidence that the declarant committed suicide (suicide note found near body). Ct. holds refusal to allow the admission of any evidence tending to show the witness' death was a suicide, coupled with the admission of evidence strongly suggesting she was murdered, was a deprivation of appellant's right to a fair trial as guaranteed him by the 6th & 14th Amend & Ind. Const. Art. 1, Section 12 & was fundamental error requiring reversal of rape conviction. Held, conviction reversed.

RELATED CASES: Palilonis, 970 N.E.2d 713 (Ind. Ct. App 2012) (evidence that victim was dead 4 years after the rape was admissible to show why she was not testifying; there is no indication D was directly responsible for her death); Drummond 467 N.E.2d 742 (Crim L 672.2; admission of deposition of witness who refused to testify at trial proper under former testimony exception); Iseton, App., 472 N.E.2d 643 (deposition properly admitted where victim was unavailable because of illness/age/infirmity).

TITLE: Moore v. State
INDEX NO.: O.9.c.12.
CITE: (9/6/84), Ind., 467 N.E.2d 720
SUBJECT: Hearsay exceptions - former testimony; foundation
HOLDING: Tr. Ct. did not err in admitting transcript of rape prosecutrix's former testimony where death made her unavailable. Admission/exclusion of testimony of unavailable witness is discretionary (Raines 269 N.E.2d 378) upon showing: (1) former testimony given under oath; (2) opportunity to cross-examine (CX) at former hearing; (3) witness is presently unavailable (Pollard 388 N.E.2d 496). Here, D argues that because his theory of defense changed between first trial when CX took place & present trial, prior testimony was inadmissible, *citing* Bryant 385 N.E.2d 415. Ct. distinguishes Bryant: issues in litigation were so dissimilar (extradition hearing vs. criminal trial) that nature of CX in first could not achieve goals of CX for second. Held, no error.

TITLE: Rhea v. State
INDEX NO.: O.9.c.12.
CITE: (2nd Dist., 9-15-04), Ind. App., 814/1031
SUBJECT: Hearsay exceptions - former testimony; opportunity to cross-examine witness
HOLDING: Tr. Ct. abused its discretion during D's second trial by admitting a transcript of testimony given by a witness at the first trial, after declaring that witness unavailable to testify. In first trial, Tr. Ct. improperly limited D's ability to cross-examine this witness regarding the benefit he received from plea agreement. At second trial, witness refused to testify against D, & Tr. Ct. declared him to be "unavailable." Tr. Ct. attempted to remedy its error from first trial by admitting into evidence D's testimony from first trial & by providing jury with information concerning penalties witness would have faced without plea agreement with State.

Prior recorded testimony may be admitted under former testimony hearsay exception if: 1) testimony was given under oath at a prior judicial proceeding; 2) the party against whom testimony is offered had the opportunity to cross-examine witness at the prior proceeding; & 3) the witness is unavailable at the time of the later proceeding. Guy v. State, 755/248 (Ind. Ct. App 2001). While Tr. Ct. in this case pursued a novel, creative approach to the thorny problem of witness's refusal to testify in second trial, witness's testimony from first trial was improperly admitted as a hearsay exception. Although witness was under oath at D's first trial & found to be unavailable at his second, D did not have a sufficient opportunity to cross-examine witness; therefore, witness's testimony was not admissible at D's second trial. Held, judgment reversed & remanded.

RELATED CASES: J.B., 205 N.E.3d 244 (Ind. Ct. App. 2023) (Juvenile court committed fundamental error in allowing non-testifying complaining witness's videotaped interview to be entered into evidence in a delinquency case against 15-year-old J.B; the recorded interview could not be considered former testimony because C.W. had not been under oath during the interview and J.B. did not have opportunity to cross examine her); Simpson, App., 915 N.E.2d 511 (no error in denying D's request to recall State's witness to impeach his earlier testimony, even if it would have been "better practice" to do so; see full review at O.1.a).

TITLE: Walker v. State
INDEX NO: O.9.c.12.
CITE: (02-09-93), Ind., 607 N.E.2d 391
SUBJECT: Deposition of unavailable witness admissible & counsel not ineffective
HOLDING: It was not ineffective assistance of counsel (IAC) to fail to have D present at deposition of witness, where deposition was later admitted at trial. Prior to trial, deposition of witness was taken by State, & when State sought to admit deposition at trial due to witness' illness, defense counsel objected on ground that D was not present at deposition because counsel assumed deposition was for discovery only, & that D's right to confrontation was violated. Counsel was present at deposition & cross-examined witness. State contended that deposition was taken specifically to guard against loss of testimony due to witness' illness. State presented evidence as to deponent's unavailability at trial, & counsel did not object to D's absence when deposition was taken. Although counsel mistakenly believed deposition was for discovery only, he fully cross-examined witness at deposition, & when deposition was read at trial, various objections & rulings were included. Ct. also found that even assuming counsel's performance was unreasonable, it could not say result of trial would have been different. Note: In concurrence, J. DeBruler discussed various rules governing depositions, & that no distinction is made between discovery depositions & depositions to preserve evidence. It appears he concurred in decision because he found no IAC, but he raised serious questions about denial of confrontation right under Indiana Constitution, & discussed using personal notice to Ds of depositions & right to be present, which should be knowingly waived if deposition is to be used at trial.

RELATED CASES: Berkman, 976 N.E.2d 68 (Ind. Ct. App 2012) (motive for a discovery deposition in a criminal case is close enough to that driving a D's approach to trial testimony to satisfy the requirements Rule 804(b)(1); even if primary motive of a discovery deposition in a criminal case is to obtain a preview of a witness's testimony, this certainly does not exclude the need to understand how the witness's story and credibility might be attacked; a prudent attorney conducting a discovery deposition would not only attempt to ascertain what the substance of the testimony might be but also explore avenues by which the testimony or the witness's credibility might be attacked).

TITLE: Winston v. State
INDEX NO.: O.9.c.12.
CITE: (3/27/2023) 206 N.E.3d 1183 (Ind. Ct. App.)
SUBJECT: No error in admitting absent witness's prior testimony
HOLDING: In murder and robbery prosecution, trial court did not err in admitting a witness's prior testimony when he was unable to come to the second trial. Defendant's first jury trial ended in a mistrial due to the prosecutor's illness, but at a second jury trial he was found guilty as charged. The trial court allowed the State to admit the absent witness's initial testimony because they showed they tried to get him to appear in court. The trial court also stated that Defendant had an opportunity to cross-examine the now-absent witness at the first trial. Where a witness is unavailable for trial, and the opposing party had the opportunity to cross-examine the witness at a prior trial or proceeding, the Confrontation Clause will not bar the admission of that witness's prior testimony. Crawford v. Washington, 541 U.S. 36, 57 (2004). Here, the Court of Appeals found the State made a good-faith, reasonable effort to procure the witness's presence at trial and the testimony was cumulative of other testimony. Therefore, any error in the admission of the prior testimony was harmless.

TITLE: U.S. v. Foster
INDEX NO.: O.9.c.12.
CITE: 128 F.3d 949 (6th Cir. 1997)
SUBJECT: Grand Jury Testimony of Unavailable Witness
HOLDING: Where defense learned four days before trial that grand jury witness had testified that D "had nothing to do with selling drugs," and where immediate attempt to subpoena witness was unsuccessful, defense should have been allowed to offer grand jury testimony at trial pursuant to Fed.R.Ev. 804(b)(1). Delay in subpoenaing witness was not fault of defense, and should not prevent finding that witness was unavailable. Government's motive and opportunity at grand jury proceedings to develop and disprove witness' testimony were similar to those it would have had at trial.

O. EVIDENCE
O.9. Hearsay
. Dying declaration

TITLE: Beverly v. State
INDEX NO.: O.9.c.13.
CITE: (2nd Dist., 1-22-04), Ind. App., 801 N.E.2d 1254
SUBJECT: Statement admissible under dying declaration hearsay exception
HOLDING: In voluntary manslaughter prosecution, victim's statement to paramedic that "Jerry shot me" fell under dying declaration exception to the hearsay rule, despite fact that victim died a day later. Tr. Ct. erroneously **O.9.c.13**found the statement admissible under Rule 803(4), as a statement for purposes of medical diagnosis or treatment, but Ct. App. held it was admissible under Ind. Evidence Rule 804(b)(2) as a dying declaration. See Ross v. State, 676 N.E.2d 339, 345 (Ind.1996) (Tr. Ct.'s hearsay ruling should be affirmed if any legal basis exists to do so). Determinative fact of admissibility is not whether a victim ultimately dies from his injuries, but whether the victim knows that death is imminent & abandoned all hope of recovery. Anderson v. State, 471 N.E.2d 291, 292 (Ind.1984). The statements in Anderson were found inadmissible because the victim after being stabbed had also noted she was all right, but here no such statements existed. In present case, inference that the victim knew death was imminent & had abandoned all hope of recovery could be drawn from the nature of the gunshot wound to the head & victim's decreased level of consciousness. It was irrelevant that victim briefly stabilized after arriving at a hospital. Held, judgment affirmed; Kirsch, J., dissenting, did not believe evidence solely led to the conclusion that the victim knew that death was imminent & majority's ruling invaded the province of the Tr. Ct. as to a factual determination since Tr. Ct. had found admissible on other, impermissible grounds.

Note: Ct. also rejected D's claims that police did not have reasonable suspicion to conduct an investigatory stop of his vehicle based on anonymous callers. While an anonymous tip alone is not generally reliable enough to provide reasonable suspicion for a Terry stop, Ct. found that police receiving numerous 911 calls about a gold SUV firing at or exchanging gunfire with another vehicle in a certain location in a relatively short amount of time distinguished this case from a situation involving a single anonymous caller. See Berry, App., 766 N.E.2d 805. The calls bear independent indicia of reliability because they corroborate each other. See U.S. v. Schaefer, 87 F.3d 562, 566 (1st Cir.1996).

RELATED CASES: Wallace, App., 836 N.E.2d 985 (Crawford v. Washington, 124 S.Ct. 1354 (2004), neither explicitly, nor implicitly, signaled that the dying declaration exception to hearsay ran afoul of an accused's right of confrontation under 6th Amendment).

TITLE: Bishop v. State
INDEX NO.: O.9.c.13.
CITE: (7/31/2015), 40 N.E.3d 935 (Ind. Ct. App 2015)
SUBJECT: Sixth Amendment does not bar dying declarations
HOLDING: In a matter of first impression, Court of Appeals held that dying declarations (Ind. Rule Evidence 804(b)(2)) are excepted from the Sixth Amendment's right of confrontation. Here, D shot Khalfani Shabazz five times. When paramedics arrived, Shabazz was sweating profusely, struggling to breathe, and was unable to speak complete sentences. At one point, he had no blood pressure. While awaiting surgery, two IMPD officers asked Shabazz who shot him, and each time he responded "Zimbabwe," which is D's nickname. Shabazz died later that day. His statements identifying D as the perpetrator were admitted at trial.

A historical exception to the right of confrontation "involves dying declarations." Crawford v. Washington, 124 S.Ct. 1354, 1367 n.6 (2004). Giles v. California said that under Crawford, "the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.'" Giles v. California, 128 S. Ct. 2678, 2682 (2008) (quoting Crawford, 124 S. Ct. at 1354). Giles observed that the Court had "previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted" and that "[t]he first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying." Giles, 128 S. Ct. at 2682. Thus, the Court of Appeals joined the "chorus of jurisdictions" that have held the Confrontation Clause does not apply to dying declarations. Accordingly, the Court said it was not necessary to decide whether Shabazz's statements were testimonial, and concluded that the Tr. Ct. did not abuse its discretion in admitting Shabazz's statements identifying D as the perpetrator. Held, judgment affirmed.

TITLE: Dean v. State
INDEX NO.: O.9.c.13.
CITE: (3/12/82), Ind., 432 N.E.2d 41
SUBJECT: Hearsay exception - dying declarations
HOLDING: In murder case, officer who accompanied shooting victim to hospital testified that when doctors & nurses were working on him they asked him how he was shot & what kind of weapon was used. Victim stated that he thought it was revolver because "he had seen a gun in the guy's hand." Dying declaration is admissible if it is shown that declarant knew death was certain or that he had given up hope for recovery. Walker, 349 N.E.2d 161.

Here, witness testified that victim was thrashing around & asking those around him to let him die. Tr. Ct. could have concluded that declarant believed his death was certain. Thus, no error in admitting evidence as dying declaration of decedent. **NOTE:** IRE 804(B)(2), dying declaration hearsay exception, is broader than pre-existing Indiana common law. First, rule applies in all cases, not just homicide prosecutions. Second, declarant need not be dead as condition of admissibility; rule only requires that declarant be unavailable witness under IRE 804(a). See Miller, Indiana Practice, § 804.202.

TITLE: Gerrick v. State
INDEX NO.: O.9.c.13.
CITE: (7/27/83), Ind., 451 N.E.2d 327
SUBJECT: Hearsay exceptions - dying declaration
HOLDING: Tr. Ct. did not err in permitting witness to testify concerning what murder victim had told him because statement was a dying declaration. Here, shortly after making statement, victim told witness he was dying (victim had been shot twice in back & could not move arms). A statement that otherwise would be hearsay is admissible as a dying declaration if it is shown that declarant knew death was certain or had given up all hope of recovery. Dean 432 N.E.2d 40; Hoskins 375 N.E.2d 191. Held, no error.

NOTE: IRE 804(B)(2), dying declaration hearsay exception, is broader than pre-existing Indiana common law. First, rule applies in all cases, not just homicide prosecutions. Second, declarant need not be dead as condition of admissibility; rule only requires that declarant be unavailable witness under IRE 804(a). See Miller, Indiana Practice, § 804.202.

RELATED CASES: Anderson 471 N.E.2d 291 (Crim L 366(3); Homic 203(5); where victim, who later died, stated she was fine, & did not need ambulance, statement that D tried to take her purse was not dying declaration; held, statement admissible as excited utterance).

TITLE: Hackner v. State

INDEX NO.: O.9.c.13.

CITE: (01/12/21), Ind. Ct. App., 161 N.E.3d 1287

SUBJECT: No abuse of discretion to admit officer's testimony a head movement was a "yes" in response to his question

HOLDING: A dying victim's non-verbal identification of the perpetrator, in response to an officer's question, is a question of credibility and not admissibility. An officer at the scene of a shooting asked the victim, who later died of his injuries, if it was Defendant who shot him and the victim nodded his head in response. The nonverbal conduct was not captured by the officer's bodycam, but the trial court allowed the testimony describing the nod and the officer's interpretation that it was intended as a "yes" to his question. The Court of Appeals rejected the argument the nod was too ambiguous to be considered a nonverbal dying declaration under Evid. R. 804(b)(2). Rather, the Court found the officer's interpretation of the alleged nonverbal act was not a question of admissibility but bears more on the officer's credibility, a question solely for the finder of fact. Held, no abuse of discretion in admitting the evidence.

TITLE: Smith v. State
INDEX NO.: O.9.c.13.
CITE: (06/30/2022), Ind. Ct. App., 190 N.E.3d 462
SUBJECT: Statement admissible under dying declaration hearsay exception
HOLDING: Keith Smith and Arnel Davis were rival drug dealers involved in a dispute. They were also both romantically involved with the same woman. Davis was shot while he was driving in his car and talking to the woman on his cell phone. The woman testified she heard a "tapping" sound and then Davis said, "Baby, Keith shot me." Davis sustained gunshot wounds to the aorta, lungs, stomach, spine, liver, kidney, abdomen, pelvis, and the arm. He died in his car. The Court of Appeals held that the statement, "Baby, Keith shot me," was admissible under the dying declaration exception to hearsay. A dying declaration is a statement that the declarant--while believing the declarant's death is imminent--made about its cause or circumstances. The Court reasoned that it was hard to imagine someone shot at least eleven times, with many of those bullets striking his chest or stomach, would not believe his death was imminent.

Smith also argued the trial court committed fundamental error when it allowed his former girlfriend's recollection to be refreshed regarding his telephone number in 2018. Demonstration of Smith's number at that time was required to prove police tracked his phone, and thus his location, on the day of the crime. Smith also argued the trial court erred when it admitted testimony from the police department's Communications Records Analyst regarding the procedures and information gleaned from cell phone records and cell tower locations, which placed Smith in the area of the crime. He argued the Communications Records Analyst was not qualified as an expert witness and the State did not present evidence that his testimony rested upon reliable scientific principles. The Court of Appeals held that any error in admitting that evidence was harmless because it was cumulative of other independent testimony placing Smith in Indianapolis at the time of the crime. Held: conviction affirmed.

TITLE: Thompson v. State
INDEX NO.: O.9.c.13.
CITE: (5th Dist., 10-7-03), Ind. App., 796 N.E.2d 834
SUBJECT: Hearsay - dying declaration; statements of Co-D prior to execution
HOLDING: Post-conviction Ct. erroneously admitted Co-D's statement just prior to his execution that D "did not know what was going on" under "dying declaration" exception to hearsay rule. To be admissible under this exception, declarant's statements must relate to the cause or circumstances giving rise to his fatal injury, which was not the case here. Montgomery v. State, 80 Ind. 338 (1881). Moreover, Co-D's statement would not likely produce a different result in a new trial & is not admissible as newly discovered evidence because it is merely impeaching of other witness' testimony. Wisehart v. State, 693 N.E.2d 23 (Ind. 2001). Held, denial of post-conviction relief affirmed; Sullivan, J. concurring in part & dissenting in part, disagrees that Co-D's statement would not constitute a "dying declaration" as his impending death through execution was directly related to the murder at issue here, but concurs in result based on evidence simply being impeaching & would not likely produce a different result.

TITLE: Wright v. State
INDEX NO.: O.9.c.13.
CITE: (4th Dist., 11-10-09), (Ind. App. 2009) 916 N.E.2d 269
SUBJECT: Statement admissible under dying declaration hearsay exception
HOLDING: In triple murder prosecution, Tr. Ct. did not err in admitting victim's statements to police officers identifying D as perpetrator. Rule in Crawford v. Washington, 124 S.Ct. 1354 (2004), neither explicitly, nor implicitly, signaled that the dying declaration exception to hearsay ran afoul of an accused's right of confrontation under 6th Amendment. Hearsay is admissible under dying declaration exception if declarant knew death was certain or that he had given up hope for recovery. Here, at time victim made statements at issue he was lying on a neighbor's front porch having sustained sixteen severe stab wounds to his face, neck, chest and back. Even if victim's statements were not dying declarations, they do not run afoul of D's Sixth Amendment right to confrontation because they were not testimonial under Crawford and Davis v. Washington, 547 U.S. 813 (2006). While victim's statements referenced the stabbing acts which had occurred in the (very recent) past, they also referenced his present injuries. Officer was merely attempting to address what was clearly an unresolved situation and to extent his inquiry into perpetrator's identity is claimed to be investigatory, such inquiries have been deemed necessary to resolve situations where, as here, it is imperative that dispatched officers know they might be encountering a violent felon. Thus, court concluded that victim's statements were elicited for purposes of resolving emergency at hand, not in preparation for future litigation and were therefore nontestimonial. Held, judgment affirmed.

RELATED CASES: Bishop, 40 N.E.3d 935 (Ind. Ct. App 2015) (6th amendment confrontation clause doesn't bar admission of dying declarations because common law at time of founding held that unconfronted testimonial dying declarations were admissible)

O. EVIDENCE

O.9. Hearsay

O.9.c.14. Statements against interest

TITLE: Badelle v. State
INDEX NO.: O.9.c.14.
CITE: (2nd Dist., 7-17-01), Ind. App., 754 N.E.2d 510
SUBJECT: Hearsay statements inadmissible - statement against interest
HOLDING: Post-conviction Ct. did not abuse its discretion in refusing to admit testimony of Deputy State Public Defender & detective's unsigned affidavit indicating his belief that D was not guilty of murder. Hearsay testimony is admissible under statement against interest exception if declarant is: 1) unavailable as witness & 2) statement, at time it was made, was so far contrary to declarant's pecuniary or proprietary interest, or so far tended to subject declarant to civil or criminal liability...that a reasonable person in declarant's position would not have made statement unless believing it to be true. Ind.Evidence Rule 804(b)(3). Here, detective was deceased at time of D's post-conviction hearing & was therefore unavailable. However, D's loose allegations of possible employment repercussions or civil suits directed towards detective from his purported statements, both as relayed by public defender & contained in her written records, failed to convince Ct. that such statements were contrary to his pecuniary or proprietary interest or of sort that would have subjected him to civil or criminal liability. Public defender's testimony as to contents of affidavit she prepared constituted hearsay & was likewise properly deemed inadmissible for failing to consist of statements against interest. Held, no error.

RELATED CASES: Minor, 376 N.E.3d 1065 (Ind. Ct. App 2015) (victim's hearsay statements described himself as acting in self-defense and were not incriminating, thus they were not against penal interest).

TITLE: Beasley v. State
INDEX NO.: O.9.c.14.
CITE: (1/14/2016), 46 N.E.3d 1232 (Ind. 2016)
SUBJECT: Victim's hearsay testimony admissible as statement against interest
HOLDING: Trial court did not abuse its discretion in admitting attempted murder victim's (Beaman's) hearsay testimony regarding statements murder victim (Allen) made to him on the day he died. Beamon testified that Allen told him he had shot D the day before the crime during a fight. Allen's recount of his altercation with D fell within the hearsay exception of Indiana Rule 804(b)(3), as admitting to such a violent act "had so great a tendency . . . to expose" him to civil or criminal liability such that "a reasonable person in [Allen's] position would have made [the statement] only if the person believed it to be true."

In both Jervis v. State, 679 N.E.2d 875 (Ind. 1997), and Camm v. State, 908 N.E.2d 215, 220 (Ind. 2009), the declarants' statements sought to be admitted (one referencing dumping off a woman and the other having bodies on one's conscience) were vague and subject to interpretation. Here, there is no such ambiguity. Allen gave Beamon a precise account of his altercation with D, and stated in no uncertain terms that he shot Beasley in the face. Even if Allen believed the shooting was justified as a matter of self-defense, it does not necessarily follow that Allen believed there was no possibility of future civil or criminal liability for the act.

Court also found the statements were sufficiently supported by corroborating evidence, which is not strictly required by Ind. R. Evid. 804(b)(3) but is by Fed. R. Evid. 804(b)(3). Held, transfer granted, Court of Appeals' opinion at 30 N.E.3d 56 vacated in part and sum. aff'd in all other respects; judgment affirmed. See also: Beasley v. State, 47 N.E.3d 607 (Ind. 2016) (companion case).

TITLE: Davis v. State
INDEX NO.: O.9.c.14.
CITE: (2nd Dist., 06-15-94), Ind. App., 635 N.E.2d 1117
SUBJECT: Hearsay - third party admission against interest
HOLDING: Tr. Ct. did not err in refusing to allow evidence of purported confession by others to victim's murder, because evidence was inadmissible hearsay. Offer to prove by D was that IYC inmate (P1) would testify that another prisoner (P2) told him two other men confessed to P2 that they had committed murder D was charged with. Neither P2 nor two other men could be located for trial. Ct. did not necessarily agree with State that although declarations against penal interest are now admissible in Ind., here statement did not have sufficient indicia of trustworthiness to qualify as exception to hearsay rule, because under IRE 804(b)(3), indicia of trustworthiness requirement is not stated. Ct. found, however, that statement was still inadmissible hearsay, because vehicle through which it was offered, was hearsay itself, i.e., P1 would testify as to what P2 told him still others had said. Because each level of hearsay must qualify as exception to hearsay rule, & here it could not, Tr. Ct. did not err in excluding testimony.

RELATED CASES: Williams, App., 757 N.E.2d 1048 (D's father's statement, made to business associate in contemplation of his suicide & to exonerate his son, cannot be characterized as "so far contrary" to father's interest that reasonable person in declarant's position would not have made statement unless believing it to be true).

TITLE: Bardonner v. State
INDEX NO.: O.9.c.14.
CITE: (4th Dist. 03/12/92), Ind. App., 587 N.E.2d 1353
SUBJECT: Third party statement against penal interest inadmissible
HOLDING: Although in Thomas 580 N.E.2d 224, Ind. adopted Fed. R. Evid. 804 (b)(3), allowing for admissibility of statements against penal interest in some instances, exclusion of statement of third party in this case was not error, because statement did not adequately expose person to criminal liability & was not adequately corroborated. D sought to admit statement of jail cell mate, that cellmate had committed & confessed to crimes D was charged with. Cellmate could not be located at time of trial & Ct. granted state's motion in limine to prohibit cellmate's alleged confession, testimony of officer to whom confession was given, & D's statement as to what cell mate told him.

Ct. noted that such statements are now admissible at judge's discretion, if they expose declarant to criminal liability & corroborating circumstances clearly show their trustworthiness. Ct. then noted that officer would have testified that cellmate gave "clean up" statement for which he was granted limited immunity, & that while cellmate admitted home burglary & description of its location, statement was not particularized enough to conclude it was same home involved in D's case. Ct. also noted that statement was not made under oath or subject to cross-examination by prosecutor's representative. Ct. then concluded that statement did not expose cellmate to criminal liability & was not sufficiently accompanied by corroborating circumstances to make it admissible. Held, reversed & remanded on other issue.

Note: Unlike its federal counterpart, Indiana Evidence Rule 804(b)(3) does not require corroborative evidence that clearly indicate trustworthiness of statement. As noted in Davis, App., 635 N.E.2d 1117, lack of similar requirement in Indiana rule renders unclear what indicia of trustworthiness, if any, must be found for statement against interest to be admitted.

TITLE: Jervis v. State
INDEX NO.: O.9.c.14.
CITE: (5-12-97), Ind., 679 N.E.2d 875
SUBJECT: Hearsay - statements against penal interest; Indiana Rules of Evidence
HOLDING: Before admitting statement offered under Indiana Evidence Rule 804(b)(3), as statement against interest exception to hearsay rule, Tr. Cts. should evaluate overall reliability of proffered statement. Reliability is ultimate justification for admission of statements against interest. Here, Tr. Ct. did not abuse discretion in excluding statements purportedly showing that third party may have committed murder. Third party told co-worker that he picked up woman & "dumped her off" near site where body was found. In offer to prove, D specifically declined opportunity to present evidence on third party's alleged involvement in murder & did not contend that woman whom third party picked up necessarily was victim. Although suspicious in context, statements attributed to third party did not constitute admission of crime & did not even "tend to subject" third party to criminal liability. Statements were uncorroborated, only marginally against penal interest, & only marginally relevant. Held, no error.

Note: Unlike its federal counterpart, Indiana Evidence Rule 804(b)(3) does not require corroborative evidence that clearly indicate trustworthiness of statement. As noted in Davis, App., 635 N.E.2d 1117, lack of similar requirement in Indiana rule renders unclear what indicia of trustworthiness, if any, must be found for statement against interest to be admitted.

RELATED CASES: Swanigan, App., 720 N.E.2d 1257 (although State conceded that statements were against D's penal interest & that D was unavailable, Tr. Ct. did not abuse its discretion in excluding statements due to their overall unreliability).

TITLE: Lilly v. Virginia
INDEX NO.: O.9.c.14.
CITE: 527 U.S. 116, 119 S.Ct. 1887 (1999)
SUBJECT: Hearsay, confrontation clause, co-D's statements
HOLDING: In this case, D's brother, an accomplice in several robberies & a murder, gave the police a statement that was arguably self-incriminating, but which primarily shifted the blame for the murder to his accomplices. At trial, the D's brother invoked his privilege against self- incrimination & refused to testify. The Tr. Ct. admitted the tape recordings & transcripts of the brother's statements into evidence in their entirety. D was found guilty of murder & sentenced to death.

The Virginia Supreme Court found that the statements were declarations against interest, that their reliability was established by other evidence, & that the statements therefore fell within an exception to Virginia's hearsay rule. The Virginia court also held that the statements had "sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule," & therefore the Confrontation Clause was satisfied.

Held, the admission of the accomplice's out-of-court statement inculpating the petitioner violated the Confrontation Clause. Accomplices' out-of-court confessions that inculpate a D are not within a "firmly rooted" hearsay exception. To satisfy the residual "trustworthiness" test (that the declarant's truthfulness is so clear that cross-examination would be of marginal utility), hearsay evidence used to convict a D must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. Case remanded to the Virginia Supreme Court for application of harmless error analysis.

Note: This case is consistent with Indiana Rule of Evidence 804(b)(3).

TITLE: Payne v. State
INDEX NO.: O.9.c.14.
CITE: (4th Dist., 08-31-06), Ind. App., 854 N.E.2d 7
SUBJECT: Testimonial statement given by unavailable witness
HOLDING: In triple murder prosecution, Tr. Ct. erred by admitting into evidence a State witness's videotaped walk-through of the crime scene after he was deemed unavailable to testify by his own refusal. Statement against interest exception to hearsay rule, Indiana Evidence Rule 804(B)(3),provides that a statement offered against the accused in a criminal case, made by a co-D or other person implicating both the declarant & the accused, is not within this exception. Here, witness's videotaped statement clearly implicated both himself & D, thus it falls squarely within types of statements hearsay rules intended to exclude. There was no other valid legal reason to admit videotape than to prove that burglary was committed in accordance with D's instructions, i.e., entering through second floor window of residence. Ct. concluded that videotaped statement substantially contributed to D's conviction, & its admission into evidence was not harmless error. Held, judgment reversed & remanded for new trial on other grounds.

RELATED CASES: J.B., 205 N.E.3d 244 (Ind. Ct. App. 2023) (even assuming C.W.'s admission of sexual activity with her half-brother J.B. sufficiently exposed her to civil or criminal liability, her statement implicated both herself and J.B., which is not within Ind. Evidence Rule 804(b)(3)'s hearsay exception for statement against interest); Garth, 182 N.E.3d 905 (Ind. Ct. App. 2022) (waiver of Rule 804(b(3)) issue notwithstanding, error in admitting video of witness's videotaped deposition was harmless because prosecutor informed Tr. Ct. of witness's arrival to court after publication of video was complete and Tr. Ct. allowed live witness to testify over the State's objection, thus preserving D's right to a fair trial); Chavez, 956 N.E.2d 709 (Ind. Ct. App 2011) (unlike Federal Rules of Evidence, Ind. Evid. R 804(b)(3) explicitly excludes statements from co'Ds from this hearsay exception).

TITLE: People v. Hernandez
INDEX NO.: O.9.c.14.
CITE: 55 Cal.App.4th 225, 63 Cal.Rptr. 2d 769 (Cal.Ct. App. 1997)
SUBJECT: Hearsay - Business Record; Police Database
HOLDING: Evidence obtained from searchable sex crime database, made up of information from detectives' reports, was not admissible under business records exception to hearsay rule. D was charged with two similar sexual assaults, and prosecutor was allowed to offer printouts from computer searches indicating that no sexual assaults with similar characteristics occurred prior to time D moved into area. Appellate court noted that information in computer database was hearsay culled from detectives' reports. Fact that hearsay was input daily into internal police computer database did not make it any more reliable than police reports themselves.

TITLE: Thomas v. State
INDEX NO.: O.9.c.14.
CITE: (10/25/91), Ind., 580 N.E.2d 224
SUBJECT: Admissibility of statements against penal interest
HOLDING: Ind. S.Ct. essentially adopted Federal Rule of Evidence 804(b)(3), allowing for admission of statements against penal interest as exception to hearsay rule. Witness to bank robbery had initially made identification of another suspect, but after receiving tip through "crime stoppers" implicating D, police changed focus of their investigation to him, & he was subsequently selected by bank tellers from lineup which did not include other suspect. Two suspects closely resembled each other, but never appeared together in any photo array or lineup. While D was awaiting trial, other suspect bragged that he had committed robbery. When called as witness at trial, other suspect invoked 5th Amend., & D then tried to call number of other witnesses to testify as to his statements. Tr. Ct. excluded evidence because it was hearsay, & Ct. App. found that third party confessions & admissions against penal interest were inadmissible because they were "permeated with untrustworthiness." (Citations omitted). Ind. S.Ct. disagreed, noting that Federal Rules of Evidence 804(b)(3) creates hearsay exception for statements against penal interest if it is corroborated by circumstances which clearly indicate its trustworthiness, & essentially adopted federal rule. Ct. found adoption of rule was not in conflict with decisions in Partlow 453 N.E.2d 259, or Taggart 382 N.E.2d 916, because these cases did not contain the required corroboration. Ct. found such circumstances did exist in the instant case. Held, reversed & remanded for new trial, J. Givan dissenting. Note: Unlike its federal counterpart, Indiana Evidence Rule 804(b)(3) does not require corroborative evidence that clearly indicate trustworthiness of statement. As noted in Davis, App., 635 N.E.2d 1117, lack of similar requirement in Indiana rule renders unclear what indicia of trustworthiness, if any, must be found for statement against interest to be admitted.

TITLE: Tolliver v. State
INDEX NO.: O.9.c.14
CITE: (03-18-10), 922 N.E.2d 1272 (Ind. Ct. App 2010)
SUBJECT: Statements against interest - harmless error
HOLDING: Tr. Ct. abused discretion in letting shooting victim's father, mother, and sister testify that victim identified D as shooter and claimed he would "get" D and "handle it himself." Because Woodard's statements were not facially incriminating and did not implicate him in a crime as they were mere expressions of intent, statements were not admissible as statements against interest under Ind. Evid. Rule 804(b)(3). Even if victim's statements that he would "get" D and "handle it himself" were against interest, they merely accompanied the disputed identification statements. Victim's statements identifying D as the shooter themselves must have been against victim's interest to be admissible.

However, D waived issue because he did not contemporaneously object to testimony at trial. Further, admission of statements was not fundamental error because of independent testimony that D was the shooter and that linked D to type of gun used. Because of this independent evidence identifying D as perpetrator, erroneous admission of victim=s statements about Agetting@ D, even combined with other erroneously admitted evidence, was not so prejudicial that a fair trial was impossible. Held, judgment affirmed.

TITLE: U.S. v. Paguio
INDEX NO.: O.9.c.14.
CITE: 114 F.3d 928 (9th Cir. 1997)
SUBJECT: Statement Against Interest -- Co-D's Statement that D Had Nothing To Do With Crime
HOLDING: Father's statement to son's defense counsel that son "had nothing to do" with preparation of fraudulent loan application which father shepherded through loan process should have admitted at trial under hearsay exception for statements against penal interest after father became unavailable. Tr. Ct. admitted portions of father's statement admitting had falsified certain forms and provided false information to accountant, but excluded his statement that his son "had nothing to do" with it. Court of Appeals disagrees, finding that entire statement inculpated father and was against his interest. Fed. R. Ev. 804(b) requires that statements tending to subject declarant to criminal liability, and offered to exculpate accused, are not admissible unless corroborating circumstances clearly indicate trustworthiness of statement. Despite fact that statement tended to exculpate declarant's own son, Court found other evidence tended to corroborate statement.

TITLE: Williamson v. U.S.
INDEX NO.: O.9.c.14.
CITE: 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)
SUBJECT: Hearsay - statements against penal interest
HOLDING: When Fed.R.Ev. 804(b)(3) provides for admission of statements against penal interest, it refers only to those portions of statement actually inculpating declarant. Government here attempted to use portion of co-D's confession which minimized declarant's culpability & inculpated D. Although confession was generally self-inculpatory, portions government sought to use were not against declarant's penal interest, regardless of their broader context. Principle behind rule is that self-inculpatory statements tend to be reliable. Fact that declarant is making broadly self-inculpatory statement, however, does not make self-exculpatory portions any more reliable or credible. In fact, self-exculpatory statements are most likely to be false, & mere proximity to self-inculpatory statements does not reduce that likelihood.

O. EVIDENCE

O.9. Hearsay

O.9.c.15. Statemetns of co-conspirators

TITLE: Jones v. State
INDEX NO.: O.9.c.15.
CITE: (3rd Dist., 09-14-05), Ind. App., 834 N.E.2d 167
SUBJECT: Right to confrontation - co-conspirator hearsay exception
HOLDING: In murder & attempted murder prosecution, Tr. Ct. did not err in admitting testimony relating a statement made by a co-conspirator during commission of crimes for which D was convicted. D argued that admission of co-conspirator's statement denied him the right to cross examine co-conspirator as guaranteed by Sixth & Fourteenth Amendments to U.S. Constitution & that it violated Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004). Crawford held that out-of-Ct. testimonial statements of unavailable witnesses may not be admitted unless the adverse party has had an opportunity to cross-examine. Although Crawford declined to specifically define "testimonial," it cited Dutton v. Evans, 400 U.S. 74, 87-89 91 S. Ct. 210, 219 (1970), for proposition that co-conspirators' statements are nontestimonial. Thus, Tr. Ct. properly admitted co-conspirator's statement pursuant to Indiana Evidence Rule 801(d)(2)(E), which categorizes a statement by a co-conspirator of a party during course of & in furtherance of conspiracy as non-hearsay. Held, judgment affirmed.

TITLE: Leslie v. State
INDEX NO.: O.9.c.15.
CITE: (2nd Dist., 9-4-96), Ind. App., 670 N.E.2d 898
SUBJECT: Co-conspirator's statements admissible under Ind.Evid.R. 801(d)(2)(E)
HOLDING: Co-conspirator's out-of-Ct. statements regarding D's drug operation were admissible because State established that conspiracy existed, that declarant & D were participants in conspiracy, & statements were made during course of & in furtherance of conspiracy. "In-furtherance" requirement of Ind.Evid.R. 801(d)(2)(E) is not satisfied by mere "idle chatter," but implies that statements must in some way have been designed to promote of facilitate achievement of goals of ongoing conspiracy. United States v. Tracy, 12 F.3d 1186 (2nd Cir. 1993). Here, declarant's statements contained descriptions of D's drug operation & were made during time that declarant & D were actively involved in drug deals. Error in admitting a different statement which constituted "idle chatter" was harmless, in light of ample independent evidence of D's guilt. Held, judgment affirmed.

RELATED CASES: M.T.V., 66 N.E.3d 960 (Ind. Ct. App 2017) (Facebook conversations properly authenticated where M.T.V. admitted to law enforcement that he had engaged in conversations with coconspirator about school shooting and records contained the content M.T.V. told law enforcement they would find; further, the records were supported by an affidavit from Facebook's authorized records custodian who testified that the records were made and kept by Facebook's automated systems at or near the time the Facebook user transmitted the information).

TITLE: Lott v. State
INDEX NO.: O.9.c.15.
CITE: (12-23-97), Ind., 690 N.E.2d 204
SUBJECT: Statements of co-conspirators - "independent evidence" requirement
HOLDING: Statement by co-conspirator of party during course & in furtherance of conspiracy is not hearsay. Ind.Evidence Rule 801(d)(2)(E). Indiana case law developed before adoption of rules of evidence also treated such statements as admissible, but required that State provide other evidence, either circumstantial or direct, that conspiracy existed as precondition to admitting hearsay. Chinn, 511 N.E.2d 1000. This "independent evidence" requirement has been viewed as useful safeguard against abusive use of co-conspirator hearsay, & Ct. will continue to apply it to evidence proposed for admission under Rule 801 (d)(2)(E). In this case, witness's own testimony described existence of conspiracy & thus rendered her relating of numerous statements admissible. Held, no error.

RELATED CASES: Chavez, 956 N.E.2d 709 (Ind. Ct. App 2011) (because State did not allege that declarant is a co-conspirator, his statements are not of a party-opponent and are therefore inadmissible as hearsay); Cockrell, App., 743 N.E.2d 799 (no conspiracy was established, thus Tr. Ct. Abused its discretion in admitting co-conspirator's statements; see full review at K.8.a); Barber, 715 N.E.2d 848 (Tr. Ct. did not make determination as to existence of conspiracy & state did not point to anything beyond hearsay statement itself in support of existence of conspiracy; however, erroneous admission of statement did not affect D's substantial rights).

TITLE: Mayhew v. State
INDEX NO.: O.9.c.15.
CITE: (5/11/89), Ind., 537 N.E.2d 1188
SUBJECT: Hearsay - statements of co-conspirators
HOLDING: Co-conspirator's instructions to witness to falsify statement to police, made after robbery was completed, were not admissible pursuant to co-conspirator's statements exception to hearsay rule. Exception is subject to abuse & has 2 limitations: 1) independent proof of conspiracy is required, & 2) statements made after conspiracy has been effected & crime perpetrated are admissible only against persons making them. Here, statements were made on way to police station where witness was to give statement to police. Witness had been threatened before robbery that she should cooperate in it, & she had done so. Robbery had been completed & proceeds distributed. In all such post-crime periods, dominant motive of individual offender is self-interest - in avoiding detection & in enjoying fruits of crime. Pre-crime group interests have steeply declined. Exception has artificial basis & should be limited to situations in which efforts of all are clearly being applied toward single target. Krulewitch v. US (1949), 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790. Conspiracy had ended when statements were made here, & exception does not apply. However, statements are not subject to hearsay rule in any case, because they were in nature of command & asserted no fact as true which was susceptible of being true or false.

RELATED CASES: Willoughby, 660 N.E.2d 570 (statements re: payment from insurance proceeds, made by co-conspirators after murder of victim, were admissible because statements were in furtherance of objective of conspiracy).

TITLE: Maynard v. State
INDEX NO.: O.9.c.15.
CITE: (1st Dist. 6/17/87) Ind. App., 508 N.E.2d 1346
SUBJECT: Statements of co-conspirators
HOLDING: Tr. Ct. did not err in admitting testimony of co-conspirator before independent proof of conspiracy had been shown. Here, D relies on Patton 175 N.E.2d 11, evidence of acts or statements of parties to conspiracy in furtherance of its objectives is admissible against all parties to conspiracy even if party against whom it is used was absent; however, before acts or declarations of one conspirator are admissible into evidence against co-conspirator, there must be some evidence, either direct or circumstantial of existence of conspiracy. Ct. finds Patton principal refers to out-of-Ct. statements or declarations & serves as exception to hearsay rule, *citing* Gubitz, App., 360 N.E.2d 259. Rule is not applicable when testimony of co-conspirator is given at trial. Gubitz; Wolfe, App., 315 N.E.2d 371. Co-conspirator is competent witness. Weekly, App., 415 N.E.2d 152. Held, no error.

RELATED CASES: Houser, App., 661 N.E.2d 1213(co-conspirator's statements before & during conspiracy were admissible under IRE 801(d)(2)(e), where there was circumstantial evidence of conspiracy independent of statements); Cain, App., 594 N.E.2d 835 (foundation showing existence of conspiracy found sufficient to admit hearsay statements of unavailable co-conspirator.)

TITLE: Simpson v. State
INDEX NO.: O.9.c.15.
CITE: (1st Dist., 1-20-94), Ind. App., 628 N.E.2d 1215
SUBJECT: Co-conspirator's statements - Confrontation right
HOLDING: Tr. Ct. did not err in admitting out-of-Ct. statements of co-conspirator (CoC) when CoC refused to testify. D & CoC made plan to kill CoC's mother & take her money & car. After murder & robbery, D left while CoC reported crime to police, implicating D. CoC was convicted in separate trial & at D's trial he invoked 5th Amend. & did not testify. His statements to police & other individual came in through those he talked to. As general rule, it is error to admit Co-D's confession implicating D when two are tried jointly, Bruton v. U.S., 391 U.S. 123, & D is denied right to confrontation when State offers witness' confession implicating D, but he is unable to cross-examine witness because he invokes 5th Amend., Douglas v. Alabama (1965), 380 U.S. 415. Although D's failure to object waived any error in admission on these grounds, Ct. found even if Bruton error occurred, it was subject to harmless error analysis. Ct. then found other evidence was sufficient to render any error in admitting CoC's statements harmless under federal constitutional principles. Ct. also found error did not require reversal under Ind. law. While acts or statements made in furtherance of conspiracy are admissible against all parties to conspiracy, even though made in D's absence, State must show existence of conspiracy first, because conspirator's involvement in conspiracy can't be proven solely by CoC's declarations. Here, conspiracy was proven by certified copies of conviction of CoC for conspiracy, murder & robbery, but there was no evidence showing CoC's declarations were in furtherance of conspiracy, so they were not relevant evidence of D's involvement in conspiracy itself. Any error in admission of statements was harmless, however, because D was acquitted of conspiracy & there was ample independent evidence establishing guilt of murder & robbery. Held, convictions affirmed.

TITLE: U.S. v. Tellier
INDEX NO.: O.9.c.15.
CITE: 83 F.3d 578 (2d Cir. 1996)
SUBJECT: Co-Conspirator Hearsay Statement - Foundation
HOLDING: Before statement can be admitted under co-conspirator hearsay exception under Fed. R. Ev. 801(d)(2)(E), state must prove D's membership in conspiracy. While hearsay itself can be considered in determining whether this requirement has been met, courts have required at least some independent corroborating evidence as well.

TITLE: U.S. v. Inadi
INDEX NO.: O.9.c.15.
CITE: 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)
SUBJECT: Hearsay - co-conspirator's out-of-court statements; unavailability
HOLDING: When party seeks to admit testimony from prior judicial proceeding in place of live testimony at trial, party generally must first demonstrate that declarant is unavailable. OH v. Roberts (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597. Confrontation Clause does not require proponent of co-conspirator's out-of-court statement to establish co-conspirator's unavailability. Co-conspirator statements are made while conspiracy is in progress & thus, provide evidence of conspiracy's context that cannot be replicated even if declarant testifies to same matters in court. Further, there is no benefit for extending unavailability requirement to co-conspirator statements. Such statements can be admitted if declarant is unavailable, or if declarant is available & produced by prosecution. Thus, D's proposed rule would only exclude co-conspirator statements if prosecution makes mistake of not producing an available witness. Unavailability rule would not add anything to truth-determining process over & above what would be produced without such a rule. Burdens imposed on criminal justice system by an unavailability rule are significant while benefits slight. Held, Confrontation Clause does not require a showing of unavailability as condition to admission of out-of-court statements of non-testifying co-conspirator. Marshall, joined by Brennan, DISSENTS.

TITLE: Wright v. State
INDEX NO.: O.9.c.15.
CITE: (12/29/97), Ind., 690 N.E.2d 1098
SUBJECT: IRE 801(d)(2)(E) - co-conspirator's statements
HOLDING: D claimed State did not lay proper foundation required under IRE 801(d)(2)(E) for admissibility of portions of witness' testimony recounting certain statements made by alleged co-conspirator to recruit assistants to help co-conspirator rob & kill someone. IRE 801(d)(2)(E) provides that statement is not hearsay if it is offered against party & is statement made by co- conspirator during course of & in furtherance of conspiracy. Before statements of one conspirator are admissible, Tr. Ct. must determine, by preponderance of evidence, that declarant & D were involved in conspiracy, & that statement was made during & in furtherance of that conspiracy. Willoughby, 660 N.E.2d 570. Existence of conspiracy may be shown by direct or circumstantial evidence, & evidence need not be strong. Lopez, 527 N.E.2d 1119. Moreover, statements that occur during course of & in furtherance of conspiracy can take many forms, & include statements made to recruit potential co-conspirators. U.S. v. Godinez, 7th Cir., 110 F.3d 448; Garlington v. O'Leary, 7th Cir., 879 F.2d 277.

Here, sufficient evidence of conspiracy existed to permit admission of declarant's statements against D, where: 1) D told police he knew another co-conspirator had gun & wanted to do "devious" things, 2) that he drove 2 co-conspirators & was present when they showed victim gun & demanded money, 3) that he waited while co-conspirators shot victim, & 4) declarant testified regarding activities of group prior to shooting, including that D was standing next to co-conspirators at time one stated that he wanted to rob & kill someone. Held, no error.

O. EVIDENCE

O.9. Hearsay

O.9.c.16. Admissions/ confessions

TITLE: Allen v. State
INDEX NO.: O.9.c.16.
CITE: (5th Dist., 5-5-03), Ind. App., 787 N.E.2d 473
SUBJECT: Party-opponent hearsay exception applies to government employees testifying in criminal trials
HOLDING: Party-opponent hearsay exception applies in criminal cases to statements by government employees concerning matters within scope of their agency or employment. Here, Tr. Ct. excluded evidence of statements made by police officer shortly before D admitted that drugs & gun found in house were his. Excluded evidence would have showed that officer stated that if D did not admit contraband was his, then everyone else in house would be arrested. Although party-opponent provision applies to government officials in civil cases, there is no Indiana case addressing issue of whether statement of government employee in criminal case constitutes statement of party-opponent. City of Indianapolis v. Taylor, 707 N.E.2d 1047 (Ind. Ct. App. 1999). Despite split in federal Cts. on this issue, Ct. found that party-opponent provision should apply in criminal cases as it does in civil cases because there is no limiting language in Indiana Rule of Evidence 801(d)(2) & because applying it in criminal cases advances concept of fairness. Further, unlike its federal counterpart, Indiana rule uses subheading "Statement by Party-Opponent" rather than "admission by party-opponent" to underscore point that party's statement need be neither confession nor admission against interest to fall within exception to definition of hearsay. Thus, concerns expressed by Seventh Circuit in United States v. Kampiles, 609 F.2d 1233 (7th Cir. 1979), relating to admissions & the adversarial process does not apply in Indiana. Because exclusion of officer's exact words had little effect on jury & did not substantially affect D's rights, error was harmless. Held, judgment affirmed.

RELATED CASES: Turner, 993 N.E.2d 640 (Ind. Ct. App. 2013) (because C.I. was acting as State agent, his statement was not hearsay but statement of a party opponent); Banks, App., 839 N.E.2d 794 (Tr. Ct. erred in excluding D's testimony concerning what a police officer told him during an undercover operation on grounds that it constituted hearsay).

TITLE: Cooley v. State
INDEX NO.: O.9.c.16.
CITE: (6/27/97), Ind., 682 N.E.2d 1277
SUBJECT: IRE 801(d)(2)(A) - Statement by party-opponent
HOLDING: D's girlfriend's statement to police that D had bought drugs to sell constituted "hearsay" since it was made on prior occasion out of court & offered to prove matters contained in statement, even though girlfriend testified to statement at trial. State argued that girlfriend's statement fell under IRE 801(d)(2)(A), a statement by D offered against D at trial, & was not hearsay. State claimed that girlfriend's testimony was gleaned from D's statements to her about his drug dealing & therefore statement girlfriend made was D's own statement. S. Ct. rejected this argument, finding reason why girlfriend's statement is hearsay is because she is testifying about her prior unsworn statements. It does not matter for this purpose that her prior statements purported to relate what D told her or not; what makes testimony hearsay is that she was testifying as to what she said on prior occasion, not as to what D said. Thus, testimony does not fall within ambit of IRE 801(d)(2)(A). However, error was harmless. Held, conviction affirmed.

RELATED CASES: Hicks, 690 N.E.2d 215 (witness's testimony about what D's friend said regarding D's statements was not hearsay because it was statement by party opponent, made in representative capacity; D made friend his representative).

TITLE: Dorsey v. State
INDEX NO.: O.9.c.16.
CITE: (1st Dist., 2-9-04), Ind. App., 802 N.E.2d 991
SUBJECT: Recorded telephone conversation admissible under party-opponent hearsay exception
HOLDING: Tr. Ct. did not err in admitting recorded telephone conversation from county jail between D, an unknown male, & a State's witness. Unknown male told witness that he was relaying a message from D, for witness to be at Ct. house next morning for her deposition & to "look out for [D]." Witness expressed doubts concerning lying about D's whereabouts at time of incident, then D came onto telephone line & talked to witness. Although telephone conversation was clearly hearsay, Ct. held it was admissible under Indiana Evidence Rule 801(d)(2)(D) as a statement by party-opponent. Party-opponent exception involves "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship..." Here, record supported finding that unidentified male was acting on behalf of D during jailhouse telephone conversation between witness & himself. D's presence at or near placement of call, along with his participation in call, proves that unknown male placed call with D's knowledge & consent, & pursuant to his request. Held, judgment affirmed.

RELATED CASES: Chambless, 119 N.E.3d 182 (Ind. Ct. App. 2019) (C.W.'s statements during jail calls were admissible because D discussed the crimes for which he was incarcerated and was advised the calls were recorded).

TITLE: Hughes v. State
INDEX NO.: O.9.c.16.
CITE: (1st Dist. 6/8/87), Ind. App., 508 N.E.2d 1289
SUBJECT: Hearsay exceptions - admission of criminal D
HOLDING: Tr. Ct. did not err in allowing witness to testify concerning D's doctor's threat to have child abuse charges filed against D if she brought her son James in one more time to be treated for a head injury. Here, D was charged with neglect & involuntary manslaughter in the death of her adopted son John. D's doctor died prior to trial. Witness' statement, attributed to D, was not inadmissible as hearsay. Statement came within exception to hearsay rule for admissions of criminal D. Lynk, 393 N.E.2d 751. Held, conviction affirmed.

TITLE: Moredock v. State
INDEX NO.: O.9.c.16.
CITE: (12/3/82), Ind., 441 N.E.2d 1372
SUBJECT: Hearsay exceptions - tacit admission; newly discovered evidence
HOLDING: A tacit admission consists of silence or an unequivocal response to an assertion made by another which ordinarily would be expected to be denied. Wickliffe, 424 N.E.2d 1007. Such an assertion or words/conduct are admissible if reaction is not a clear denial. Jethroe, 319 N.E.2d 133. Extrajudicial admissions of witnesses who testify & are subject to cross-exam are admissible as substantive evidence to extent relevant. Williams, 426 N.E.2d 662. Here, after D's trial, cousin of S.B. made affidavit stating S.B. tacitly admitted D did not rape her & that S.B. had emotional problems & was known to overdramatize & tell untruths. D submitted this affidavit with MCE which was denied by Tr. Ct. Ct. finds affidavit constitutes newly discovered evidence satisfying test set forth in Smith, 429 N.E.2d 956 & Emerson, 287 N.E.2d 867. Situation is similar to Key, 132 N.E.2d 143 in which D's MCE was accompanied by affidavit of jailer stating that alleged accomplice (crucial witness against D) told officer he intended to take D to penitentiary with him because D had dated his wife. Ct. in Key held "significant & startling revelation" indicating perjury on part of state's crucial witness, which probably could have produced different result, required new trial. Held, denial of MCE reversed, remanded for new trial.

RELATED CASES: Scisney, App., 690 N.E.2d 342 (failure to act surprised when large quantity of cocaine found in D's car did not constitute tacit admission); James, App., 481 N.E.2d 417 (failure to deny fondling when not explicitly asked is insufficient evidence to support conviction for child molesting; case includes good discussion of tacit admissions).

TITLE: Shackelford v. State
INDEX NO.: O.9.c.16.
CITE: (10/9/86), Ind., 498 N.E.2d 382
SUBJECT: Hearsay exceptions - admissions against interest; adoptive admission
HOLDING: Tr. Ct. did not err in denying D's motion for severance; D was not prejudiced by witness' testimony of statements made by co-D implicating D in commission of crime. Here, D & co-D described each of their roles in committing murder. Witness was allowed to testify to this conversation. D contends witness' testimony re co-D's statements were improper because co-D did not testify; therefore, D was *denied* right to confront witnesses, *citing* Bruton v. US, (1968), 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476. Ct. finds Bruton inapplicable. Statements were admissible against D under 2 exceptions: (1) admissions against interest (Cooper, 461 N.E.2d 1119) & (2) adoptive admission (Harris, 425 N.E.2d 154 & Robinson, 365 N.E.2d 1218). Ct. finds D's involvement in conversation goes further than holdings in Harris & Robinson which referred to situation where accusation against D is made & D maintains silence without denial. D in this case did not remain silent but joined in conversation agreeing with what co-D said & adding his own commentary. Witness' testimony was admissible against D & co-D equally & it would have been so had D been tried separately or jointly (as was the case). Ct. also notes D did not object to witness' testimony on grounds now presented on appeal. Held, no error.

RELATED CASES: Lancaster, ___ N.E.3d ____ (Ind. Ct. App. 2020) (witness's testimony admissible as adoptive admission and statement made by a party opponent; see full review, this section).

TITLE: Thomas v. State
INDEX NO.: O.9.c.16.
CITE: (4th Dist., 04-26-93), Ind. App., 612 N.E.2d 604
SUBJECT: CHINS agreed entry admissible in criminal prosecution
HOLDING: In D's trial for molesting daughters, it was not error to admit Agreed Entry from CHINS action, stating girls were victims of sex offense & that D agreed to participate in incest program. Both parents, with advice of counsel, entered into Agreed Entry stipulating children were CHINS. At criminal trial Agreed Entry was admitted over D's objection that it was involuntary confession. D relied primarily on Hastings, App., 560 N.E.2d 664, trans. denied, where statement given by D to welfare worker as part of requirement to regain custody of child was ruled inadmissible because caseworker was acting as agent of government in course of securing conviction, & statement was given involuntarily. Ct. noted that in D's case document specifically indicated that he was aware of contents & signed it voluntarily while being represented by counsel. Document contained language that parties were advised they could not be compelled to enter into agreement with Welfare Department against their will; that they were entering into agreement of own free will without any threats, promises or coercion; & that they stipulated children were CHINS in that they were victims of sex offense. Ct. found it was clear Welfare Department was government agency but did not determine whether it was attempting to secure conviction because it found statement was given voluntarily. Document was clear & unambiguous, & D signed it voluntarily with advice of counsel. Ct. rejected D's argument that he signed it only pursuant to poor advice of counsel, finding that issue was between D & his counsel. Held, conviction affirmed.

O. EVIDENCE

O.9. Hearsay

O.9.c.16.a. Admission by conduct (flight/threats, etc.)

TITLE: Burris v. State
INDEX NO.: O.9.c.16.a.
CITE: (2/17/83), Ind., 444 N.E.2d 1187
SUBJECT: Hearsay exceptions - admission by conduct; post-arrest silence
HOLDING: Prosecutor's comment in closing argument that the first time D said he shot decedent in self-defense was 1« years after shooting was permissible because D had made a prior inconsistent statement. Here, D contended prosecutor's comment referred to his post arrest silence, thereby violating Doyle v. OH (1976), 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (prosecutor may not impeach D's exculpatory story told for first time at trial by cross-examining D about failure to tell this story to police after receiving Miranda warnings; use of D's post arrest silence in such manner violates due process). Ct. finds Doyle inapplicable where D has made an inconsistent statement. Held, no error.

TITLE: Collins v. State
INDEX NO.: O.9.c.16.a.
CITE: (4th Dist., 05-04-05), Ind. App., 826 N.E.2d 671
SUBJECT: Erroneous admission of statement - adopted statement by party-opponent
HOLDING: In murder prosecution, Tr. Ct. erred in admitting portion of statement made by eyewitness who did not testify, to be included with taped statement of D which was played for jury. State argued that statement was admissible under Indiana Evidence Rule 801(d)(2)(B) as a statement by a party-opponent because D manifested an adoption or belief in its truth. Following U.S. v. Lilley, 581 F.2d 182 (8th Cir. 1978), which had facts nearly identical to those here, Ct. concluded that statements made by witness & repeated by sheriff to D should not have been admitted. While being interviewed by sheriff, D denied having any knowledge of victim's death even though sheriff had informed him that eyewitness had indicated that D shot victim. Tenor of eyewitness's recorded statement played to D was to demonstrate the malevolent, purposeful discharge of gun into victim's head.

After hearing statement, D changed his story & said the shooting did not happen as eyewitness described it, but that it was accidental. While D adopted the fact he shot victim, he did not manifest an adoption of the statement to extent that it would be a confession to an intentional or knowing killing of victim. Thus, it is clear that D did not adopt (manifestly or otherwise) eyewitness's characterization of what occurred. At best, D agreed that he had the gun, it discharged, & that victim was killed. That the occurrence was brutally malicious, as opposed to accidental, was not admitted by D. Error in admission of this hearsay evidence was not harmless, because eyewitness's statement was the most condemning evidence of D's intent. Held, conviction reversed & remanded for new trial; Bailey, J., dissenting, believes that error was harmless beyond a reasonable doubt.

TITLE: Connell v. State
INDEX NO.: O.9.c.16.a.
CITE: (11/16/84), Ind., 470 N.E.2d 701
SUBJECT: Hearsay exceptions - admissibility by conduct; harassment of witness
HOLDING: Tr. Ct. did not err in admitting testimony that D had shot at Butler's house & fled from police who arrived on scene. Here, D contends evidence is not relevant to crime of burglary & theft of property from Wilson home. Butler called police & asked them to remove items from her home which she believed were stolen. D, who stayed with Butler periodically, had stored these items there. Three days after police removed property, Butler called police because someone was shooting at her home. Ct. finds D's act of shooting at home gave rise to inference he was threatening/harassing a potential witness & thus is relevant on issue of guilt. See Gray 437 N.E.2d 983. Held, no error.

TITLE: Douglas v. State
INDEX NO.: O.9.c.16.a.
CITE: (6/11/84), Ind., 464 N.E.2d 318
SUBJECT: Hearsay exceptions - admission by conduct; prior threats
HOLDING: Tr. Ct. did not err in admitting testimony of prior threat D made against victims (of involuntary manslaughter & attempted voluntary manslaughter) during incident occurring several weeks before instant crimes. Evidence is relevant if it tends to prove element of charge. Wilson 432 N.E.2d 30. Tr. Ct. has broad discretion in ruling on relevance of such evidence. Wilson; Turpin 400 N.E.2d 1119. Here, testimony re prior threat was probative on issue of intent. Held, no abuse of discretion.

RELATED CASES: Neal, 659 N.E.2d 122 (threat made against witness was not only admissible as threat to show D's guilty knowledge, but was also admissible as statement by party-opponent; such statements are admissible as non-hearsay under IRE 801(d)(2)(A)).

TITLE: Erickson v. State
INDEX NO.: O.9.c.16.a.
CITE: (9/1/82), Ind., 439 N.E.2d 579
SUBJECT: Hearsay exceptions - admission by conduct; flight; instructions
HOLDING: Flight while in custody or to avoid arrest is admissible to show guilty knowledge. Porter 391 N.E.2d 801. Here, 6 months after offense (robbery with a deadly weapon), police officer attempted to serve arrest warrant. After knocking on door & identifying himself, officer heard shuffling noises. Officer broke in door & discovered D hiding in crawl space under front porch. Ct. found evidence of flight to avoid arrest ample to justify instruction given. Clemons 424 N.E.2d 113. Held, no error. DISSENT by DeBruler distinguishes Clemons (D observed running away from scene of crime) & Porter (D escaped from jail while awaiting trial).

RELATED CASES: Stout 479 N.E.2d 563 (Crim L 814(13); 1172.6; Tr. Ct. erred in giving flight instruction where there was no evidence of flight, but error was harmless because other evidence sustains conviction); Abercrombie 478 N.E.2d 1236 (Burglary 41(1); Larc 55; Ct. finds D's 2 steps taken after officer ordered him to stop indicated "moment of indecision in which D was contemplating whether to run" & flight of D's partner is circumstantial evidence connecting D with offenses of burglary & theft); King 468 N.E.2d 226 (flight instruction proper where D left scene hurriedly, did not return home for 2 days & fled to Utah); Engle 467 N.E.2d 712 (flight from state); Calvert, App., 498 N.E.2d 105 (flight instruction was improper where accomplice (not tried with D) fled, but D did not; held, reversed on other grounds).

TITLE: Fry v. State
INDEX NO.: O.9.c.16.a.
CITE: (4/14/83), Ind., 447 N.E.2d 569
SUBJECT: Hearsay exceptions - admission by conduct; change in appearance
HOLDING: Tr. Ct. did not err in allowing prosecutor to ask D if he had done anything before trial to change the appearance of his hair where victim testified that D's hair was kinky at lineup. Davidson (1933), 205 Ind. 564 (conduct indicating consciousness of guilt is admissible against D at trial). Here, defense counsel objected on grounds that the victim had already testified that D had kinky hair at lineup, thus prosecutor should be precluded from expounding on subject. Prosecutor countered that questioning was relevant to show D made deliberate effort to change appearance before trial. Held, no error.

TITLE: Grimes v. State
INDEX NO.: O.9.c.16.a.
CITE: (7/6/83), Ind., 450 N.E.2d 512
SUBJECT: Hearsay exceptions - admission by conduct; false alibi
HOLDING: To extent D's exculpatory statements to police were false, they were properly admitted to show his consciousness of guilt. Any testimony tending to show an accused's attempt to conceal implicating evidence or to manufacture exculpatory evidence may be considered by trier of fact as relevant, revealing consciousness of guilt. Washington 402 N.E.2d 1244; Matthew 337 N.E.2d 821; Harris 281 N.E.2d 85. Here, officer testified regarding statements D made to him detailing D's whereabouts/activity during evening of murder. D objected to testimony. State said it would show D's statements were false. Other witnesses contradicted D's statements as to whereabouts. Held, no error.

TITLE: Hansford v. State
INDEX NO.: O.9.c.16.a.
CITE: (4/1/86), Ind., 490 N.E.2d 1083
SUBJECT: Hearsay exceptions - admission by conduct; escape
HOLDING: Tr. Ct. did not err in allowing evidence of D's escape from jail & evidence of his plan to escape. Evidence of escape is sufficient basis for jury to infer consciousness of guilt & is relevant to issue of D's guilt. Lee 439 N.E.2d 603; Lofton 378 N.E.2d 834; Layton 240 N.E.2d 489. Held, no error. **NOTE:** See Hansford card at D.9.g.2.h re jury instruction on this issue.

TITLE: Lancaster v. State

INDEX NO.: O.9.c.16.

CITE: (8/14/20), Ind. Ct. App., 153 N.E.3d 1144

SUBJECT: Witness's testimony admissible as adoptive admission and statement made by a party opponent

HOLDING: In murder prosecution, trial court did not err in permitting witness to testify about the conversation he overheard between Defendant and Defendant's brother about the need to kill all three victims before the murders occurred. After Defendant's brother stated that they needed to "smoke Jessica," meaning to kill her, Defendant did not deny, disagree with, or refute the statement, and even went a step further, saying that they would "have to do them all." Defendant's brother's first statement was not hearsay, but was admissible as an adoptive admission, which is a statement offered against an opposing party that "the party manifested that it adopted or believed to be true[.]" Ind. Evid. R. 801(d)(2)(B). Defendant's statement was plainly admissible pursuant to Ind. Evid. Rule 801(d)(2)(A) as a statement made by a party opponent (Defendant) and was offered by the State against that party. Therefore, the trial court did not err by admitting this portion of the witness's testimony. Bell v. State, 29 N.E.3d 137, 143 (Ind. Ct. App. 2015) (holding that it was not error to admit into evidence defendant's out-of-court statement).

TITLE: Mayes v. State
INDEX NO.: O.9.c.16.a.
CITE: (9/11/84), Ind., 467 N.E.2d 1189
SUBJECT: Hearsay exceptions - consciousness of guilt; attempt to influence juror
HOLDING: Tr. Ct. did not err in allowing witnesses to testify re D's attempt to influence juror in previous trial that ended in mistrial. Such testimony reveals consciousness of guilt & is analogous to flight, concealment, etc. US v. Bellomini (DC Pa. 1980), 454 F.Supp. 44; see Washington 402 N.E.2d 1244 (D attempted to enlist witness in scheme to suppress evidence) & Matthew 337 N.E.2d 821 (D attempted to cover up evidence of guilt by false testimony before grand jury). Here, prisoner made 3 calls on D's behalf to juror (friend) & asked her to find D not guilty. Juror reported calls & mistrial was declared. Prisoner & juror testified in second trial. Evidence is admissible if D was privy to efforts to influence juror. See Barnes 403 N.E.2d 331. Prisoner testified he made calls at D's request. Tr. Ct. did admonish jury that testimony, alone, was insufficient to establish guilt, but could be considered with other evidence. Held, no error.

TITLE: U.S. v. Allen
INDEX NO.: O.9.c.16.a.
CITE: 10 F.3d 405 (7th cir. 1993)
SUBJECT: IRE 801(d)(2)(B) - adopted statement by party-opponent
HOLDING: Tr. Ct. did not err in admitting audio & videotaped conversations between him & declarant, where D adopted declarant's statements as his own under FRE 801(d)(2)(B). Although D never said, "I adopt [declarant]'s statements," rules require only "a manifestation of a party's intent to adopt another's statement, or evidence of the party's belief in the truth of the statements." U.S. v. Rollins, 7th Cir., 862 F.2d 1282; FRE 801(d)(2)(B). From entire context of each conversation (including non-verbal cues jury could see in tapes), along with D's failure to contest any incriminating statements, Tr. Ct. & jury could find D adopted declarant's statements. Held, no error.

RELATED CASES: U.S. v. Young, 7th Cir., 814 F.2d 392 (D adopted statement by another robber, which essentially became background for D's own statement).

O. EVIDENCE

O.9. Hearsay

O.9.c.17. Child victim/witness (Ind. Code 35-37-4-6 and 8)

TITLE: Anderson v. State
INDEX NO.: O.9.c.17.
CITE: (5th Dist., 08-26-05), Ind. App., 833 N.E.2d 119
SUBJECT: Admissibility of statements under Crawford & protected person's statute
HOLDING: In child molesting prosecution, complaining witness's (CW's) out-of-Ct. statements to her great-grandmother were admissible under Indiana's Protected Person statute & Crawford v. Washington, 541 U.S. 36 (2004), but statements she made to detective & caseworker were "testimonial" & not admissible. Crawford held that Sixth Amendment prohibits introduction of testimonial statements in a criminal trial where D had no opportunity to cross-examine the person who made the statements. A "testimonial" statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. Hammon v. State, 829 N.E.2d 444 (Ind. 2005).

Here, CW's spontaneous statements made to her great-grandmother were nontestimonial under Crawford & were sufficiently reliable under Ind. Code 35-37-4-6(e). Further, D's opportunity to cross-examine CW at Protected Persons hearing satisfied statutory cross-examination requirement even though she was found incompetent to testify at trial & her testimony at hearing was not coherent. Pierce v. State, 677 N.E.2d 39 (Ind. 1997).

Ct. reached different conclusion with respect to CW's statements to caseworker & detective. It is clear that these questioners were taking CW's statements for potential future use in legal proceedings, thus CW's statements to them were "testimonial" & governed by Crawford. Although D was allowed to cross-examine CW at Protected Persons hearing, thus satisfying Ind. Code 35-37-4-6(f), CW's testimony at hearing did not constitute cross-examination for Crawford purposes because Tr. Ct. determined that CW was incapable of understanding nature & obligation of an oath & was therefore unavailable as a witness for trial. Crawford demands a higher standard of cross-examination for out-of-Ct. testimonial statements than non-testimonial statements because testimonial statements implicate to a greater extent confrontation concerns. Purvis v. State, 829 N.E.2d 572, 583-84 (Ind. Ct. App. 2005). Since CW was incompetent to testify at trial, D's cross-examination of her at hearing did not satisfy requirements of Crawford because D lacked opportunity for full, adequate, & effective cross-examination. At least under circumstances of this case, a witness unable to appreciate obligation to testify truthfully cannot be effectively cross-examined for Crawford purposes. Held, conviction reversed on other grounds & remanded for new trial.

RELATED CASES: Agilera, App., 862 N.E.2d 298 (CW's out-of-court statements to her mother, grandmother, detective, & forensic interviewer were admissible under Indiana's Protected Person statute and Crawford).

TITLE: Arndt v. State
INDEX NO.: O.9.c.17.
CITE: (11-9-94), Ind., 642 N.E.2d 224
SUBJECT: Hearsay--child victim (C-V) statement admissible
HOLDING: Tr. Ct. did not err in admitting C-V's out-of-court statements via testimony of his mother & father. D was charged with molesting 3-year old, who made statements to parents incriminating D. Between arrest & trial, D was afforded full physical face-to-face confrontation at recorded & transcribed pre-trial admissibility hearing, where C-V repeated his former accusations. Tr. Ct. admitted testimony pursuant to Ind. Code 35-37-4-6, a recognized hearsay exception, & listed the following reasons for finding statements sufficiently reliable: (1) C-V had no motive to falsify, (2) C-V made statements during bath time while crying & in pain, (3) C-V used language appropriate for 3 year-old child, & (4) C-V repeated statements to more than one person he trusts. Court found that statutory procedure was scrupulously followed, rejecting D's claim that admission of hearsay statements at trial violated state & federal constitutional confrontation rights. Here, Tr. Ct.'s findings strongly support reliability & defense counsel conducted untrammeled cross-examination with face-to-face confrontation between D & C-V. Application of statutory exception to hearsay rule to bath-time statements was consistent with Article 1, Sec. 13 & its federal counterpart. Held, transfer granted & conviction affirmed.

TITLE: Brady v. State
INDEX NO.: O.9.c.17.
CITE: (06/28/91), Ind., 575 N.E.2d 981
SUBJECT: Child-victim witness - Ind. Code 35-37-4-8, videotaped testimony
HOLDING: S. Ct. grants transfer, reverses Brady, App., 540 N.E.2d 59, & holds that provisions (c) & (f)(7) of Indiana's alternative child victim testimony statute, Ind. Code 35-37-4-8, in effect at time of D's trial, are constitutionally infirm because they infringe on D's right to confront witnesses against him "face to face" as they give their trial testimony. These provisions relate to videotape procedures where children do not have to see Ds. Although statute is not violative of 6th Amend. of U.S. Constitution, so long as it is construed to include requirement that trauma to child stem from testifying in presence of accused, & not just in Ct. room, the provisions at issue are violative of Art. I, 13, of Ind.Const. Ct. finds that Indiana's confrontation right includes both right to cross-examine, & to meet witnesses "face to face." Ct. seems to suggest that one constitutionally satisfactory alternative would be to place witness in private room during trial & use 2-way closed circuit TV by which witness & D can see each other. Held, reversed & remanded for new trial after finding double jeopardy did not bar retrial, JJ. Givan & Krahulik, dissenting.

TITLE: Broude v. State
INDEX NO.: O.9.c.17.
CITE: (10-24-11), 956 N.E.2d 130 (Ind. Ct. App. 2011)
SUBJECT: No prejudice from lack of timely notice about closed circuit testimony
HOLDING: In child molesting prosecution, Tr. Ct. did not abuse its discretion in allowing victim to testify via closed circuit television, even though the State did not notify D at least ten days before trial that the victim would so testify, as required by Ind. Code § 35-37-4-8(e)(3), the Protected Person Statute. D failed to show that he was prejudiced by lack of timely notice, even though he claimed that if he had known that the victim would testify via closed circuit television, he might have accepted a plea offer. The Tr. Ct. remedied this problem by continuing the trial and giving the State and D fourteen days to engage in further plea negotiations before recommencing the trial. Held, judgment affirmed.

TITLE: Carpenter v. State
INDEX NO.: O.9.c.17.
CITE: (4-14-03), Ind., 786 N.E.2d 696
SUBJECT: Improper admission of hearsay statements under protected person statute
HOLDING: In child molesting prosecution, hearsay testimony recounting three year-old complaining witness's (CW's) statements to her mother & grandfather, & her subsequent videotaped interview failed to exhibit sufficient indicia of reliability to be presented to jury under Indiana's protected person statute, Ind. Code 35-37-4-6. Thus, Tr. Ct. erred in admitting CW's out-of-court statements at trial. Protected person statute impinges upon ordinary evidentiary regime such that a Tr. Ct.'s responsibilities thereunder carry with them a special level of judicial responsibility. Distinguishing Pierce v. State, 677 N.E.2d 39 (Ind. 1997), Court noted that there was no evidence at all as to when alleged molestation occurred. Hearsay testimony was unreliable because of the combination of following circumstances: 1) there was no indication that CW's statements were made close in time to alleged molestations, statements themselves were not sufficiently close in time to each other to prevent implantation or cleansing, & during competency hearing, CW was unable to distinguish between truth & falsehood. Reversal of conviction was warranted because erroneous admission of evidence affected substantial rights of D. Held, transfer granted, Ct. App.' memorandum opinion vacated, conviction reversed & remanded for new trial.

RELATED CASES: A.R.M., 968 N.E.2d 820 (Ind. Ct. App. 2012) (Tr. Ct. did not abuse discretion when it determined the CW's videotaped statement was reliable and that she testified at juvenile's fact-finding hearing, both prerequisites for admission of videotape under Protected Person Statute); Nunley, App., 916 N.E.2d 712 (Tr. Ct. erroneously admitting child victim’s hearsay statement via videotape of her interview which occurred a year after the alleged molestation and initial disclosure of the molestation and that included new allegations); Taylor, App., 841 N.E.2d 631 (distinguishing Carpenter, Ct. held that CW's statements to mother provided sufficient indications of reliability to be admissible under Indiana's protected person statute; despite passage of time, CW's statements were spontaneous, CW used age-appropriate language to describe incident & had no discernible motivation to lie); Trujillo, App., 806 N.E.2d 317 (Tr. Ct. did not abuse its discretion in concluding that four year-old complaining witness's statements to her mother had sufficient indications of reliability under Indiana's protected person statute, Ind. Code 35-37-4-6, as well as determining that subsequent videotaped interview with detective was admissible; distinguishing Carpenter, Ct. noted that it was clear that alleged incident in this case occurred several hours before CW made statements to her mother).

TITLE: Casada v. State
INDEX NO.: O.9.c.17.
CITE: (1st Dist. 9/28/89), Ind. App., 544 N.E.2d 189
SUBJECT: Child victim witness (CV) - blocking view between D & witness
HOLDING: Tr. Ct. denied D's 6th Amend. confrontation right by placing chalkboard between D & CV over 10 years old during direct examination. Tr. Ct. ordered 6' X 4' chalkboard set up between CV & D, who was accused of molesting CV, after CV became too distraught to testify. Screen was removed during cross-examination (CX). Confrontation clause in both U.S. & Ind. constitutions guarantee D both right to confront witness face to face & right to CX. Coy v. Iowa, (1988), 108 S. Ct. 2798, 101 L.Ed.2d 857; Miller, 517 N.E.2d 64; Miller, 531 N.E.2d 466. Because these 2 rights are separate, removing screen during CX did not cure denial of face-to-face confrontation right, but merely facilitated exercise of right to CX. U.S.S.Ct. in Coy did not say whether exceptions to confrontation right exist, but stated that if so they would only be allowed "when necessary to further an important public policy," based on particularized findings. Indiana legislature has expressed compelling public policy of prosecuting child molesters, as well as reducing trauma to CVs. However, Tr. Ct. here simply stated on record that CV was too distraught to testify & that it hoped that chalkboard screen would enable her to do so. Tr. Ct. neither received nor mentioned any evidence other than its own observation. This was not particularized finding such as to outweigh D's right to confront CV face to face. Held, denial of right to face-to-face confrontation was not harmless error. **NOTE:** In dicta, Ct. App. discusses procedure for making particularized findings which might outweigh confrontation right.

TITLE: Casselman v. State
INDEX NO.: O.9.c.17.
CITE: (4th Dist. 12/10/91), Ind. App., 582 N.E.2d 432
SUBJECT: Alternative videotape statute constitutional
HOLDING: Because Indiana's videotape testimony statute, Ind. Code 35-37-4-6, provides for 2 face-to-face encounters, it is not constitutionally invalid in light of Brady, Ind., 575 N.E.2d 981. Additionally, although separate hearing on videotape's admissibility was not held, trial was to bench, not jury, & necessary statutory procedures were followed at hearing during trial. Ct. noted that Ind. Code 35-37-4-6(d)(2)(A) & (B) require both that "protected person" be present at hearing on admissibility & that said person either testify at hearing or have been available for face-to-face cross-examination when videotape was made. Therefore, confrontation rights under Ind.Const. were satisfied. Ct. also found D could demonstrate no prejudice from failure to hold separate hearing on admissibility of videotape because statute only requires that D get notice of hearing, D has right to be present, hearing is conducted outside of presence of jury, protected person attend hearing, & sufficient indicia of reliability of videotape be present. Although D argued alleged victim was unavailable for CX because her testimony failed to show indicia of reliability, Ct. disagreed because Tr. Ct. had found 3-year-old child competent to testify. Ct. also rejected D's argument that substituting out-of-Ct. statement for in-Ct. testimony was violation of then existing Patterson rule. Held, conviction affirmed. Note: Ct. did not address issue of statute's failure to require that child's unavailability be due to emotional trauma from testifying in presence of D, rather than just testifying at trial. This requirement was discussed in context of testimony by child outside of Ct. room in Maryland v. Craig, 497 U.S., 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990), & recognized by Brady, supra.

RELATED CASES: D.G., 947 N.E.2d 445 (Ind. Ct. App. 2011) (Tr. Ct. erred by not assessing competency of 6-year-old CW before allowing her to testify about being molested by teenage boy); Hoover, 582 N.E.2d 403.

TITLE: D.G.B. v. State
INDEX NO.: O.9.c.17.
CITE: (4th Dist., 08-31-05), Ind. App., 833 N.E.2d 519
SUBJECT: Statements admissible under excited utterance hearsay exception; Crawford
HOLDING: In child molesting prosecution, D did not have an opportunity to cross-examine the complaining witness (CW) under the Protected Person Statute, Ind. Code 35-37-4-6(f), where CW would not take the oath & turned away from the judge & put her hands over her ears during questioning. Under these circumstances, Ct. could not conclude that CW was available for cross-examination at the admissibility hearing. However, Ct. found a statement CW made to her mother at a hospital was admissible under the "excited utterance" exception to the hearsay rule, see Ind. Evid. Rule 803(2). Despite the fact CW had undergone surgery & been put under anesthesia, Ct. determined the statement to her mother was still under the stress of excitement caused by the earlier molestation. Ct. noted the interval between the molestation & the statement "is longer than what has been considered allowable for the excited utterance exception," but noted language from Hammon, 829 N.E.2d 444, & cases where significant time elapsed between the event & the statement. Ct. emphasized that decision should not be interpreted as an extension of the excited utterance rule & is based upon the unique facts of this case, where a six-year-old child had her genitalia mutilated & was threatened that if she told she would be burned on a grill & fed to a dog.

Ct. found that additional statements made by CW to mother & police officer at police station should have been suppressed on all grounds. CW's statements at the police station were not admissible under Crawford, 124 S.Ct. 1354 (2004). Although CW took the stand in Protected Person hearing, the determination of unavailability as to the Protected Person Statute is applicable to her availability under Crawford. However, denial of confrontation is harmless where, as here, evidence is so convincing that a jury could not have found otherwise. In a footnote, Ct. noted D did not challenge hospital statement under the 6th Amend. & Crawford. Ct. also held that Protected Person Statute is applicable to juvenile proceedings, declining to depart from J.V., App., 766 N.E.2d 412. Held, judgment affirmed.

TITLE: Edwards v. State
INDEX NO.: O.9.c.17.
CITE: (12/12/86), Ind., 500 N.E.2d 1209
SUBJECT: Hearsay - child victim statement; audio tape
HOLDING: Tr. Ct. did not err by allowing edited tape & transcript of prior interview with child molest victim, given tender age & minimal understanding of victim. Here, D contends tape & transcript were hearsay. Ct. finds them admissible for 2 reasons: (1) out-of-Ct. declarations of witness are not objectionable hearsay & are admissible as substantive evidence if witness also testifies & is available for in-Ct. cross-examination, *citing* Patterson, 324 N.E.2d 482; (2) witness may be treated in manner similar to hostile witness if peculiar circumstances attending examination, such as witness' age, lack of understanding or demeanor so indicate, *citing* Brown, 23 N.E.2d 267. Some answers given by witness on direct exam did appear somewhat confusing & contradictory. Under such circumstances, state was entitled to introduce victim's prior statements in order to clarify situation & give jury maximum opportunity to discern total sum of her testimony. Held, no error.

TITLE: Harris v. State
INDEX NO.: O.9.c.17.
CITE: (03-27-12), 964 N.E.2d 920 (Ind. Ct. App. 2012)
SUBJECT: Protected person statute - testimony via closed-circuit television
HOLDING: In child molesting prosecution, Tr. Ct. did not err in permitting complaining witness (CW) to testify at trial via two-way closed-circuit television. Based on testimony of a psychiatrist, a behavioral clinician and CW's grandmother, State was able to show that CW was a protected person who, if required to testify in physical presence of D, could suffer serious emotional harm. State presented more than sufficient evidence at protected person hearing to support Tr. Ct.'s conclusion, pursuant to Ind. Code 35-37-4-8(B)(I) and (iii), that testifying in person would cause CW to suffer serious emotional harm and that she could not reasonably communicate to the jury in the physical presence of D. Although CW was not present in the courtroom, the defense was still able to cross-examine her via closed-circuit television. Held, judgment affirmed and remanded in part on other grounds.

RELATED CASES: McKinney, 82 N.E.3d 290 (Ind. Ct. App 2017) (Tr. Ct. abused discretion in denying State's request to let an alleged child molesting victim testify via closed-circuit TV; State's evidence showed child would be harmed more by testifying in open court than via closed-circuit TV).

TITLE: Hart v. State,
INDEX NO.: O.9.c.17.
CITE: (09/18/91), Ind., 578 N.E.2d 336
SUBJECT: Child victim alternative testimony - Brady confrontation error not fundamental
HOLDING: Admission of pretrial videotape of child witness' testimony, made without D's presence & in violation of his right to face-to-face confrontation, was not fundamental error. Tape of 6 year old's testimony was made three days before trial, pursuant to Ind. Code 35-37-4-8. Tape was made in Ct. Room with child sitting alone in witness chair, robed judge, prosecuting attorney, defense attorney, Ct. reporter, camera operator, & child's mother & aunt present. D was in adjoining room & listened over audio equipment. Testimony lasted 1 ½ hours, with one hour of that time being for cross-examination. D was tried & his appeal decided in Ct. App., prior to the Ind. S. Ct.'s holding that videotape provisions at issue created an unconstitutional denial of D's state constitutional right to face-to-face confrontation with his accusers. Brady, 575 N.E.2d 981. Therefore, S. Ct. granted transfer to assess whether Brady decision required reversal in this case. While D raised both Ind. & federal confrontational & due process claims on appeal, at trial he objected to videotape testimony only on federal constitutional grounds. S.Ct. found that D's failure to assert state constitutional grounds in objection at trial constituted waiver of issue on appeal unless error was determined fundamental, & held that under circumstances of instant case, it was not. Held, conviction affirmed.

TITLE: Howard, Jr. v. State

INDEX NO.: O.9.c.17.

CITE: (09-06-06), Ind., 853 N.E.2d 461

SUBJECT: Protected person statute- no showing that witness was unavailable; discovery deposition constitutes prior "opportunity" to cross-examine under Crawford

HOLDING: Because there was no showing that a child witness was unavailable for trial within the meaning of the protected person statute, Tr. Ct. erred in allowing a deposition of the child witness into evidence. Under Ind. Code 35-37-4-6, a determination that a child witness is unavailable may be predicated only upon a Tr. Ct. finding: (1) from testimony of a psychiatrist, physician, or psychologist & other evidence, if any, that the child will suffer emotional distress such that she cannot reasonably communicate if testifying in physical presence of the D; (2) the child cannot participate at trial for medical reasons; or (3) the child is legally incompetent to testify. Here, the child witness became emotional & unable to testify at trial. Although both parties & Tr. Ct. tried to encourage the child to testify, there was no testimony from a psychiatrist, physician or psychologist about the child suffering emotional harm. Because child was not properly found unavailable, it was error to admit into evidence her pre-trial discovery deposition.

However, D had a full, fair & adequate opportunity to confront & cross-examine the child witness, within the meaning of the Sixth Amendment, when her pre-trial deposition was taken regardless that the deposition was for discovery purposes. Testimonial hearsay statements of an unavailable witness are admissible under the Sixth Amendment if the D had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36 (2004). Thus, if the Tr. Ct. makes a finding of unavailability consistent with the protected person statute, child witness' deposition may be introduced into evidence at any subsequent retrial. Held, transfer granted, Ct. App.' opinion at 816 N.E.2d 948 vacated, judgment reversed.

TITLE: L.H. v. State
INDEX NO.: O.9.c.17.
CITE: (4th Dist., 12-27-07), Ind. App., 878 N.E.2d 425
SUBJECT: Child hearsay - hearing cannot be incorporated into bench trial
HOLDING: Juvenile court erred in incorporating all the testimony, evidence, & exhibits from the child hearsay hearing into the fact-finding hearing. One of the requirements for child hearsay to be admissible at a trial is if the child testifies at trial or is found unavailable. Ind. Code 35-37-4-6(e). Thus, the statute contemplates a dual proceeding. Here, juvenile court held a child hearsay hearing immediately prior to the fact-finding hearing. At the end of the hearing, State asked the court to incorporate all evidence & exhibits from the hearing into the trial. Tr. Ct. did so over the juvenile's objection. State offered no additional testimony, evidence or exhibits. Because the juvenile never agreed to the incorporation of the hearing into the trial & because the child never testified at trial, the incorporation was erroneous. Although incorporating testimony & evidence from a proceeding with greater procedural protections into a proceeding with lesser protections may be appropriate in certain circumstances, doing the opposite is not. Thus, the juvenile was denied a fair fact-finding hearing. Held, judgment reversed; Kirsch, J., dissenting on the basis that the juvenile did not show how he was prejudiced by the incorporation.

RELATED CASES: J.A., 904 N.E.2d 250 (Ind. Ct. App. 2009) (trial counsel's incorporation of child hearsay hearing into fact-finding hearing was not IAC where it occurred years before L.H. was decided and could have been strategical decision).

TITLE: Matthews v. State
INDEX NO.: O.9.c.17.
CITE: (12/7/87), Ind., 515 N.E.2d 1105
SUBJECT: Hearsay exception - child-victim (C-V) witness; mental age
HOLDING: Ind. Code 35-37-4-6, providing an exception to hearsay rule for statements of C-V under 10, cannot be applied to statements by children 10 or older. Here, D was charged with molesting 10-year-old whose mental age was 5. Tr. Ct. found C-V incompetent to testify because she was incapable of understanding nature & obligation of oath. C-V's hearsay statements were admitted at trial & served as basis of D's conviction. Tr. Ct. reasoned that Ind. Code 35-37-4-6 applied because C-V's mental age was under 10 years. However, because statute does not mention mental age, chronological age must be determinative factor. Held, hearsay statements improperly admitted, conviction reversed. **NOTE:** Ind. Code 35-37-4-6 has been amended, effective 4/1/90, to take away presumption of incompetence for children under 10 & to remove age limit for application of statute's provisions.

TITLE: Miller v. State
INDEX NO.: O.9.c.17.
CITE: (12/7/88), Ind., 531 N.E.2d 466
SUBJECT: Child victim (C-V) statement - indicia of reliability
HOLDING: Tr. Ct.'s ruling that C-V's statement was surrounded by sufficient indications of reliability is not adequately supported. D was charged with molesting 3-year-old, who made statement at sheriff's office incriminating D. Tr. Ct. ruled that statement had sufficient indications of reliability due to corroborating testimony of doctor. This evidence should not have been considered. Under Ind. Code 35-37-4-6, requirement of corroborative evidence is separate from requirement of indications of reliability, & corroborative evidence cannot be used to bolster reliability. Focus of Tr. Ct. should be upon time, content, & circumstances surrounding making of statement itself, not upon outside occurrences. While C-V's inability to understand nature & consequences of oath does not render statement inadmissible, it is significant negative factor. Age of C-V here bespeaks major inability to observe, remember, recollect, & describe experiences. She was under intense control & scrutiny for several hours before statement was made. She was subject to stressful physical examination, was confronted by strange adult at welfare department, then was taken to sheriff's office where she was left by yet another stranger. When she did not concentrate on questions being asked, her parents were removed & she was confronted with 2 adults who, with difficulty, finally elicited answers sought & expected. It is difficult to imagine more exhausting, stressful & coercive situation. Questioning commenced with leading question referring not to C-V's injury but to D himself. These circumstances do not provide sufficient indicia of reliability. Held, transfer granted, Ct. App. opinion vacated, & conviction reversed & remanded. Pivarnik, J., would deny transfer.

TITLE: Norris v. State
INDEX NO.: O.9.c.17.
CITE: (4/26/2016), 53 N.E.3d 512 (Ind. Ct. App. 2016)
SUBJECT: Non-medical professional's opinion about child's unavailability to tesify
HOLDING: In deciding whether to declare complaining witness (C.W) unavailable to testify at D's trial for Level 5 battery, Tr. Ct. did not err in considering additional testimony from a person who is not a psychiatrist, physician, or psychologist ("Evaluation Professionals") because the Protected Person Statute allows a Tr. Ct. to consider "other evidence," and this evidence may include testimony from a person who is not an Evaluation Professional. See Ind. Code 35-37-4-6(e)(2)(B)(i). Thus, the State is incorrect that "other evidence" is restricted to testimony from additional Evaluation Professionals and medical records related to the assessment of a juvenile. Held, judgment affirmed.

RELATED CASES: Vega, 119 N.E.3d 193 (Ind. Ct. App. 2019) (no error in admitting a video-recorded child forensic interview when a licensed mental health professional reviewed and approved work of her unlicensed subordinate regarding C.W.'s emotional distress about testifying at trial).

TITLE: Perryman v. State
INDEX NO.: O.9.c.17.
CITE: (7/7/2017), 80 N.E.3d 234 (Ind. Ct. App. 2017)
SUBJECT: No error in admission of video under protected-person statute
HOLDING: In battery and neglect prosecution, Tr. Ct. did not err in admitting complaining witness's (C.W.'s) Child Advocacy Center ("C.A.C.") videotaped interview under the protected person statute because the statement was reliable. The protected person statute is not unconstitutional under the Confrontation Clause. The Sixth Amendment did not require the opportunity to cross-examine C.W.'s testimonial statements at the time they were made because no prosecution had commenced and D was not an accused. Texas v. Cobb, 532 U.S. 162 (2001). And even if confrontation rights have attached at the time a testimonial statement is made, the Sixth Amendment does not require opportunity to cross-examine at that time. The statute does not violate Crawford v. Washington, 541 U.S. 36 (2004) by requiring trial judges to determine the reliability of the protected person's statement in addition to confrontation. D in this case was not denied the opportunity for full, adequate, and effective cross-examination. He was able to fully probe whether motive or opportunity for manipulation or fabrication existed. Held, judgment affirmed.

TITLE: Pierce v. State
INDEX NO.: O.9.c.17.
CITE: (2-28-97), Ind., 677 N.E.2d 39
SUBJECT: Statements properly admitted under protected person statute
HOLDING: Hearsay testimony recounting three-year-old complaining witness's (CW's) statements to her mother & police officers, as well as subsequent videotaped interview, exhibited sufficient indications of reliability as required by Indiana's "protected person" statute, Ind. Code 35-37-4- 6. At combined competency & admissibility hearing, Tr. Ct. found that CW's statements were spontaneous, not prompted, & occurred "a very short time" after alleged molestation. Although videotaped interview did not occur until several hours after alleged molestation, CW's statements were reliable because they were consistent with what she said immediately following incident. Unlike Miller v. State, 517 N.E.2d 64 (Ind. 1987), videotape was not only direct evidence of events.

Ct. also held that: 1) Ind. Code 35-37-4-6 does not require Tr. Ct. affirmatively to offer D opportunity to cross-examine CW after finding her to be incompetent; statute requires that CW be available for cross-examination at admissibility hearing, if separate hearings are conducted, or combined hearing if that procedure is followed; 2) Here, CW was available for cross-examination at combined competency & admissibility hearing as required by Ind. Code 35-37-4-6, & D waived his right to question her; & 3) D was not denied his right to face-to-face confrontation under Indiana Constitution, Article I, Section 13. Held, transfer granted, convictions affirmed.

Note: Exercising its supervisory powers, Ct. also held fairness to D will normally require giving D option to have cross-examination of CW videotaped & later shown to jury along with tape of other statements admitted under protected person statute.

RELATED CASES: Ennik, 40 N.E.3d 868 (Ind. Ct. App. 2015) (despite significant gap between the alleged molestation and C.W.'s initial disclosure to Mother, Tr. Ct. did not abuse its discretion in finding C.W.'s hearsay statements sufficiently reliable under protected person statute); J.V., App., 766 N.E.2d 412 (protected person statute applies in juvenile proceedings despite language in statute that states it applies to criminal action); Lewis, App., 754 N.E.2d 603 (Pierce factors satisfied, since defense counsel was given opportunity to cross-examine).

TITLE: Poffenberger v. State

INDEX NO.: O.9.c.17.

CITE: (1st Dist. 11/14/91), Ind. App., 580 N.E.2d 995

SUBJECT: Hearing on admissibility of videotape, Ind. Code 35-37-4-6 - necessity of alleged victim's testimony

HOLDING: Language of Ind. Code 35-37-4-6 clearly requires that child must testify at hearing on admissibility of audiotaped statement, not just be available for cross-examination (CX), & counsel's failure to call alleged victim to CX at hearing was ineffective assistance of counsel (IAC). On morning of trial, State notified Ct. that it would use audiotaped statement of alleged victim made shortly after alleged molestation took place, rather than live testimony. Ct. held hearing & psychologist testified that child would be traumatized by testifying in Ct.; that it would open old wounds, hurt her, make her fearful, make her fear retaliation, & make her feel guilty & disloyal. Child was present at hearing, but did not testify, & was not called by defense counsel. Statement was admitted at trial without objection, & D was found guilty of child molesting. Ct. found that Ind. Code 35-37-4-6 requires more than just availability of child at hearing on admissibility, because while Miller, 531 N.E.2d 466 stressed importance of opportunity for confrontation, statute in effect then has been amended. Old statute allowed for admissibility of statement if "the child: testifies at trial," while amendment allows for admissibility if "the protected person: testifies at the hearing described in subdivision (1)". If legislature had meant anything less, it could have used "availability for confrontation" language found elsewhere in statute. Ct. found IAC because defense counsel did not call child for CX at admissibility hearing, thus losing possibility of raising serious questions of credibility or other grounds for exclusion. Held, conviction reversed & remanded for new trial. **Note:** "Testifies" language was changed in 1994 to provide that child must be "available for cross-examination" either "at the hearing" or "when the statement or videotape was made."

TITLE: Purvis v. State
INDEX NO.: O.9.c.17.
CITE: (2nd Dist., 6-7-05), Ind. App., 829 N.E.2d 572
SUBJECT: Crawford - Child molest victim's statement to parents "non-testimonial"
HOLDING: Tr. Ct. did not err in admitting statements of alleged child molest victim to others as excited utterances or under Ind. Code 35-37-4-6, the protected persons statute. D argued statements were inadmissible under Crawford v. Washington, 541 U.S. 36 (2004), which held that "out-of-Ct. testimonial statements of unavailable witnesses may not be admitted" unless the adverse party has had an opportunity to cross-examine. Ct. found that statements the child made to his mother & a man he treated as his father were not "testimonial," because they were elicited by his parents to find out what had occurred & whether the child had been harmed, & not for purposes of prosecution. Ct. rejected argument that statements should be considered testimonial because parents suspected illegal activity on D's part when they spoke to child & then contacted police after getting information. Ct. concluded this "argument sweeps too broadly" & the parents' primary motivation was the child's safety & not law enforcement. Because the statements were non-testimonial, analysis was still necessary under the Indiana Evidence Rules & the protected persons statute. Ct. found the statements qualified as "excited utterances," as the crying child "was plainly upset from the stress of his unpleasant experience with [D] & the trauma of being discovered by his mother." Another statement was allowed under Ind. Code 35-37-4-6. Subsection (f) of statute, which requires the child to be available for cross-examination at a hearing to determine the statement's reliability, was met even though child was found incompetent. Ct. noted cross-examination under the statute has been determined adequate even when the child's testimony is incoherent, Pierce v. State, 677 N.E.2d 39 (Ind.1997), & the statute as written clearly contemplates cross-examination of children found incompetent to testify. The purpose of cross-examination under the protected persons statute is different than that required by Crawford in that its aim is to aid the Tr. Ct. in determining the reliability of out-of-Ct. statements.

Ct. found statements made by the child to a police officer after his parents contacted police were testimonial, as the primary purpose of the questioning was to get information for prosecution. Further, although D had an opportunity to question the child during a hearing to determine the child's competency to testify, this did not constitute cross-examination for Crawford purposes, because the child was determined incompetent to testify & D "lacked an opportunity for 'full, adequate, & effective cross-examination.'" While not providing a precise test for adequate opportunity, a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for Crawford purposes. However, Ct. found admission of these statements at trial cumulative of other evidence & thus harmless error. Held, judgment affirmed. [Ed. **note:** This decision was published just prior to the Indiana S. Ct.'s decision in Hammon (above) & may need to be reconsidered in its light.]

TITLE: Rickey v. State
INDEX NO.: O.9.c.17.
CITE: (4th Dist., 2-8-96), Ind. App., 661 N.E.2d 18
SUBJECT: Child victim (CV) hearsay statement - indicia of reliability
HOLDING: Tr. Ct. properly applied child hearsay statute, Ind. Code 35-37-4-6, & did not abuse discretion in admitting CV's videotaped statement & ruling that CV would be unavailable for trial. Construing language of statute, Tr. Ct. had discretion to combine competency hearing with hearing to determine admissibility of videotape. In affirming Tr. Ct.'s finding that time, content, & circumstances of videotape provided sufficient indicia of reliability, Ct. noted that: 1) videotaped interview occurred within two days of incident at welfare office; 2) caseworker's interview of CV was neither adversarial nor coached; 3) inconsistencies in CV's statements did not necessarily make his statement unreliable; & 4) CV described incident using age-appropriate terms. After reviewing testimony from pre-trial hearing, Ct. rejected D's argument that he was absolutely deprived of any opportunity to cross-examine & test credibility of CV. Although defense counsel may not have elicited "the most illuminating" responses from CV, who only nodded in response to questions, D was not denied his federal & state constitutional right to confront & cross-examine CV. Ind. Code 35-37-4-6 does not require that CV be available for cross- examination after Tr. Ct.'s determination of incompetency. Held, conviction affirmed.

TITLE: Rosenbaum v. State
INDEX NO.: O.9.c.17.
CITE: (7/22/2022), Ind. Ct. App., 193 N.E.3d 417
SUBJECT: Harmless error in admitting video of child's forensic interview when child gave consistent testimony at trial
HOLDING: Over Defendant's objection, the State was allowed to admit a child's recorded forensic interview and call the child as a witness during trial on child molesting charges. The trial court admitted the forensic interview under the Protected Person Statute (PPS). The trial court also denied Defendant's request to depose the child, relying on the then-newly enacted child deposition statute. The Court of Appeals held that the trial court erred in admitting the child's forensic interview under the PPS, I.C. 35-37-4-6. The Court relied on the Indiana Supreme Court's decision in Tyler v. State, 903 N.E.2d 463 (Ind. 2009), where the supreme court held that "if the [child's] statements are consistent and both are otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statement through the PPS, but not both except as authorized under the Rules of Evidence. If the person is able to testify live without serious emotional distress such that the protected person cannot reasonably communicate, that is clearly preferable." The supreme court reasoned that the PPS is meant to protect children from the trauma of testifying. Thus, admitting trial testimony and recorded statements that are consistent could be unfairly prejudicial to the defense. Here, the Court of Appeals had to decide whether the child's interview statements, and trial testimony were "consistent" under Tyler, making the recorded interview inadmissible. The Court noted the dearth of case law concerning the standard for determining whether statements were consistent in this context. It declined to equate cumulativeness with consistency as the State's argument urged. The Court instead found case law discussing consistency for impeachment purposes under Evidence Rule 801(d)(1) instructive. Under Rule 801, a prior statement may not be used for impeachment if it and the trial testimony are "reconcilable with each other." Applying a similar standard to this case, the Court of Appeals rejected the State's argument that the child's two statements were inconsistent in the way she described the offense, finding "V.V.'s interview and her trial testimony are not irreconcilable; the differences between them are minor in that they essentially describe the same act, namely that Rosenbaum dug into her vagina with his hand using his fingers." The Court thus held that the recorded interview and trial testimony were consistent, Tyler applies, and that the trial court abused its discretion when it admitted both. The Court found the error did not warrant reversal, though, because it did not affect Defendant's substantial rights since the child established under oath that she understood the difference between truth and a lie, and there was no relentless repetition of her allegations before the jury.

The second issue raised in this appeal concerned the denial of Defendant's request to depose the child victim after the enactment of the child deposition statute in I.C. 35-40-5-11.5. Defendant's argument relied on a series of Court Appeals decisions holding that the statute is a nullity because it is a procedural law that conflicts with the Indiana Rules of Trial Procedure and, as a result, a trial court abuses its discretion in denying a request to depose a child victim based on that statute. After the appeal was fully briefed, the supreme court decided Church v. State, 189 N.E.3d 580 (Ind. 2022), in which it upheld the validity of the child deposition statute. Because our supreme court rejected the arguments Defendant raised here, the Court of Appeals found no abuse of discretion in relying on the child deposition statute to prohibit Defendant from deposing the child victim.

TITLE: Taylor v. State

INDEX NO.: O.9.c.17.

CITE: (4th Dist., 9-21-00), Ind. App., 735 N.E.2d 308

SUBJECT: Protected person statute - unavailability finding based on well-being of witness requires professional testimony

HOLDING: In child molesting prosecution, Tr. Ct. erred in admitting videotaped statement of six-year-old complaining witness (CW) because finding of CW's unavailability to testify at trial was improper. Tr. Ct. found that CW was unavailable as witness based upon Ct.'s personal observation of CW, leading Ct. to conclude that testifying at trial would cause CW to suffer such emotional distress that her ability to communicate would be impaired. However, Ind. Code 35-37-4- 6(d)(2)(B)(1) requires such conclusion to be made upon "testimony of psychiatrist, physician, or psychologist, & other evidence, if any." Although arguably Tr. Ct.'s personal observation of CW satisfies latter option for consideration of "other evidence" to support conclusion specified, it does not relieve Ct. of its statutory mandate to hear testimony from psychiatrist, physician, or psychologist to that effect in order to reach conclusion. Erroneous admission of CW's hearsay statement over objection was not harmless error, thus Ct. reversed D's conviction. Held, affirmed in part, reversed in part & remanded for new trial on one of D's convictions.

RELATED CASES: Vega, 119 N.E.3d 193 (Ind. Ct. App. 2019) (no error in admitting a video-recorded child forensic interview when a licensed mental health professional reviewed and approved work of her unlicensed subordinate regarding C.W.'s emotional distress about testifying at trial).

TITLE: Tyler v. State
INDEX NO: O.9.c.17.
CITE: (03-31-09), 903 N.E.2d 463 (Ind. 2009)
SUBJECT: Child hearsay - protected persons statute only applies when child does not testify
HOLDING: Exercising its supervisory power, the Supreme Court held that a party may not introduce testimony via the protected person statute if the declarant testifies in open court as to the same matters. The protected persons statute, Ind. Code 35-37-4-6, permits the introduction of prior out-of-court statement of a protected person even when that person testifies at trial if certain requirements are met. However, under Evidence Rule 801(d)(1)(A) or (B), prior statements are only admissible if they are inconsistent with testimony or rebut a claim of fabrication. By allowing admission of statements which are not admissible under Evidence Rule 801, the protected persons statute permits admitting both a child's live testimony and consistent videotaped statements, creating cumulative evidence which can be unfairly prejudicial. Also, if a child or other protected person is sufficiently mature and reliable to testify without serious emotional distress, resort to the protected persons statute is unnecessary. Thus, if statements are consistent and both are otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statement through the protected person statute, but not both except as authorized under the Rules of Evidence. If the person is able to testify live without serious emotional distress such that the protected person cannot reasonably communicate, that is clearly preferable. Because this rule was implemented by use of supervisory power, the rule does not apply to proceedings conducted prior to publication. Here, Tr. Ct. did not err in admitting hearsay statements of the young victims under Indiana Rule of Evidence 403 and the law existing at that time.

RELATED CASES: Reynolds, 142 N.E.3d 928 (In. Ct. App. 2020) (harmless error to admit both video interview and child's live testimony); Kindred, 973 N.E.2d 1245 (Ind. Ct. App 2012) (drumbeat repetition of child's accusations made to investigators, grandfather and mother constituted fundamental error when considered with effect of improper vouching testimony); Velasquez, 944 N.E. 2d 34 (Ind. Ct. App 2011) (where child makes statement accusing D of molest to social worker for purposes of treatment or diagnosis, statement is admissible even if child testifies); Cox, 937 N.E. 2d 874 (Ind. Ct. App. 2010) (where complaining witness actually took witness stand and was cross-examined, State could not substitute direct examination with his previous videotaped statement; there was no evidence that the complaining witness met the protected persons statute's standard for unavailability based on the potential for serious emotional distress that testifying might cause; this procedure constituted reversible error).

TITLE: Weis v. State
INDEX NO.: O.9.c.17.
CITE: (1st Dist., 04-20-05), Ind. App., 825 N.E.2d 896
SUBJECT: Statements admissible under Protected Persons Statute
HOLDING: In child molesting prosecution, Tr. Ct. did not err in admitting previously recorded statements of complaining witness (CW) under Protected Person Statute, Ind. Code 35-37-4-6. Because D failed to object to admission of statements, Ct. used fundamental error analysis. Ct. determined that the prosecution notified D of intent to use some of the statements within ten (10) days of trial pursuant to Ind. Code 35-37-4-6(g); & that D failed to show prejudice as to another statement not provided within ten (10) days of trial. Ct. found no error in introducing the prior recorded statements without a hearing required by Ind. Code 35-37-4-6(e), because evidence was cumulative of CW's trial testimony. Held, judgment affirmed.

TITLE: Williams v. State
INDEX NO.: O.9.c.17.
CITE: (03-12-21), Ind. Ct. App., 170 N.E.3d 237
SUBJECT: Out-of-court forensic interview admissible under Protected Person statute
HOLDING: In child molesting prosecution, trial court did not abuse its discretion by admitting a recorded out-of-court forensic interview of complaining witness (C.W.), who testified at trial but refused to talk about what Defendant had done to her because she had already told forensic interviewer and sexual assault nurse. Thus, C.W. did not testify live to the facts underlying the charges against Defendant, which eliminates the concern expressed in Tyler v. State, 903 N.E.2d 463 (Ind. 2009) about repetition of testimony from a live witness and a videotaped statement. In addition, the State attempted to take the "clearly preferable" path of having C.W. testify live, but she refused to talk about the molestations while on the stand. The trial court had already determined that C.W.'s out-of-court statements were reliable and admissible under the requirements of Indiana's Protected Person Statute (Ind. Code § 35-37-4-6).

O. EVIDENCE

O.9. Hearsay

O.9.c.18. Res gestae

TITLE: Matthews v. State
INDEX NO.: O.9.c.18.
CITE: (12/7/87), Ind., 515 N.E.2d 1105
SUBJECT: Hearsay exception - res gestae
HOLDING: Res gestae exception to hearsay rule does not apply absent evidence that child's out-of-Ct. statements were direct spontaneous reaction to criminal offense or were made while child was under stress of excitement caused by incident. Res gestae exception refers to spontaneous or excited utterances. [Citations omitted.] Here, child's statements concerned molestation alleged to have occurred during 2-day stay with D. Incident could have occurred over 30 hours before statements. Record fails to show statements were direct spontaneous reaction to alleged molestation or were made while child was under stress of excitement from incident. Held, statements improperly admitted.

TITLE: McMillian v. State
INDEX NO.: O.9.c.18.
CITE: (7/7/83), Ind., 450 N.E.2d 996
SUBJECT: Hearsay exceptions - admission by conduct; res gestae
HOLDING: Tr. Ct. did not err in admitting into evidence business card from burglarized store dropped by co-D (who attempted to kick it under police car to hide it) & retrieved by officer during D's arrest. Here, D & co-D were stopped by police for questioning concerning robbery of Playback store. When officer asked for identification, co-D dropped playback business card as he offered identification. Ct. finds act of companion in trying to conceal card occurred close in time & space to commission of crime & was part of story of D's arrest. Evidence of happenings near in time & place which complete story of crime are properly admissible under theory of res gestae. Brown 417 N.E.2d 333; Maldonado 355 N.E.2d 843; Tapp, App., 406 N.E.2d 296. Held, no error.

TITLE: Terry v. State
INDEX NO.: O.9.c.18.
CITE: (1/4/84), Ind., 457 N.E.2d 546
SUBJECT: Hearsay exceptions - res gestae; D's custodial statements
HOLDING: D's custodial statement made shortly after arrest & showup identification was admissible under res gestae doctrine. Here, co-D & police officer testified D told police D did not commit the offense because "he had just gotten out of Boys' School." D claimed reference to Boys' School was unduly prejudicial. Ct. finds statement was voluntarily made without solicitation & part of crime's res gestae because near in time/place to crime/helped complete story of crime. Pitman 436 N.E.2d 74; Brown 417 N.E.2d 333. Ct. said D apparently thought at the time what he was saying to police had meaning & was significant with respect to crime, therefore, jury was entitled to be informed of D's statement. Held, no error.

RELATED CASES: Cox 493 N.E.2d 151 (D's comments about his own character (lied thousands of times/was greedy) made to officer were admissible as part of res of confession).

TITLE: Torres v. State
INDEX NO.: O.9.c.18.
CITE: (12/14/82), Ind., 442 N.E.2d 1021
SUBJECT: Hearsay exceptions - res gestae
HOLDING: Words simultaneously uttered at time of occurrence, transaction or accident at issue may be admissible within res gestae exception to hearsay rule. Hernandez 439 N.E.2d 625. Here, police received anonymous packet of pictures showing D & his girlfriend engaging in sexual acts with 3-year-old female child. File card enclosed with pictures named D, girlfriend, victim & victim's mother. Prosecutor at D's trial on child molesting charge introduced file card which was admitted as part of the res gestae over defense objection. Held, written statement on file card was made 2 years after offenses charged & constituted no part of it, thus it was inadmissible under res gestae exception. However, error was harmless because ample identification evidence existed. Held, convictions affirmed.

RELATED CASES: Jones 472 N.E.2d 1255 (Crim L 365(1); testimony re injury caused to customer by D during bank robbery admissible under theory of res gestae); Edwards 466 N.E.2d 452 (prejudicial utterances made during commission of offense admissible as part of res gestae); Arnold 460 N.E.2d 494 (Crim L 368(1); robbery victim could testify re statements of D's accomplice made during robbery because they were part of res gestae).

O. EVIDENCE
O.9. Hearsay
O.9.c.19. Other

TITLE: Clark v. State
INDEX NO.: O.9.c.19.
CITE: (12/7/2012), 978 N.E. 2d 1191 (Ind. Ct. App. 2012)
SUBJECT: Child Victim's Medical Records Cannot be Used to Prove D's Age
HOLDING: Where D was charged with Battery as Class D felony, based on age of both D and alleged victim, age of D cannot be proved solely by statement of social worker in alleged victim's medical record. At trial, D objected to admission of these medical records on ground that they were testimonial hearsay and social worker would not be testifying. State argues that they are admissible under Ind. Ev. R. 803(4) -- statements for purpose of medical diagnosis or treatment. However, because evidence of D's age was not reasonably pertinent to diagnosis or treatment of child's injuries, social worker's statements about his age were not admissible under Rule 803(4). Since there was no other evidence regarding D's age, an element of the charged offense, the Ct. App. reverses due to insufficient evidence.

RELATED CASES: Clark, 985 N.E.2d 1095 (Ind. Ct. App 2013) (on rehearing, court clarified that the social worker will not always be the declarant and age may, in some cases, be pertinent to a medial diagnosis or treatment).

TITLE: Craig v. State
INDEX NO: O.9.c.19.
CITE: (3-11-94), Ind., 630 N.E.2d 207
SUBJECT: Statement not admissible to show reason for investigation
HOLDING: Tr. Ct. erred in allowing officer to testify as to statements made by complaining witness (CW) and his mother, but error was harmless due to other evidence; granting transfer of decision at 613 N.E.2d 501. In child molesting and incest trial, CW testified that D placed his penis in CW's mouth and tried to use restroom. CW also said he told mother and officer of incident but did not relate what he said. Officer was allowed to testify that CW's mother told him CW had told her D put his penis in CW's mouth. He was also allowed to testify that CW told him D had pushed his head onto CW's wee-wee.

Although Ct. App. found statement admissible to rebut charge of recent fabrication, S.Ct. found this was not basis of Tr. Ct.'s ruling. Statement given by mother was neither consistent nor inconsistent with her trial testimony, and so would not have been admissible on this ground. Ct. also found statements were not admissible to show that it was made and to explain conduct of police in interviewing CW. Ct. noted confusion in this area and set forth test to use.

Tr. Ct. should first determine whether testimony described out-of-court statement asserting fact susceptible of being true or false. If not, testimony does not contain hearsay and should be admitted. If it does contain assertion of fact, Tr. Ct. must next consider evidentiary purpose of proffered statement. If purpose is to prove fact asserted, and statement does not qualify under IRE 801(d), objection should be sustained unless statement fits in exception to hearsay rule. If proponent of statement urges purpose other than proof of fact asserted, Tr. Ct. must consider whether fact to be proved under suggested purpose is relevant and whether danger of prejudice outweighs its probative value. If fact is not relevant, or danger of unfair prejudice substantially outweighs probative value, hearsay objection should be sustained.

Here, alleged hearsay contained assertion of facts, and State alleged it was being offered to prove report was made and explain police investigation. Ct. found that specific content of report of mother was not contested issue, nor was propriety of police investigation questioned. Therefore, neither statement had any conceivable relevance apart from proving facts asserted in statements, and so were inadmissible hearsay and erroneously admitted. Due to testimony from CW himself, however, error as harmless and reversal was not required. Given, J., dissenting as to hearsay.

RELATED CASES: Corbally, 5 N.E.2d 463 (Ind. Ct. App 2014) (investigator's testimony relating C.W.'s hearsay statements was not admissible as "course of investigation" evidence; State introduced this improper bolstering evidence to counteract D's contention that police acted too hastily in apprehending him; see full review at O.9.b); Kindred, 973 N.E.2d 1245 (Ind. Ct. App 2012) (fact that the child made molest allegations to the investigators was not relevant to the course of investigation; the genesis, development or quality of the investigation was not at issue); Hernandez, App., 785 N.E.2d 294 (police officer's testimony re: genesis of investigation of D was highly prejudicial and not relevant to contested issue in case; see full review at O.9.a); Ortiz, 741 N.E.2d 1203 (State did not explain how steps of police investigation were relevant to contested issue at trial); Maxey, 730 N.E.2d 158 (Craig's rationale is applicable in analyzing admissibility of any otherwise inadmissible evidence that State argues is admissible because it merely describes course of police investigation); McKeller, App., 620 N.E.2d 744 (Hearsay rule did not prevent officer from testifying as to third party's statement that coat and gun belonged to D. Record indicated that testimony was used to explain why officers took coat from door

handle and patted it down when arresting D, and therefore it was admissible to show reason for their action); O'Grady, 481 N.E.2d 115 (police officer's testimony of his conversation with informant was sufficiently prejudicial so that all proceedings were tainted; State had introduced evidence that D was dealing, which was unnecessary fact to establish that police were pursuing investigation into alleged drug activities; dealing offense was otherwise unsupported by sufficient evidence; Ct. noted danger from State using hearsay evidence under guise of police investigation).

TITLE: Headlee v. State
INDEX NO.: O.9.c.19.
CITE: (2nd Dist., 4-8-97), Ind. App., 678 N.E.2d 823
SUBJECT: Hearsay testimony of prior bad acts - reversible error
HOLDING: In possession of cocaine prosecution, Tr. Ct. committed reversible error in admitting hearsay testimony that confidential informant had given D cocaine in exchange for legal services in past. Over D's hearsay & Evidence Rule 404(b) objection, Tr. Ct. permitted police sergeant to testify that he attended interview with detective & informant to determine whether he would authorize criminal investigation of D. Tr. Ct. instructed jury that purpose of testimony was to explain how & why certain actions were taken in investigation. Sergeant then told jury that informant said that he had paid D for legal services with cocaine in past, & based on this information, he authorized investigation of D. Later in trial, over D's hearsay objection, detective corroborated sergeant's testimony. Jury was given no limiting instruction with regard to this testimony. When admissibility of evidence of out-of-Ct. statements received by police officers engaged in investigative work is challenged as hearsay, & State urges purpose other than to prove fact asserted therein, Ct. must consider: 1) whether fact to be proved under State's suggested purpose for statement is relevant to some issue in case; & 2) whether danger of prejudice outweighs probative value. Craig, 630 N.E.2d 207. In this case, other evidence adequately explained to jury how & why police initiated its criminal investigation of D. Additional information on this point was not necessary & was therefore not relevant. Following Craig, Ct. held that informant's statements lacked relevance to any contested issue other than matters asserted therein, & they were either irrelevant or improperly admitted as hearsay. Bonner, 650 N.E.2d 1139. Error in admission of this evidence prejudiced D's substantial rights, & likely contributed to D's conviction. Held, conviction reversed & remanded for retrial.

TITLE: Holliday v. State
INDEX NO: O.9.c.19.
CITE: (3rd Dist., 10-26-92), Ind. App., 601 N.E.2d 385
SUBJECT: Statements admissible to rebut D's insanity claim
HOLDING: Officer's rebuttal testimony that informant & one of D's relatives advised him of D's participation in prior unrelated robbery, was properly admitted over D's hearsay objection, because evidence was not offered to prove D committed prior robbery, but to rebut medical testimony as to insanity, & to explain why officer was in position to apprehend D. After arrest, D gave statement admitting that he entered victim's apartment & stole his checkbook. He filed notice of insanity & was found GBMI. Statements involved purse snatching in March, & instant offense occurred in April. Unless statement of out of Ct. declarant is offered for truth of matter asserted, it is not hearsay. Although there must be reasonable assurance that testimony was not offered or received as evidence of its truth, Ct. found such assurance present here. When D asserts insanity defense, otherwise inadmissible evidence may be offered to bear on credibility of conclusions of doctors & relevant observations of D's behavior. Ct. found that unlike Williams 544 N.E.2d 161, evidence did not address identity of perpetrator of instant crime, nor corroborate fact that D was perpetrator of earlier offense. Ct. found statements similar to those in Johnston 530 N.E.2d 1179, & that earlier encounter served as additional basis of ability of officer to observe D's demeanor & were offered to rebut defense of insanity. Ct. also found limiting instruction on use of statements was adequate to insure they were not considered for the truth of the matters asserted therein.

RELATED CASES: Steen, 987 N.E.2d 159 (Ind. Ct. App 2013) (testimony that tags on stolen clothes bore store's name was not double hearsay because store's name on label is not capable of being true on untrue; testimony about tags was not offered for truth of matter asserted).

TITLE: Reemer v. State
INDEX NO.: O.9.c.19.
CITE: (10-25-05), Ind., 835 N.E.2d 1005
SUBJECT: Label on drug boxes - hearsay; market reports exception
HOLDING: In case of first impression, Ct. held that labels of commercially marketed drugs are admissible under the "market reports, commercial publications" exception to hearsay rule, Indiana Evidence Rule 803(17), to prove composition of drug. D was charged with conspiracy to commit dealing in methamphetamine and possession of a precursor. Over D's objection, Tr. Ct. admitted into evidence discarded labels from boxes of nasal decongestants found in trash can to prove weight and content of tablets found in D's possession. Labels stated that tablets contained "pseudoephedrine hydrochloride," which is an isomer of ephedrine and thus within statutory list of chemical reagents or precursors in Ind. Code 35-48-4-14.5. Rule 803(17) permits admission into evidence of "market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by public or by persons in particular occupations." In this case, labeling of tablets found in D's possession was subject to federal and state regulations, which require that drug labels be accurate, trustworthy and specifically prohibit introduction into commerce of any drug that is mislabeled. Thus, Tr. Ct. properly admitted nasal decongestant labels into evidence as proof of the contents. Expert witnesses or laboratory results are not required to prove the composition of over the counter or prescription drug when it is found in an unaltered state and its weight and contents are described in required labeling. Held, transfer granted, Ct. App.' opinion at 817 N.E.2d 626 vacated, conviction affirmed.

RELATED CASES: Jedij, 186 N.E.3d 696 (Ind. Ct. App. 2022) (writings and symbols on packaging of unregulated and illegal products such as edibles are hearsay and inadmissible under market reports exception); Washington, 178 N.E.3d 1275 (Ind. Ct. App. 2021) (the market reports exception to hearsay under Evidence Rule 803(17) does not apply to allow the admission of evidence from Drugs.com that was used to identify pills for possession charges; see full review at K.8.b); Phillips, 25 N.E.3d 1284 (Ind. Ct. App 2015) (no abuse of discretion in admitting warning labels on infant crib because statements on labels were directives and did not make assertions of fact); Montgomery, 22 N.E.3d 768 (Ind. Ct. App 2014) (Tr. Ct. properly admitted a label from drain cleaner bottle that indicated the drain cleaner contained sulfuric acid, a precursor of methamphetamine); Robertson, App., 877 N.E.2d 507 (assuming without deciding challenged exhibits did not meet Reemer's foundation requirement error in admission of those exhibits was harmless); Forler, App., 846 N.E.2d 266 (no error in admitting labels on a starting fluid can and Liquid Fire bottle; there must be some evidence that at time police seized a container, the contents of the package or container where the label is placed are the original contents).

TITLE: Stahl v. State
INDEX NO.: O.9.c.19.
CITE: (9-24-97), Ind., 686 N.E.2d 89
SUBJECT: Hearsay - statements affecting interest in property
HOLDING: Statements in documents affecting interest in property are excepted from hearsay rule when matter stated was relevant to purposes of document, unless dealings with property since document was made have been inconsistent with truth of statement or purport of document. Ind. R. Evid. 803(15). Document which affects interest in property typically must be ancient, dispositive & reliable due to circumstances in which it was created. Account owner went to bank to watch video tape of withdrawal & signed affidavit claiming that he did not withdraw funds, authorize their withdrawal or benefit from their withdrawal. Because account owner did not testify, State introduced affidavit into evidence to establish that D was unauthorized to make withdrawal.

Affidavit did not fall within documents affecting interest in property exception to hearsay rule. Affidavit was not ancient; rather, it was recently created. Unlike deeds & bills of sales which are inherently reliable, affidavit was not dispositive. Lastly, affidavit was created in conjunction with very transaction giving rise to lawsuit in which it was offered, & under circumstances, there were variety of reasons to supply incorrect affidavit. Thus, affidavit bears none of indicia of reliability that Rule 803(15) assumes. Because there are many theories as to whether D was authorized to make ATM transactions, cross-examination is crucial & necessary on this issue. Therefore, error of admitting affidavit as only evidence of lack of authorization was not harmless error. Held, transfer granted & remanded for new trial.

TITLE: State v. Samuel
INDEX NO.: O.9.c.19.
CITE: 643 N.W.2d 423 (Wis. 2002)
SUBJECT: Involuntary Witness Statements - Suppression
HOLDING: Wisconsin S.Ct. holds that when D seeks to suppress statement of witness on ground that it was obtained under pressure from authorities, conduct must be so egregious that it makes statement involuntary as matter of law. Court listed 6 factors to aid in determining egregiousness of police misconduct: (1)whether witness was coached; (2) whether questioning was blatantly tailored to extract particular answer; (3) whether authorities made threat that would have been unlawful if carried out; (4) whether witness was given express and unlawful quid pro quo; (5) whether state had separate legitimate purpose for its conduct, and (6) whether the witness was represented by counsel at time of statement. First 4 factors weigh in favor of suppression, while last two weigh against it.

TITLE: White v. State
INDEX NO.: O.9.c.19.
CITE: (11/21/2012), 978 N.E. 2d 475 (Ind. Ct. App 2013)
SUBJECT: Murder victim's statements admissible under "forfeiture by wrongdoing" exception
HOLDING: In issue of first impression regarding Evidence Rule 804(b)(5), trial court properly admitted hearsay statements of Defendant's wife ("Wife"), whom Defendant murdered, about his abusive behavior because the State proved by preponderance of evidence that Defendant murdered Wife, in part, to prevent her from testifying at a provisional custody hearing regarding their child. See id. Excluding the statements would have rewarded Defendant for making Wife unavailable to testify. Thus, the trial court properly ruled that the statements were admissible under the "forfeiture by wrongdoing" exception to the general rule against admission of hearsay. See id. Further, admission of the statements did not violate Defendant's confrontation rights under the 6th Amendment.

Here, after Defendant and Wife separated, he verbally and physically abused her, often when they argued about parenting time. Wife told others about Defendant's behavior, including incidents where he 1) hit and shoved her; 2) called her a "f***ing whore"; 3) told her she was "going to get what she deserved,"; and 4) put his hand in the shape of a gun and pointing it at her as if to shoot her. The day before the provisional hearing, Wife went to Defendant's house to pick up their child. Defendant asked Wife if he could keep the child another 30 minutes. Wife denied the request. They argued and Defendant shot Wife twice in the abdomen. She and her unborn child died.

Evidence Rule 804(b)(5) establishes the "forfeiture by wrongdoing" exception. It permits admission of a "statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The State need only show that a defendant was "motivated in part by a desire to silent a witness." U.S. v. Dhinsa, 243 F.3d 635, 653-34 (2nd Cir. 2001) (quoting U.S. v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)). Under these circumstances, a defendant "waives his right to object on confrontation grounds to the admission of the declarant's out-of-court statements." Dhinsa, 243 F.3d at 653-54 (quoting Houlihan, 92 F.3d at 1280). To prevent admission of facially unreliable hearsay, a court should balance the probative value of the evidence against its prejudicial effect. U.S. v. Miller, 116 F.3d 641, 668 (2nd Cir. 1997).

The State's evidence showed by a preponderance of evidence that Defendant shot Wife, in part, to make her unavailable at the provisional custody hearing. Thus, her statements were admissible under the "forfeiture by wrongdoing" exception. See Evid. R. 804(b)(5). Further, the statements' probative value outweighed their potential prejudicial effect. Held, judgment affirmed.

O. EVIDENCE

O.10. Writings

O.10.a. Best evidence/original documents rule

TITLE: Belcher v. State
INDEX NO.: O.10.a.
CITE: (2nd Dist., 10-15-03), Ind. App., 797 N.E.2d 307
SUBJECT: Erroneous admission of duplicate document - portions covered up
HOLDING: Tr. Ct. erred in admitting duplicate of original document under Ind. Evidence Rule 1003 because several portions of the document were covered up by a picture. However, error was harmless because D testified that he signed document & described what document said in those portions covered up. D had signed "Notice of Trespass" form that excluded him from trespassing at a local mall unless working in an employment capacity. Portion covered up included terms of his restrictions & his signature verifying his understanding of these terms. Under Evid. Rule 1003, a duplicate is inadmissible if "(1) a genuine question is raised as to the authenticity of the original or (2) ... it would be unfair to admit the duplicate in lieu of the original." Ct. held that admitting document in this case was not fair because it was not fully legible, & illegible portions had impact on whether D trespassed. Nevertheless, error in admitting document was harmless in light of D's testimony. Held, judgment affirmed.

TITLE: Ceasar v. State

INDEX NO.: O.10.a.

CITE: (1-16-2020), Ind. Ct. App., 139 N.E.3d 289

SUBJECT: Best Evidence Rule 1002 - witness's testimony about what she saw on security footage video

HOLDING: In theft prosecution, any error in admitting police officer's testimony about the content of a CVS store's security video, which the State did not admit into evidence at trial, was harmless. Where, as here, the proponent of the evidence offers it to prove the contents of a video recording, Indiana Evidence Rule 1002, also known as the best evidence rule, generally requires admission of the original video. See, e.g., Wise v. State, 26 N.E.3d 137, 143 (Ind. Ct. App 2015). Here, soon after Defendant was suspected of stealing several items from a CVS store, a police officer located and detained him. The officer returned to the CVS to speak with an employee who witnessed the incident and to review security footage. The employee later positively identified Defendant, and officers found the bag he had filled was full of items labeled "CVS." During trial, over Defendant's objection the officer described what she saw on the CVS security video, which the State did not attempt to admit into evidence. The officer described a man that "matched the description" of "the male that was being … detained at the time." She also noted that she saw the man leave the store "past all points of payment and that he had a bag." Court of Appeals declined to decide whether the admission of the officer's testimony about the content of the security footage violated the best evidence rule because the probable impact of this evidence was sufficiently minor so as to not affect Defendant's substantial rights. Accordingly, any error in the trial court's admission of that testimony was harmless.

TITLE: Gerrick v. State
INDEX NO.: O.10.a.
CITE: (7/27/83), Ind., 451 N.E.2d 327
SUBJECT: Writings - testimony regarding written report
HOLDING: Tr. Ct. did not err in permitting police technician/firearms expert to testify concerning results of his analysis of gun/bullets after lab report had been admitted; best evidence rule is not violated so long as witness is being asked to testify regarding personal observations & not to attest to content of writing he/she has prepared. Here, D contends state was attempting to prove terms of writing (lab report), thus only written report was admissible to prove its content & oral testimony was inadmissible under best evidence rule. Ct. finds D misconstrues rule, which requires use of writing where party seeks to prove terms of writing itself. Eldridge 361 N.E.2d 155; Hilligoss 255 N.E.2d 101. Testimony of witness as to facts personally observed is not inadmissible simply because these observations have been embodied in a written report. Jackson 411 N.E.2d 609; Hilligoss. Held, no error.

TITLE: Lawson v. State
INDEX NO.: O.10.a.
CITE: (5th Dist., 2-11-04), Ind. App., 803 N.E.2d 237
SUBJECT: Best evidence rule
HOLDING: In minor consumption prosecution, Ct. rejected D's argument that the State should have produced bottles with labels of "Budweiser" products based on the "best evidence rule." Utilizing a test noted in McCormick on Evidence, the Ct. found that the need for accuracy as to labels was "far less than that which is necessary to determine the amount of an inheritance, for example" & beer labels are generally easy to recall. The Ct. did question why the beer bottles were not produced considering the second McCormick factor -- the ease or difficulty of production -- but on balance did not believe evidence as to the brands of beer needed to be excluded based on the best evidence rule. Held, judgment affirmed in part & reversed in part on other grounds.

TITLE: Lopez v. State
INDEX NO.: O.10.a.
CITE: (9/6/88), Ind., 527 N.E.2d 1119
SUBJECT: Best evidence rule - audiotapes
HOLDING: Best evidence rule requires that if contents of document are sought to be proved, then original must be accounted for or produced as exhibit unless it is shown to be unavailable for some reason other than serious fault of proponent. Here, D claimed witness' testimony concerning recorded phone conversations violated best evidence rule. When witness has personal knowledge of facts contained in best evidence, best evidence rule will not bar witness' testimony since witness is not being asked to reveal contents of best evidence, but rather is being asked to recall his own independent observations. Jackson, 411 N.E.2d 609. Witness was asked to relate contents of his phone conversations w/ another individual wherein cocaine deal was arranged. He was not asked to give contents of recordings. Therefore, best evidence rule was inapplicable. Held, no error.

RELATED CASES: Bickford, 25 N.E.3d 1275 (Ind. Ct. App 2015) (recorded playback of videos from cell phone did not violate best evidence rule; see Rule 1004(a) and full review at E.6.h); Minnick, 544 N.E.2d 471 (testimony of jail dispatcher, who over monitor heard D make statement to another inmate, was best evidence of what she heard & saw, even if conversation were recorded on video by jail's monitoring system).

TITLE: Owensby v. State
INDEX NO.: O.10.a.
CITE: (9/4/84), Ind., 467 N.E.2d 702
SUBJECT: Best evidence rule - photocopies
HOLDING: Tr. Ct. did not err in admitting photocopies of D's waiver of rights forms. Here, D contends that because originals were available, photocopies were not best evidence & thus not admissible. Photocopies are equally as admissible as original of document. Wilson, App., 348 N.E.2d 90. Held, no error.

RELATED CASES: Levi, App., 627 N.E.2d 1345 (Photocopy of consent to search form was admissible, even though D speculated that original may have had additional markings that didn't copy. Speculation isn't enough to make photocopy inadmissible & officer testified there were no such markings).

TITLE: Stuckey v. State
INDEX NO.: O.10.a.
CITE: (9/27/90), Ind. App., 560 N.E.2d 88
SUBJECT: Admissibility of duplicates
HOLDING: D claimed photocopies of certain invoices were improperly admitted into evidence because they were copies of copies & not original documents, & that no showing of why original document could not be produced was made. Photographic copies of business records are admissible. Ind. Code 34-3-15-1 & 2; Wilson, App., 536 N.E.2d 1037. Photocopy is equally as admissible as original of document. Owensby, 467 N.E.2d 702. D failed to claim that prejudice arose from admission of photocopies as opposed to original documents, & Ct. found none. Held, photocopies were properly admitted.

RELATED CASES: Kelly, 561 N.E.2d 771 (even if copy or duplicate of official record were admissible when no genuine question was raised as to authenticity of original, D's objections & argument were sufficient to preclude admission of copies of official records offered to establish prior felony conviction that were accompanied by photocopied certifications of authenticity).

TITLE: Shively v. Shively
INDEX NO.: O.10.a.
CITE: (6/9/97), Ind. App., 680 N.E.2d 877
SUBJECT: Summaries of records or reports
HOLDING: In dissolution proceeding, Tr. Ct. did not err in admitting summary of pay records prepared by wife's attorney's law clerk. Specifically, appellant-husband argued that law clerk was not qualified to prepare summary of his pay records because he did not possess expertise in accounting or interpreting retirement plans & did not have personal knowledge about methods used by Navy in preparing pay records. Under IRE 1006, contents of voluminous writings or other recordings which cannot be conveniently examined in court may be presented in form of chart, summary or calculation as long as underlying documents are made available to other party. Further, summary may be admitted where records or reports used to prepare summary are admitted into evidence, are in court, or are available to opposite party. Brane v. Roth, 590 N.E.2d 587. Here, exhibit tendered by wife was two-page summary comprised of data from 28 pages of pay records & tax documents previously admitted into evidence & made available for husband's inspection. Held, no error.

TITLE: Thomas v. Ind. Dept. of State Revenue
INDEX NO.: O.10.a.
CITE: (1997), Ind.Tax, 675 N.E.2d 362
SUBJECT: Best evidence rule - harmless error
HOLDING: Court may permit use of secondary evidence to prove contents of writing when original is lost or has been destroyed unless proponent lost or destroyed document in bad faith. Rule 1004(1). Tax Ct. stated that while it does not condone careless handling of tax records by Dept. Of Revenue, paramount concern in this context is accuracy of submission. Where, as here, there is no dispute as to accuracy of secondary evidence & no indication that document was lost purposely, evidence should be admitted. Lopez, 527 N.E.2d 1119 (effective objection must identify actual dispute over accuracy of secondary evidence); Glasscock, 576 N.E.2d 600 (purpose of best evidence is to secure reliable information as to contents of document when those terms are disputed; admission of secondary evidence is harmless when no dispute exists regarding its accuracy). Held, no error.

TITLE: Wise v. State
INDEX NO.: O.10.a
CITE: (2/13/2015), 26 N.E.3d 137 (Ind. Ct. App 2015)
SUBJECT: Re-recordings of cell phone videos admissible - silent witness & best evidence rule
HOLDING: In rape prosecution, Tr. Ct. did not abuse its discretion in admitting into evidence handheld camera recordings complaining witness (C.W.) took of videos from D's cellular phone. Videos depicted D having sexual intercourse or oral sex with C.W. after he drugged her. By the time of trial, D apparently no longer possessed the phone and thus videos could not be retrieved from the device. On appeal, D argued that the videos did not satisfy the requirements of the "silent witness" theory, that the recordings could not be properly authenticated, and that admission of the recordings would violate his Sixth Amendment right to confrontation. Court found that testimony from C.W., D and a friend to whom D admitted he had drugged his wife established a sufficient foundation upon which Tr. Ct. could admit the recordings under the "silent witness" theory. C.W.'s renaming of the videos on D's phone did not mean that they had somehow been altered, thus admission of C.W.'s recording as a duplicate did not violate best evidence rule (Evid.R. 1003). D's confrontation rights were not violated because defense counsel cross-examined C.W. regarding the recordings and her identification of him in the video.

Court also found no abuse of discretion in denying D's motion to compel C.W. to answer questions during deposition regarding her potential extramarital affairs, as D was able to cross-examine her at trial. Held, judgment affirmed.

O. EVIDENCE

O.10. Writings

O.10.b. Special rules (e.g., completeness doctrine)

TITLE: Desjardines v. State
INDEX NO.: O.10.b.
CITE: (12-6-01), Ind., 759 N.E.2d 1036
SUBJECT: Videotape evidence - doctrine of completeness
HOLDING: All modes of conveying information, including videotapes, constitute writings or recordings & fall within scope of Indiana Rule of Evidence 106 & doctrine of completeness. Rule 106 provides that if party introduces a part of writing or recorded statement & fairness requires that additional portions of it be introduced, then adverse party may require that additional parts be admitted. Evans v. State, 643 N.E.2d 877 (Ind. 1994). Completeness doctrine is independent of medium & applies to any mode of conveying information. Here, in child molesting prosecution, D argued that once State showed several minutes of videotape showing D committing offenses, he then should have been allowed to show remaining four hours of videotape to jury. Although Rule 106 was applicable to videotapes, D failed to demonstrate relevance of excluded portions. Thus, Tr. Ct. did not commit reversible error in denying D's request to play videotapes in their entirety. Held, transfer granted, opinion of Ct. App. at 751 N.E.2d 323 on all other issues summarily affirmed.

RELATED CASES: Lewis, App., 754 N.E.2d 603 (Tr. Ct. did not err in admitting testimony regarding only part of videotape because admitted portion clearly conveyed D's denial of crime & not admitting entire videotape did not distort D's version or otherwise exclude substantial exculpatory information).

TITLE: Evans v. State
INDEX NO.: O.10.b.
CITE: (11-23-94), Ind., 643 N.E.2d 877
SUBJECT: Prior statements - doctrine of completeness
HOLDING: Witness's statement to police & his deposition were admissible under doctrine of completeness, which allows placement of remainder of statement or document before jury after opposing party has introduced portion of that statement or document into evidence. After defense counsel attacked credibility of witness on cross-examination, State attempted to introduce transcript of deposition & statements to clarify inconsistencies. Tr. Ct. properly admitted evidence & ordered certain segments of documents redacted. Held, Tr. Ct. affirmed.

RELATED CASES: Burton, 23 N.E.3d 49 (Ind. Ct. App 2014) (under Evid. R. 106 and doctrine of completeness, admission of molestation victim's entire deposition was proper where defense counsel's use of selected parts of deposition to impeach child's trial testimony potentially created misleading impression that child's testimony was inconsistent with deposition testimony); Birdsong, 685 N.E.2d 42 (because D used grand jury testimony several times in attempt to impeach witness's testimony, State was entitled to rehabilitate witness on redirect examination by introducing other pertinent portions of statement).

TITLE: Hart v. State
INDEX NO.: O.10.b.
CITE: (5/15/2015), 30 N.E.3d 1283 (Ind. Ct. App 2015)
SUBJECT: Doctrine of completeness not violated by exclusion of character evidence
HOLDING: In murder and criminal confinement prosecution, Tr. Ct. did not err in allowing State to redact details of a peace treaty D brokered between rival rap groups from his statements to police. D wanted to testify about the peace treaty to show his peaceful character, and argued that excluding the details of the treaty he organized violated the "completeness doctrine" under Ind. Evidence Rule 106. However, admitted portion of police statements already contained D's assertions that he was a peaceful, harmless person. In addition, peace treaty took place almost five months before shooting and neither of two victims were members of rival groups involved in the treaty. Thus, details of the treaty were irrelevant and unnecessarily add details that are likely to confuse the issues. Held, judgment affirmed.

TITLE: Ryans v. State
INDEX NO.: O.10.b.
CITE: (3d Dist. 1/28/88), Ind. App., 518 N.E.2d 494
SUBJECT: Hearsay exceptions - completeness doctrine
HOLDING: Tr. Ct. erred in excluding balance of D's statement, which had been partiallyintroduced by state on direct examination. Police officer had testified that D admitted cashing checks at 5 bank branches on one day, withdrawing the balance shortly thereafter. On CX, officer was asked whether D told him she knew checks were written on closed account. State's objection on grounds of self-serving hearsay was sustained. D argues once state presented part of conversation, she was entitled to have jury consider all of it. Ind. S. Ct. was evenly divided in recent decision on this question. Duff 508 N.E.2d 17. Statements against interest are admissible, while D's out-of-Ct. exculpatory statements generally are not. [Citations omitted.] Different considerations come to bear when one party introduces part of conversation or document. With limitations, other party is allowed to introduce omitted portion, either on CX or during own case. Purpose is to aid factfinder by adding context to information already received. McCormick on Evidence (3d ed. 1984), 145-46; 7 Wigmore, Evidence 2084, 2113. Two limitations apply: (1) offered remainder must be relevant to other admitted portion - must color, modify, or explain; (2) highly prejudicial, incompetent evidence will not be admitted. McCormick, 146. Here, excluded portion of statement colored & added meaning to portion admitted, & Tr. Ct. erred in excluding it. Error was harmless, however, since D offered testimony on direct similar to excluded portion of statement to police. Held, conviction affirmed.

RELATED CASES: Farmer, 908 N.E.2d 1192 (Ind. Ct. App 2009) (although Tr. Ct. should have allowed D to cross-examine officer regarding D's self-serving statements where officer testified on direct to D's admissions made during the same interview, error was harmless because D testified to the interview)

TITLE: Sanders v. State
INDEX NO.: O.10.b.
CITE: (1-12-06), Ind., 840 N.E.2d 319
SUBJECT: Doctrine of completeness not violated by redacted letter
HOLDING: In child molesting prosecution, letter written by D to trial judge was properly redacted & did not violate the "doctrine of completeness." In the letter, D made statements characterized as admissions by State, including statements that "I did touch someone else's child," "our sins will be forgiven," & "something like this will never happen again, as long as I live." Tr. Ct. redacted reference in the letter to D's saying he had learned that the child had previously been molested & he wanted to accept a plea so as not to cause the child & her family any more harm. D argued & Ct. App. agreed that the letter read in its entirety could be read not as an admission of guilt, but as an expression of sorrow for the child's past experience & wish to avoid putting the child through a trial. Ct. App. held that "the remainder of the letter was misleading & unduly prejudicial" without the redacted portion.

On transfer, S.Ct. held that even if it agreed that the redaction precluded D from arguing the letter was not a confession, the incriminating statements noted above had nothing to do with fact that child had been previously molested. "Indeed, he admits that he touched [the child], says he has committed a sin, & promises to never do it again." The letter taken as a whole is clearly an admission of wrongdoing, an apology, & a plea for mercy & forgiveness. While the redacted material would have added some information, it would not have changed the context of the letter from one of confession to even arguably one of sympathy for D, & thus "doctrine of completeness" encapsulated under Ind. Evid. Rule 106 was not violated. Held, transfer granted, judgment of Tr. Ct. affirmed, Sanders v. State, 823 N.E.2d 313 (Ind. Ct. App2005) reversed as to this issue & affirmed on all other issues.

TITLE: Saperito v. State
INDEX NO.: O.10.b.
CITE: (3/25/86), Ind., 490 N.E.2d 274
SUBJECT: Relevancy - redactions permitted
HOLDING: Ct. rejects D's contention that "completeness doctrine" prohibited deletion of reference to possible sentence from letter he had written to defense witness & admitted on rebuttal. D contends once conversation, etc., is put into evidence by one party, other party may call for entire conversation, etc., to be introduced. Brown (1915), 184 Ind. 254; Smith, App., 400 N.E.2d 1137. Ct. finds general rules of admissibility still apply in such instances. Generally, comments on sentencing are not admissible to jury. Smith, 432 N.E.2d 1363. Possibility of prejudice resulting from statement far outweighed relevance to rest of letter. Held, no error.

TITLE: Stanage v. State
INDEX NO.: O.10.b.
CITE: (12/13/96), Ind. App., 674 N.E.2d 214
SUBJECT: Doctrine of completeness
HOLDING: Under doctrine of completeness, when one party seeks to admit portion of document or recorded statement into evidence, opposing party can place remainder of statement into evidence. Evans, 643 N.E.2d 877. This prevents jury from being misled by statements taken out of context. Id. However, the omitted portions are still subject to normal rules of admissibility. Id. Immaterial, irrelevant or prejudicial material must be redacted from portions of statement which are admitted. Id. This includes evidence of prior bad acts committed by D. Johnston, 517 N.E.2d 397. The doctrine has been incorporated into IRE 106. Though rule does not specifically state that omitted portions must be subject to normal rules of admissibility, committee commentary to rule states that Indiana's rule requires such admissibility under the doctrine of completeness.

Here, D sought to have omitted portions of his videotaped confession admitted into evidence. However, Tr. Ct. determined that those portions of interview were prejudicial to D because they contained statements concerning other wrongs committed by him, which are generally inadmissible under IRE 404(b). Therefore, Ct. concluded that Tr. Ct. did not err by redacting prejudicial portions of D's interview from videotape. Held, no error.

RELATED CASES: Atwell, App., 738 N.E.2d 332 (404(b) evidence was admissible under doctrine of completeness; see full review at O.4.b); Brown, 728 N.E.2d 876 (remainder of statement or document is subject to general rules of admissibility & irrelevant portions must be redacted; party may, but is not required to, introduce completeness evidence at earlier stage of trial); Liberenz, App., 717 N.E.2d 1249 (rule is designed to avoid misleading impressions caused by taking statement out of its proper context or otherwise conveying distorted picture by introduction of only selective parts).

TITLE: Sweeney v. State
INDEX NO.: O.10.b.
CITE: (12/18/98), Ind., 704 N.E.2d 86
SUBJECT: Doctrine of completeness -- D's prior self-serving statements made outside of court
HOLDING: Generally, a D who does not testify cannot introduce exculpatory statements made outside of court in order to enhance his credibility at trial. However, pursuant to doctrine of completeness, when one party introduces part of a conversation or document, the opposing party is generally entitled to have entire conversation or entire instrument placed into evidence, even if self-serving hearsay statements are involved. McElroy v. State, 553 N.E.2d 835 (Ind. 1990). Remainder of statement or document is subject to general rules of admissibility, and any portions found immaterial, irrelevant, or prejudicial must be redacted. Evans v. State, 643 N.E.2d 877 (Ind. 1994). In balancing potential harm resulting from introduction of self-serving hearsay against that resulting from exclusion of relevant portions of prior statements otherwise admitted, policy expressed in Trial Rule 43(A) is persuasive: "In any case, the statute or rule which favors the reception of evidence governs." McElroy. Here, D in murder case was not entitled to have purportedly exculpatory portions of his statement to police introduced into evidence along with inculpatory portions thereof concerning his discovery of victim's body, where purportedly exculpatory language concerning victim's alleged involvement in drug transaction and blue van which was alleged to have been following victim prior to murder was self-serving and irrelevant to discovery of victim's body. Held, judgment affirmed.

RELATED CASES: Hawkins, App., 884 N.E.2d 939 (while doctrine of completeness does allow for self-serving hearsay, that determination should be and is left to Tr. Ct.'s discretion)

O. EVIDENCE

O.10. Writings

O.10.c. Authentication/ identification

TITLE: Ashley v. State
INDEX NO.: O.10.c.
CITE: (6/6/86), Ind., 493 N.E.2d 768
SUBJECT: Writings - authentication; when discretionary
HOLDING: Tr. Ct. did not err in allowing state to introduce documents bearing D's name found in briefcase in trunk of stolen car. Here, D argues documents were inadmissible because they were not properly authenticated. Generally, proof of authentication is required before documents may be admitted. Blevins, 291 N.E.2d 84. Admissibility of documents requiring authentication is within discretion of Tr. Ct. & will be reversed only on clear showing of error. Wolfe, 426 N.E.2d 647. When execution of document is not in issue & only fact of document's existence is in question, authentication is unnecessary. 4 Wigmore on Evidence §2132, at 714. Authorship, execution & content of documents was immaterial. Documents were offered merely to show their existence in stolen vehicle. Held, no error.

RELATED CASES: Mann, App., 754 N.E.2d 544 (meeting requirements of both IRE 901(b) and TR 44(A)(1) was sufficient to authenticate foreign court documents, notwithstanding noncompliance with Ind. Code 34-39-4-3, which requires attestation by clerk); L.H., App., 682 N.E.2d 795 (through custodian's affidavit, State provided sufficient evidentiary foundation under IRE 902(9) to admit school attendance report as self-authenticating document); Lockhart, App., 671 N.E.2d 893 (Tr. Ct. properly admitted handwriting exemplar completed by complaining witness at handwriting expert's request; expert's testimony sufficiently authenticated exemplar under IRE 901(b)(3)); Coates, App., 650 N.E.2d 58 (BMV documents bearing stamped signatures & computer-generated initials were properly authenticated under TR 44 (a)(1)).

TITLE: Brown v. State
INDEX NO.: O.10.c.
CITE: (4/14/20), Ind. Ct. App., 146 N.E.3d 1031
SUBJECT: Trial court may take judicial notice of pleadings signed by defendant
HOLDING: A trial court may take judicial notice that the defendant signed pleadings, and a rebuttable presumption arises which requires the defendant to come forward with any evidence to dispute the presumption. Here, during Defendant's trial, the State offered into evidence a letter purportedly written by Defendant. Defendant objected on the basis that the witness was not familiar with Defendant's handwriting and therefore could not authenticate the letter. The trial court then took judicial notice of two additional letters as having been written by Defendant, one from 2018 and one from 2019, for the jury to use as a handwriting comparison, admitted the first letter and published all of the exhibits to the jury. Following Owens v. State, 396 N.E.2d 376 (1979), Court held that it was reasonable for the trial court to take judicial notice that the handwriting in the two exhibits was Defendant's. The contents of the letter, fact that a hearing was held to address the letter's concerns, that Defendant appeared at the hearing, and that the concerns expressed in the letter were resolved all support the trial court's decision to take judicial notice that the handwriting and signature in the letter from 2018 belonged to Defendant. The 2019 letter was mailed from the jail where Defendant was incarcerated, asked the clerk to send Defendant the CCS, and the handwriting looks like the handwriting in the 2018 letter. The Court concluded that under the circumstances it was reasonable for the trial court to take judicial notice that the documents filed with the court had been written by Defendant.

TITLE: Calvert v. State

INDEX NO.: O.10.c.

CITE: (09/27/2021), Ind. Ct. App., 177 N.E.3d 107

SUBJECT: Circumstantial evidence of authenticity supported cell phone's admission under Evidence Rule 901

HOLDING: The Court of Appeals affirmed the admission of cell phone and related records, finding that the State established a reasonable probability the cell phone belonged to Defendant. Evidence that the phone was registered to someone other than Defendant goes to the weight of the evidence and not admissibility. The Court of Appeals found no fundamental error in not giving a special unanimity instruction under Baker v. State, 948 N.E.2d 1169 (Ind. 2011). Because the State was permitted to present the jury with alternative ways to find Defendant guilty as to one element, the jury did not have to unanimously decide which crime (battery or criminal recklessness) Defendant assisted in the charge for Level 6 felony assisting a criminal.

TITLE: Dumes v. State
INDEX NO.: O.10.c.
CITE: (4th Dist., 11-5-99), Ind. App., 718 N.E.2d 1171
SUBJECT: Certification of public records must be made by custodian of records
HOLDING: Tr. Ct. erred in admitting D's driving records into evidence based solely on prosecutor's certification because prosecutor's office was not appropriate entity to certify driving records as true & complete. Regardless of self-authentication method used by party, either under I.C 34-37-1-8 or Indiana Evid. R 902(9), documents must be attested as true & complete by custodian of records. BMV, not prosecutor's office, is both custodian of driving records & entity statutorily empowered & responsible for certifying these public records. In this case, D's BMV records were obtained via Internet & certified by paralegal employed by prosecutor's office. Public records cannot be placed in evidence merely upon party's offering copy & claiming it to be accurate copy of original, especially where, as here, party to Ct. proceeding is certifying & authenticating documents it intends to introduce into evidence. Mott, App., 547 N.E.2d 58. Held, conviction reversed & remanded for new trial on other grounds.

RELATED CASES: Carpenter, App., 743 N.E.2d 326 (BMV can certify judgments from county courts).

TITLE: Hightower v. State
INDEX NO.: O.10.c.
CITE: (5th Dist.; 10-6-00), Ind. App., 735 N.E.2d 1209
SUBJECT: Authentication - public record; facsimile
HOLDING: Tr. Ct. did not err in excluding facsimile that witness allegedly faxed to D's attorney to resolve child support matters. Public record is authenticated by evidence that writing authorized by law to be recorded or filed & in fact recorded or filed in public office, or purported public record, report, statement, or data complication, in any form, is from public office where items of this nature are kept. Ind. R. Evid. 901(b)(7). Public record authenticated under Rule 901(b)(7) without being certified under Rule 902 must be original record within meaning of original document rule. Here, D wanted to impeach witness' testimony that she did not know D's salary by introducing facsimile that stated D's salary which witness allegedly faxed to D's attorney & which was later filed in D's child support case. D contended that facsimile was authenticated because it was file stamped & part of file in child support case. However, because fax did not contain original attestation, it was not properly authenticated as public record, &, therefore, could not be admitted as prior inconsistent statement to impeach witness. Held, judgment affirmed.

RELATED CASES: Suggs, App., 883 N.E.2d 1188 (photocopy of certification of court records evidencing D's prior convictions did not provide certification necessary for proper authentication)

TITLE: Kerner v. State
INDEX NO.: O.10.c.
CITE: (10/22/2021), 178 N.E.3d 1215 (Ind. 2021)
SUBJECT: Convictions and 179-year sentence upheld for youthful offender
HOLDING: In murder, attempted robbery and arson prosecution, trial court did not err in denying a motion to suppress evidence obtained from Defendant's cell phone. Unlike the defendant in Seo v. State, who consistently refused to provide her pass code to law enforcement, Defendant here voluntarily provided the pass code. He also made no Fifth Amendment objection to doing so until 19 months later on the sixth day of trial. The Court of Appeals concluded that because Defendant voluntarily gave his pass code to law enforcement instead of timely asserting his Fifth Amendment privilege, his disclosure was not a compelled incrimination.

Court also found no error in admitting audio recordings obtained from another witness's cell phone, even though a forensic scientist examined the recordings and found they had been altered. The forensic scientist could not identify what was changed, but only that they had been changed from the original. The Court concluded, based on other corroborating evidence, that the unidentified alterations in the recordings were insignificant. Because the State made a threshold showing of authenticity, the challenge to the veracity of the recordings went to the weight of the evidence and not admissibility.

Next, Court found convictions for murder and attempted robbery did not violate the double jeopardy prohibition under Wadle v. State. Neither offense was an included offense of the other either inherently or as charged. But the Court of Appeals *sua sponte* concluded that the two attempted robbery convictions violated double jeopardy under Powell v. State. Attempted robbery is a conduct-based crime, as its commission is marked by conduct, not results. Although both victims suffered serious bodily injury, there was only one act of attempted robbery. While the serious bodily injury to a second victim can elevate the offense, it cannot form the basis of a separate attempted robbery. The Court thus vacated one conviction for attempted armed robbery. In a footnote, the Court explained that, in its view, Level 2 felony attempted robbery is not an offense that fits neatly within the Powell framework.

Sufficient evidence existed to sustain the conviction for Level 2 felony robbery resulting in serious bodily injury. Although Defendant was 17 years old when he committed the two murders, the Court declined to exercise its authority to reduce his 179-year aggregate sentence under Appellate Rule 7(B). The Court found the case different from those where the offender's youth warranted a sentence reduction—in Brown, 10 N.E3d 1, Taylor, 86 N.E.3d 157, and Wilson, 157 N.E.3d 1163. The Court found that Defendant's conduct was "exceedingly heinous" because the victim lingered in pain from being shot before he was beaten to death. The Court also cited abusing the bodies beyond recognition and attempting to cover up the crimes as supporting the enhanced sentence. Further, it found Defendant had a good childhood and no significant substance abuse issues. Finally, it noted Defendant stabbed a man four months before committing the murders under "alarmingly similar circumstances."

TITLE: McCalllister v. State
INDEX NO.: O.10.c.
CITE: (2/15/2018), 91 N.E.3d 554 (Ind. 2018)
SUBJECT: Videotape properly authenticated
HOLDING: Videotape surveillance of a hotel lobby was properly authenticated, even though the hotel manager who authenticated the videotape did not begin working at the hotel until seven months after the video was made.

D, his sister Jade Stigall, Joseph Nelson, and several others were using drugs in D's room at an Evansville hotel. Everyone left D's room except Nelson and Stigall; Nelson asked Stigall if she "wanted to play," which she interpreted as a sexual advance. Stigall told D about Nelson's unwelcomed sexual advance; D told two of the partygoers to get Nelson out of the hotel and bring him to D. The video showed them bringing Nelson out of the hotel at 2:47 a.m. D later shot and killed Nelson execution style at a Warrick County coal mine. At 4:38 a.m., the video showed D and the other members of the group, except Nelson, return to the hotel. At trial, Stigall testified against D. The videotape corroborated her testimony. D was convicted of murder and was sentenced to life without parole.

Even though the hotel manager who authenticated the videotape did not begin working at the hotel until seven months after the video was made, and even though he was unable to say with certainty that the video contained accurate footage of the lobby on the date of the crime, the manager adequately authenticated the video. He verified the time-and-date-stamp system was accurate and attuned to "standard accepted time" and was reset in January each year to ensure accuracy. The manager recognized every piece of furniture and some of the people working in the lobby. And he said the surveillance system is always on and the videos are backed up to "the cloud" on the Internet. These verifications, along with the officer's testimony concerning chain of custody, provided sufficient grounds for the Tr. Ct. to have admitted the videotape. Held, judgment affirmed.

TITLE: M.T.V. v. State
INDEX NO.: O.10.c.
CITE: (12/22/2016), 66 N.E.3d 960 (Ind. Ct. App. 2017)
SUBJECT: Facebook conversations properly authenticated and admissible
HOLDING: Trial court did not abuse its discretion in admitting copies of Facebook conversations containing statements made by M.T.V. and his co-conspirator detailing plans to shoot a classmate at school. To satisfy the requirement of authenticating or identifying an item of evidence, including words set down by electronic recording, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Indiana Evid. Rule 901(a); Wilson v. State, 30 N.E.3d 1264 (Ind. Ct. App. 2015).

Here, M.T.V. admitted to law enforcement that he had engaged in conversations with co-conspirator about shooting up the school, and Facebook records introduced at delinquency fact-finding hearing contained the content M.T.V. told law enforcement they would find. Further, the records were supported by an affidavit from Facebook's authorized records custodian, who testified that the records were made and kept by Facebook's automated systems at or near the time the Facebook user transmitted the information. Thus, the records were properly authenticated.

Further, Court found that the Facebook records and coconspirator's statements did not constitute hearsay because the independent evidence was sufficient to establish the existence of a conspiracy between M.T.V. and his co-conspirator for purposes of Evidence Rule 801(d)(2)(E)(admitting coconspirator's statements made in furtherance of conspiracy). Held, judgment affirmed.

TITLE: Newman v. State
INDEX NO.: O.10.c.
CITE: (3rd Dist., 12-31-96), Ind. App., 675 N.E.2d 1109
SUBJECT: Handwriting sample - sufficient authentication
HOLDING: Tr. Ct. did not abuse discretion in admitting handwritten note pursuant to Indiana Evidence Rule 901. Exemplar was sufficiently authenticated by D's co-worker, who testified that he received note in course of conducting work-related communication. Co-worker properly testified as to his familiarity with D's handwriting & his non-expert opinion that exemplar was written by D. Absolute proof of authenticity is not required. Lahr, App., 640 N.E.2d 756. Held, no error.

RELATED CASES: Herrera, App., 710 N.E.2d 931 (documents were properly authenticated where co-conspirator testify that he had seen D prepare them & they were in substantially same condition as when co-conspirator received them).

TITLE: Parker v. State
INDEX NO.: O.10.c.
CITE: (8/3/2020), 151 N.E.3d 1269 (Ind. Ct. App. 2020)
SUBJECT: Facebook messages properly authenticated and admitted
HOLDING: After learning that Defendant, who was wanted on a warrant, was possibly in the area, a police officer obtained a BMV photo of Defendant and used it to find a profile on Facebook which also matched Defendant's name and date of birth. Using a fictitious profile, the officer contacted Defendant about a vehicle sale and eventually made plans to meet at a gas station to purchase methamphetamine. The trial court admitted the Facebook messages over objection and made a finding the photo on the Facebook profile was similar to the BMV photo of Defendant and appeared to be the same person. The profile under Defendant's name sent a message stating he lived on the same street that law enforcement identified as Defendant's street. The messages discussed methamphetamine and meeting at a particular gas station, and Defendant appeared at that gas station with methamphetamine. After Defendant was arrested, the officer also made a phone call to the Facebook profile and the phone found in Defendant's possession rang. Following Pavlovich v. State, 6 N.E.3d 969 (Ind. Ct. App. 2014), trans. denied, the Court noted authentication of an exhibit can be established by either direct or circumstantial evidence and concluded the evidence was sufficient to authenticate the messages as being authored by Defendant. Even if the evidence was not indisputable proof that he wrote the messages, such proof was not required, and the Court held the trial court did not abuse its discretion in admitting the messages.

TITLE: Pavlovich v. State
INDEX NO.: O.10.c.
CITE: (3/28/2014), 6 N.E.3d 969 (Ind. Ct. App. 2014)
SUBJECT: Authentication - text messages and emails
HOLDING: Tr. Ct. did not abuse its discretion by admitting text messages and emails that were not associated with D's name or address. The proponent of evidence needs to establish only a reasonable probability that the document is what it is claimed to be. Once this reasonable probability is shown, any inconclusiveness regarding the exhibit's connection with the events at issue goes to the exhibit's weight, not its admissibility. Authentication of an exhibit can be established by either direct or circumstantial evidence.

Here, S.Y., a prostiture arranged a sexual encounter with D through texts and a phone call with a 2662 number. During the sexual encounter, S.Y. mentioned she had a nine-year-old sister, P.Y. D wanted to include P.Y. in future sexual encounters. S.Y. expressed disgust for the idea. However, when arrested for prostitution a week later, she offered to provide evidence on D in return for leniency. She texted the 2662 number again and told him she changed her mind about her sister. D told S.Y. his email address was "golfnutmi." D repeatedly texted and emailed about his desire to include P.Y. Some of these emails were responded to by a police officer posing to be P.Y. However, the 2662 number was not registered in D's name or address. Nor was the "golfnutmi" email associated with D. Regardless of the lack of technological connection to D, circumstantial evidence is sufficient to authenticate the texts from the 2662 number and "golfnutmi" to be authored by D. The contents of the conversations not only recognize a familiarity with S.Y., her escorting business, and their prior meeting, but corroborate S.Y.'s testimony of D's desires to be with her nine-year-old sister. Further, S.Y. was familiar with D's voice through talking with him on the phone and in person, and she identified his voice as the person on the voice mail for the 2662 number. Also, the texts and the emails stopped once D was arrested. Therefore, the evidence properly authenticated that the texts and emails were from D. Held, judgment affirmed.

TITLE: Richardson v. State
INDEX NO.: O.10.c.
CITE: (7/6/2017), 79 N.E.3d 958 (Ind. Ct. App 2017)
SUBJECT: Insufficient foundation, authentication of Facebook message
HOLDING: In murder prosecution, Tr. Ct. did not err in excluding a Facebook message between victim and a third party from evidence presented at trial. During D's case-in-chief, detective tesfified about his examination of a password-protected cellphone that had been recovered from the victim's body. During his examination, detective retrieved a Facebook profile under the name "Bandman Trapp" and a message D interpreted to reveal victim's intention to "rob somebody for a black gun." Detective noted that the Facebook account could not only be accessed through the cellphone but also through any computer or any other telephone. Detective testified he had "no idea ...who composed the message."

To lay a foundation for the admission of evidence, the proponent of the evidence must show that it has been authenticated. Hape v. State, 903 N.E.2d 977 (Ind. Ct. App. 2009). Indiana Evidence Rule 901(b) provides examples of evidence that satisfies the authentication requirement, including where, taken together with all the circumstances, the evidence has distinctive characteristics in appearance, contents, or substance. See Ind. Evidence Rule 904(b)(4); Wilson v. State, 30 N.E.3d 1264 (Ind. Ct. App 2015).

Distinguishing Wilson and M.T.V. v. State, 66 N.E.3d 960 (Ind. Ct. App. 2016), Court concluded that the Facebook message was not sufficiently authenticated as having been authored by victim. D did not present any evidence describing distinctive characteristics that could connect the particular statement to vicitm, nor did he present any other indicia of reliability establishing victim as the author of the contested statement. Held, judgment affirmed.

TITLE: Schiro v. State
INDEX NO.: O.10.c.
CITE: (8/5/83), Ind., 451 N.E.2d 1047
SUBJECT: Writings - authentication of exhibit
HOLDING: Tr. Ct. did not err in sustaining state's objection to introduction of letter written by D to doctor who had been treating D (for alcohol & drug abuse) prior to murder. Here, state called doctor to testify concerning D's mental state. On cross-exam, defense attempted to introduce letter written by D & delivered by D's girlfriend. State objected - lack of foundation of doctor's ability to authenticate letter as one written by D. Doctor said he could recognize D's handwriting from other letters he'd received but failed to explain how he knew D wrote any of them. Ct. notes defense could have called girlfriend, who delivered D's letter, to authenticate it. Held, no error. CONCURRING IN RESULT, Prentice believes Spencer, 147 N.E.2d 581 provides appropriate standard for authentication: anyone familiar with D's writing from experience, having seen D write, having carried on correspondence or having frequently handled & observed D's handwriting is competent to give opinion as to genuineness. Thomas, (1855) 103 Ind. 419, did not require witness to know origins of first letters received. However, Prentice would not reverse because Tr. Ct. has broad discretion re authentication.

TITLE: Smith v. State
INDEX NO.: O.10.c.
CITE: (1st Dist., 12-29-05), Ind. App., 839 N.E.2d 780
SUBJECT: Admissibility/authentication of cell phone records
HOLDING: In stalking prosecution, Tr. Ct. did not err in admitting cell phone records of complaining witness (CW). Records were submitted as evidence that D made alleged telephone calls to CW's cell phone & CW never attempted to call D from her cell phone. D argued that State failed to lay a proper foundation for admission of cell phone records because affidavits supporting their authenticity are not certified by a proper "custodian thereof or another qualified person" pursuant to Ind. Evidence Rule 902(9). When considering who qualifies as a "custodian...or another qualified person," the phrase 'other qualified witness' should be given the broadest interpretation to encourage admissibility of relevant & trustworthy evidence. Williams v. Hittle, 629 N.E.2d 944 (Ind. Ct. App. 1994). Here, in affidavit, affiant confirmed that she was acting on behalf of custodian of records of Verizon Wireless or was otherwise qualified as a result of her position with business named in subpoena to make this declaration. This declaration within affidavit was sufficient to satisfy custodial element of rules of evidence absent a substantive challenge to truth of assertion. Affidavits fully complied with Rule 902(9) & 803(6), which sets forth hearsay exception for records of regularly conducted business activity. Held, judgment affirmed.

RELATED CASES: Walters, 120 N.E.3d 1145 (Ind. Ct. App. 2019) (erroneous admission of unauthenticated phone records; see full review at O.9.c.5); Fry, App., 885 N.E.2d 742 (cell phone records are self-authenticating under Rule 901(b)(4) in that distinctive characteristics within the records, along with evidence of the request for the records, create a reasonable probability that the records are what they purport to be).

TITLE: Smith v. State
INDEX NO.: O.10.c.
CITE: (5th Dist., 11-09-07), Ind. App., 875 N.E.2d 813
SUBJECT: Text messages and cell phone adequately authenticated through witness testimony
HOLDING: Cell phone and text messages were authenticated even though the State introduced the evidence through a detective not personally involved in Defendant's arrest. Another State's witness, who allegedly sent text messages to Defendant about buying drugs, could not independently verify Defendant's phone number. The Court of Appeals held that taken together, the testimony describing the cell phone and how it was collected and placed into evidence, the extraction report, the witness's testimony, and the text messages were enough to authenticate both the cell phone and, independently, the text messages as being authored by Defendant. The Court further held that even if the trial court erred in admitting the evidence, the error was harmless because it was cumulative of other evidence establishing Defendant's guilt for dealing methamphetamine. The Court rejected Defendant's argument that admitting the cell phone extraction report was also error because its redactions made the evidence confusing and intelligible to the jury. The Court found the claim was waived for lack of an objection, and even still, any error in its admission would be harmless.

TITLE: Speybroeck v. State

INDEX NO.: O.10.c.

CITE: (5th Dist., 11-09-07), Ind. App., 875 N.E.2d 813

SUBJECT: Business records affidavit lacked trustworthiness & could not attest to records made by another business

HOLDING: Tr. Ct. committed reversible error by admitting seventy-five pages of documents attached to an affidavit of an operations manager at a bank's fraud department. To admit business records pursuant to Rule 803(6), the proponent of the exhibit must authenticate it. Unless the source of information or the circumstances of preparation indicate a lack of trustworthiness, Evidence Rule 902(b) permits self-authentication through certification. Here, State's Exhibit 11 included a business records Affidavit by a bank employee attached to thirteen pages of computer printouts, fifty-three pages of Kawasaki documents & nine pages of letters written by D & the victim to the bank. The Affidavit neither specified the number of pages nor identified the documents it purported to authenticate & was a boilerplate recitation unconnected to the underlying documents. Moreover, the computer printouts were dated one day after the Affidavit was signed. Thus, the Affidavit lacked trustworthiness, did not comply with Rule 902(9) & failed to authenticate the attached documents. Held, judgment reversed.

TITLE: Strunk v. State
INDEX NO.: O.10.c.
CITE: (9/15/2015), 44 N.E.3d 1 (Ind. Ct. App. 2015)
SUBJECT: Facebook message properly authenticated
HOLDING: In sexual misconduct with a minor prosecution, Tr. Ct. properly authenticated message D sent to complaining witness (C.W.) via Facebook. During C.W.'s testimony, Tr. Ct. admitted screen shots of D's Facebook profile and his message to C.W. after the molestation. C.W. testified that she had communicated with D through the same profile page on previous occasions. She knew it was D's page because D's profile picture was a wolf and the screen shot in State's exhibit contained the same picture. C.W. knew the screen shot was D's Facebook profile because they had two mutual friends listed on D's page, one of which was her mother. C.W.'s mother also identified the exhibit as a screen shot of D's Facebook profile and verified that she was one of D's mutual friends. C.W. testified that after D left her house, she received his message through the same Facebook page she had used to communicate with D earlier in the day. Testimony that an item is what it is claimed to be, by a witness with knowledge, is sufficient to authenticate the item under Indiana Evidence Rule 901. Held, judgment affirmed.

TITLE: U.S. v. Harvey
INDEX NO.: O.10.c.
CITE: 117 F.3d 1044 (7th Cir. 1997)
SUBJECT: Authentication - writings; Rule 901
HOLDING: In manufacturing marijuana case, evidence supported Tr. Ct.'s finding that D authored diaries & notebooks found at his campsite. Rule 901(a) states that authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901 requires only prima facie showing of genuineness & leaves it to jury to decide true authenticity & probative value of evidence. Gov't did not attempt to authenticate written materials using handwriting analysis under Rule 901(b), which specifically contemplates use of handwriting comparisons to authenticate written materials. However, Rule 901(b)(4) allows evidence to be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Here, written materials were found next to D's bed in isolated and remote area where campsite was located. Writings also made numerous references to Ds dog. Ct. concluded that these distinctive characteristics & circumstances were sufficient to support finding that materials were written by D. Held, convictions affirmed. **NOTE:** Rule 901(a) & (b)(4) are identical to corresponding Indiana rule.

TITLE: United States v. Jackson
INDEX NO.: O.10.c.
CITE: 2007 U.S. Dist. LEXIS 23298 (D. Neb. 2007)
SUBJECT: Copied, pasted internet discussions inadmissible
HOLDING: U.S. District Court for Nebraska held that a document created by copying and pasting parts of online conversations into a word processing program is not admissible as evidence against D accused of luring a minor over the Internet.

D engaged in online chats with a law enforcement agent who was posing as a 14-year-old girl and set up a meeting. The evidence at issue involved computer "instant message" or "chat" conversations between the two. However, both D's and the agent's computers were lost, which left no original electronic computer printouts or copies on discs or drives capturing the computer conversations. Court did not allow government to introduce copy-and-paste notes the officer had taken from the online chats and saved into a Microsoft Word document, finding that the government failed to meet its burden under FRE 901 to show that the document was authentic and trustworthy. Court added that the proffered document contained numerous examples of missing data, timing sequences that did not make sense, and editorial information. Further, Court noted that the document did not meet the "best evidence" rule as it was not the best evidence of the conversations and did not reflect the entire conversations. Finally, Court held that the inaccuracy of the document made it inadmissible under FRE 1004, which may allow the admission of secondary evidence when an original is destroyed.

TITLE: Valdez v. State
INDEX NO.: O.10.c.
CITE: (7/22/2016), 56 N.E.3d 1244 (Ind. Ct. App. 2015)
SUBJECT: D's exhibits inadmissible for failure to authenticate
HOLDING: Tr. Ct. did not err in refusing to admit two exhibits supporting D's insanity defense because D did not authenticate the exhibits. Even though the State did open the door to this evidence, D's failure to authenticate still rendered the exhibits inadmissible.

D was charged with attempted rape, criminal confinement, and intimidation for sexually assaulting his sister. At trial, he tried to introduce evidence of insanity, Exhibit M, which included psychological evaluations, and Exhibit N, which contained a police report stating D could not sleep because he believed people were hiding in his closet or attic or were watching him from outside. The Tr. Ct. refused to admit the evidence on hearsay grounds.

Even if, as D alleges, the exhibits were admissible under Evidence Rule 803(8), they were inadmissible because he failed to authenticate them. See Ind. Evidence Rule 901(a). It is true the State opened the door to this evidence because it created a false impression by claiming there was no evidence that D was insane. See Hall v. State, 36 N.E.3d 459, 471 (Ind. 2015). To rebut this false impression, D needed to establish that the exhibits were, in fact, what he claimed they were; in other words, he needed to persuade Tr. Ct. that the allegations within the exhibits were factual. See Evid.R. Rule 901(a). By failing to authenticate the exhibits, D failed to establish that the statements within the exhibits were true, so they were not inadmissible on the ground that the State opened the door. Held, judgment affirmed.

TITLE: Williams v. State
INDEX NO.: O.10.c.
CITE: (12/11/97), Ind., 690 N.E.2d 162
SUBJECT: Authentication of documents
HOLDING: D claimed two documents, a gang's "creed" & "commandments," were not properly authenticated. Court noted that D's argument was not developed, as D's authentication argument at trial focused on fact that no effort was made to prove ownership of documents. Officer who found documents testified only to where & when she discovered them & what they appeared to be on their face. Court determined that this testimony was not necessarily sufficient to establish by witness with personal knowledge "that the matter in question [was] what [the] proponent claim[ed]." See IRE Rule 901(a). However, Ds were free to offer alternative explanation for documents different from what they on their face appeared to be. In absence of genuine dispute as to authenticity, their admittance was not to reversible error.

TITLE: Wilson v. State
INDEX NO.: O.10.c.
CITE: (12/22/20), Ind. Ct. App., 162 N.E.3d 489
SUBJECT: Social media posts properly admitted, no violation of procedural Double Jeopardy
HOLDING: Trial court did not abuse its discretion by admitting posts from Instagram and Facebook because they were properly authenticated under Evidence Rule 901(a). The trial court allowed the State to admit photographs taken from a Facebook and Instagram account showing photos and videos of Defendant. Noting that the admissibility of photos or videos taken from such online social media platforms has not been specifically addressed in Indiana, the Court of Appeals concluded the authentication of social-media evidence turns on whether there is sufficient evidence to support a finding it is what the claimant purports it to be. And while the source of the evidence may sometimes be needed, authentication depends on context. Here, the exhibits were used by the State to show Defendant was affiliated with other gang members. A detective testified she recognized Defendant in the photos and believed other individuals in the photos were gang members who had been convicted of gang-related activities, one of the accounts was registered in Defendant's name, had a gang-related nickname as a username, and photos and videos referred to gang activity. Held, no abuse of discretion to admit the exhibits.

After the jury acquitted Defendant of criminal-organization activity in the first phase of the trial, the State was allowed to go forward with the gang enhancement in the second phase, resting on the evidence that had already been presented at trial. The Court of Appeals rejected Defendant's procedural double jeopardy claim, noting that the question under the relevant test is not whether the same evidence was presented but whether the trier of fact considered and relied upon the same evidence to make the two decisions. Here, the jury found Defendant guilty of possession with a gang enhancement but acquitted him of dealing and then convicted him of a gang enhancement in the second phase. Because there was limited evidence of dealing and plenty of evidence of gang membership and affiliation, the evidence taken together indicates the jury did not "latch on" to the same facts to acquit Defendant of dealing with a gang enhancement but convict him of the gang enhancement in the second phase. The acquittal was based on the lack of evidence of dealing and the enhancement was based on the overwhelming gang evidence. Held, Defendant was not twice prosecuted for the same offense in violation of the Double Jeopardy clause of the Indiana Constitution.

TITLE: Wilson v. State
INDEX NO.: O.10.c.
CITE: (4/30/2015), 30 N.E.3d 1264 (Ind. Ct. App 2015)
SUBJECT: Authentication of social media posts
HOLDING: Addressing issue of first impression on authentication of social media posts, Court held that taken together, witness's testimony identifying Twitter account as belonging to D and content posted on account, including pictures and gang references, were "more than sufficient to authenticate the Twitter posts as being authored by" D. Indiana Evidence Rule 901(b) provides examples of evidence that satisfies the authentication requirement, including: "(1) testimony of witness with knowledge and (4) "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."

Here, in murder and criminal gang activity prosecution, Court admitted D's Twitter posts over D's objection that the State had not laid the proper foundation to identify the account as belonging to him. D's girlfriend testified that the account belonged to D and she often communicated with him through Twitter. The account had pictures posted of D holding guns that match those used in the crimes. He also often referenced his gang affiliations on his Twitter account. *Citing* Palovich v. State, 6 N.E.3d 969 (Ind. Ct. App. 2014), Court found that girlfriend's testimony coupled with the content on the account served to authenticate that it belonged to D. Held, judgment affirmed in part, reversed in part on other grounds.

RELATED CASES: M.T.V., (Ind. Ct. App. 2017) (Facebook conversations properly authenticated where M.T.V. admitted to law enforcement that he had engaged in conversations with coconspirator about school shooting and records contained the content M.T.V. told law enforcement they would find; further, the records were supported by an affidavit from Facebook's authorized records custodian who testified that the records were made and kept by Facebook's automated systems at or near the time the Facebook user transmitted the information).

TITLE: Wininger v. State
INDEX NO.: O.10.c.
CITE: (1st Dist. 8/18/88), Ind. App., 526 N.E.2d 1216
SUBJECT: Authentication - handwriting standard
HOLDING: Tr. Ct. erred in admitting handwriting standards into evidence for purpose of comparison by State's expert with allegedly forged documents. D was convicted of forgery. On appeal, D argues that standards were erroneously admitted because their own genuineness was not properly established. Admitted or proved handwriting may be used as basis for comparison with questioned handwriting. Ind. Code 34-3-6-1. Before comparison may be made, however, genuineness of standard must be established. Wells, 261 N.E.2d 865. State here sought to establish genuineness through testimony of witness in whose presence standards had been signed. However, 91-year-old witness had no recollection of signing, & had to refer to transcript from prior trial in which he had given similar testimony. State argues witness' testimony was admissible as present recollection refreshed. However, even after referring to his prior testimony, witness indicated his memory was not refreshed. Alternatively, State argues transcript of prior testimony was admissible as past recollection recorded. However, transcript was made some 9 to 10 years after signing of documents, & thus was not contemporaneous record of signing. Gee, 389 N.E.2d 303. Finally, State argues transcript was admissible under former testimony exception to hearsay rule. However, State failed to produce certified transcript or testimony of Ct. stenographer. Testimony & transcript were not admissible under any of these theories. State's erroneous admission was not harmless, since expert-based opinion that documents were forged on comparison with inadmissible standards.

O. EVIDENCE

O.11. Real/demonstrative evidence

TITLE: Diaz v. State

INDEX NO.: O.11.

CITE: (09-29-10), 934 N.E.2d 1089 (Ind. 2010)

SUBJECT: Voluntariness of plea - inadequate translation for Spanish-speaking D; presenting chart as demonstrative evidence

HOLDING: Post-conviction Tr. Ct. erred by excluding certified translator=s chart, which summarized her conclusions that translation at guilty plea hearing was inaccurate. Testimony reflecting the content of an expert report is not hearsay, Wilbur v. State, 460 N.E.2d 142 (Ind. 1984), so certified interpreter's chart was demonstrative evidence, not hearsay. Wise v. State, 719 N.E.2d 1192, 1196 (Ind. 1999).

D's native language is Spanish. Based on translation at guilty plea hearing, D thought he pleaded guilty to only one crime but actually pleaded guilty to two crimes. D's petition for post-conviction relief claimed his plea was not knowing and intelligent because translation was inaccurate. D also claimed trial counsel was ineffective. Even though Tr. Ct. allowed interpreter to testify about alleged problems with translation, erroneous exclusion of interpreter's chart from hearing was not harmless because it undermined benefit of interpreter's expertise. Such charts should normally be used as a matter of course. "When the question at issue is the accuracy of the interpretation at a plea hearing, we see the use of a chart or a similar demonstrative exhibit as being nearly inevitable." Evidence did not reveal whether translation at guilty plea was accurate. Thus, Court directed Tr. Ct. to "commission its own translation of the plea hearing and sentencing hearing" and rehear such evidence to determine if plea was knowing and voluntary. Held, transfer granted, memorandum Court of Appeals' opinion vacated, judgment reversed and remanded for a new post-conviction hearing.

TITLE: Meisberger v. State
INDEX NO.: O.11.
CITE: (9/26/94), Ind. App., 640 N.E.2d 716
SUBJECT: Demonstrative evidence - In general
HOLDING: Demonstrative evidence is admissible if it is sufficiently explanatory or illustrative of relevant testimony in case to be of potential help to trier of fact. Underly v. Advance Machine Co., 605 N.E.2d 1186. Demonstrative evidence includes all phenomena which can convey relevant firsthand sense impression to trier of fact, as opposed to those which serve to report secondhand sense impressions of others. Demonstrative evidence aids trier of fact by rendering other evidence comprehensible, has unusual persuasive force because it permits trier of fact to derive its own perception, & may convey impression of objective reality. Demonstrative exhibits are generally admissible in Tr. Ct.'s discretion because ordinarily, whatever jury may learn through hearing descriptions given by witnesses, they may also learn directly through sight from objects described. SCM Corp. v. Letterer, App., 448 N.E.2d 686. A substantially similar duplicate is unobjectionable. Id. Here, D claims Tr. Ct. erred in denying mistrial when State, in absence of real physical evidence, displayed "2 x 4" without first obtaining judge's approval or disclosing its intent to do so during discovery. In response to D's objection, prosecutor stated he intended to use 2 x 4 as illustrative evidence during testimony of forensic expert. Ct. noted it was questionable whether object would have been admissible to corroborate forensic testimony as to cause of victim's death, as expert could only say that blunt object had been used to crush victim's skull. However, Ct. held that display of 2 x 4 was not prosecutorial misconduct requiring reversal because prosecutor never sought admission of object & other evidence presented at trial supported conviction, including D's former fiancee's statement that D told her he had struck victim in head with "2 x 4," slit his throat & disposed of weapons, which corroborated nature of skull fracture, & D's own version of events did not present viable claim of self-defense. Held, no error.

TITLE: Springer v. State
INDEX NO.: O.11.
CITE: (5/15/84), Ind., 463 N.E.2d 243
SUBJECT: Real/demonstrative evidence - foundation
HOLDING: Tr. Ct. erred in admitting knife into evidence as Exhibit 8 where state never connected that specific knife to D or to commission of crimes. Error was harmless because D failed to demonstrate prejudice. Here, victim testified knife was "exactly like" knife D used to stab him. State conceded at trial that Exhibit 8 was not knife used by D. Foundation requirements for admission of physical evidence are: (1) witness must testify object is like object used to commit crime; (2) connection of object to D & to commission of the crime. Hooper 443 N.E.2d 822. Tr. Ct. could have allowed knife to be used to illustrate/explain victim's testimony. Held, conviction affirmed.

RELATED CASES: Granger, 946 N.E. 2d 1209 (Ind. Ct. App 2011) (where State connected up the relevance of sex toys, a sex book, condoms and a pregnancy test through the victims' testimony that they saw and used such items with the D, the earlier unconditioned admission of the evidence was harmless); But see Kuchel 501 N.E.2d 1032 (Crim L 404(4); where D threatened to use knife to fight with victim's husband if husband found D engaging in deviate conduct with victim, Ct. finds knife was admissible at Tr. Ct.'s discretion (despite fact it was in car & criminal act occurred in house); knife was relevant to show D threatened victim & her family, *citing* State v. Hall 432 N.E.2d 679); Martin 490 N.E.2d 309 (Crim L 404(1); 2 purses were properly admitted into evidence to faithfully reconstruct crime scene, citing Malott 485 N.E.2d 879; inconclusive connection with D affects weight, not admissibility, *citing* Carman 396 N.E.2d 344); Malott 485 N.E.2d 879 (Crim L 404(2); Ct. holds 10 exhibits (gun, shells, tools, etc.) admissible); King 468 N.E.2d 226 (photographs admissible); Jackson 462 N.E.2d 63 (gun admissible); Forrester 440 N.E.2d 475 (gun was properly identified & therefore admissible; objects constituting hard physical evidence with characteristics capable of identification (as opposed to fungible items) are admissible upon being properly identified [citations omitted]); Hooper 443 N.E.2d 822 (prosecutor failed to connect shirt to D & robbery before admitting it into evidence; this constituted error, but Ct. finds error harmless, *citing* Jackson 275 N.E.2d 538).

O. EVIDENCE

O.11. Real/demonstrative evidence

O.11.a. Photographs (mug shots, see R.3)

TITLE: Amburgey v. State
INDEX NO.: O.11.a.
CITE: (6/18/98), Ind., 696 N.E.2d 44
SUBJECT: Gruesome photographs of murder victim
HOLDING: D claimed bloody, close-up photographs of victim's face at crime scene was irrelevant because he did not dispute shooting or killing victim. D further claimed that prejudicial effect outweighed its probative value & should have been excluded.

Admission of photographic evidence falls within sound discretion of Tr. Ct. Even gory & revolting photos may be admissible as long as they are relevant to some material issue or show scenes that witness could describe orally. Jackson, 597 N.E.2d 950. A relevant photo, of course, should be excluded if its prejudicial effect outweighs its probative value. IRE 403.

Here, D's failure to contest shooting or killing victim did not alleviate State's burden of proving them. Butler, 647 N.E.2d 631. Photo at issue illustrated testimony of other witnesses, identified victim, & showed two of his four wounds. Location of these wounds & proximity of victim to shooter were probative on question of intent. Further, while photos were slightly gruesome, court found their prejudicial effect & probative value were at best in balance. Held, photos admissible no error.

RELATED CASES: Burns, 59 N.E.3d 323 (Ind. Ct. App 2016) (although unpleasant, 28 photographs of victim's bodiliy remains were relevant to material issues adn to the testimony of criminal investigator and forensic pathologist); Pruitt, 834 N.E.2d 90 (no abuse of discretion in admitting pre-autopsy photo showing victim's body bloated with 100 pounds of extra fluid & large incision that exposed internal organs).

TITLE: Meisberger v. State
INDEX NO.: O.11.
CITE: (9/26/94), Ind. App., 640 N.E.2d 716
SUBJECT: Demonstrative evidence - In general
HOLDING: Demonstrative evidence is admissible if it is sufficiently explanatory or illustrative of relevant testimony in case to be of potential help to trier of fact. Underly v. Advance Machine Co., 605 N.E.2d 1186. Demonstrative evidence includes all phenomena which can convey relevant firsthand sense impression to trier of fact, as opposed to those which serve to report secondhand sense impressions of others. Demonstrative evidence aids trier of fact by rendering other evidence comprehensible, has unusual persuasive force because it permits trier of fact to derive its own perception, & may convey impression of objective reality. Demonstrative exhibits are generally admissible in Tr. Ct.'s discretion because ordinarily, whatever jury may learn through hearing descriptions given by witnesses, they may also learn directly through sight from objects described. SCM Corp. v. Letterer, App., 448 N.E.2d 686. A substantially similar duplicate is unobjectionable. Id. Here, D claims Tr. Ct. erred in denying mistrial when State, in absence of real physical evidence, displayed "2 x 4" without first obtaining judge's approval or disclosing its intent to do so during discovery. In response to D's objection, prosecutor stated he intended to use 2 x 4 as illustrative evidence during testimony of forensic expert. Ct. noted it was questionable whether object would have been admissible to corroborate forensic testimony as to cause of victim's death, as expert could only say that blunt object had been used to crush victim's skull. However, Ct. held that display of 2 x 4 was not prosecutorial misconduct requiring reversal because prosecutor never sought admission of object & other evidence presented at trial supported conviction, including D's former fiancee's statement that D told her he had struck victim in head with "2 x 4," slit his throat & disposed of weapons, which corroborated nature of skull fracture, & D's own version of events did not present viable claim of self-defense. Held, no error.

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SUBJECT: Real/demonstrative evidence - foundation
HOLDING: Tr. Ct. erred in admitting knife into evidence as Exhibit 8 where state never connected that specific knife to D or to commission of crimes. Error was harmless because D failed to demonstrate prejudice. Here, victim testified knife was "exactly like" knife D used to stab him. State conceded at trial that Exhibit 8 was not knife used by D. Foundation requirements for admission of physical evidence are: (1) witness must testify object is like object used to commit crime; (2) connection of object to D & to commission of the crime. Hooper 443 N.E.2d 822. Tr. Ct. could have allowed knife to be used to illustrate/explain victim's testimony. Held, conviction affirmed.

RELATED CASES: Granger, 946 N.E. 2d 1209 (Ind. Ct. App 2011) (where State connected up the relevance of sex toys, a sex book, condoms and a pregnancy test through the victims' testimony that they saw and used such items with the D, the earlier unconditioned admission of the evidence was harmless); But see Kuchel 501 N.E.2d 1032 (Crim L 404(4); where D threatened to use knife to fight with victim's husband if husband found D engaging in deviate conduct with victim, Ct. finds knife was admissible at Tr. Ct.'s discretion (despite fact it was in car & criminal act occurred in house); knife was relevant to show D threatened victim & her family, *citing* State v. Hall 432 N.E.2d 679); Martin 490 N.E.2d 309 (Crim L 404(1); 2 purses were properly admitted into evidence to faithfully reconstruct crime scene, citing Malott 485 N.E.2d 879; inconclusive connection with D affects weight, not admissibility, *citing* Carman 396 N.E.2d 344); Malott 485 N.E.2d 879 (Crim L 404(2); Ct. holds 10 exhibits (gun, shells, tools, etc.) admissible); King 468 N.E.2d 226 (photographs admissible); Jackson 462 N.E.2d 63 (gun admissible); Forrester 440 N.E.2d 475 (gun was properly identified & therefore admissible; objects constituting hard physical evidence with characteristics capable of identification (as opposed to fungible items) are admissible upon being properly identified [citations omitted]); Hooper 443 N.E.2d 822 (prosecutor failed to connect shirt to D & robbery before admitting it into evidence; this constituted error, but Ct. finds error harmless, *citing* Jackson 275 N.E.2d 538).

O. EVIDENCE

O.11. Real/demonstrative evidence

O.11.a. Photographs (mug shots, see R.3)

TITLE: Amburgey v. State
INDEX NO.: O.11.a.
CITE: (6/18/98), Ind., 696 N.E.2d 44
SUBJECT: Gruesome photographs of murder victim
HOLDING: D claimed bloody, close-up photographs of victim's face at crime scene was irrelevant because he did not dispute shooting or killing victim. D further claimed that prejudicial effect outweighed its probative value & should have been excluded.

Admission of photographic evidence falls within sound discretion of Tr. Ct. Even gory & revolting photos may be admissible as long as they are relevant to some material issue or show scenes that witness could describe orally. Jackson, 597 N.E.2d 950. A relevant photo, of course, should be excluded if its prejudicial effect outweighs its probative value. IRE 403.

Here, D's failure to contest shooting or killing victim did not alleviate State's burden of proving them. Butler, 647 N.E.2d 631. Photo at issue illustrated testimony of other witnesses, identified victim, & showed two of his four wounds. Location of these wounds & proximity of victim to shooter were probative on question of intent. Further, while photos were slightly gruesome, court found their prejudicial effect & probative value were at best in balance. Held, photos admissible; no error.

RELATED CASES: Burns, 59 N.E.3d 323 (Ind. Ct. App 2016) (although unpleasant, 28 photographs of victim's bodiliy remains were relevant to material issues adn to the testimony of criminal investigator and forensic pathologist); Pruitt, 834 N.E.2d 90 (no abuse of discretion in admitting pre-autopsy photo showing victim's body bloated with 100 pounds of extra fluid & large incision that exposed internal organs).

TITLE: Askew v. State
INDEX NO: O.11.a.
CITE: (10/4/82), Ind., 439 N.E.2d 1350
SUBJECT: Photographs - autopsy
HOLDING: Tr. Ct.'s admission of photographs will not be deemed an abuse of discretion absent clear showing of imbalance between relevancy (Moore 414 N.E.2d 558) & tendency to inflame passions of jury. Graves 400 N.E.2d 139; Brandon 374 N.E.2d 504. Gruesomeness alone, as in case of autopsy photos, is not sufficient to exclude photos from evidence if photos are material & relevant. Drollinger 408 N.E.2d 1228; Porter 391 N.E.2d 801. Here, D claims error in admission of 2 photos, one showing face & shoulders of decedent (some pellet wounds visible at bottom of photo), the other showing the entire body laying on a metal table in autopsy lab (a chest x-ray visible in background). Ct. holds photos relevant (i.e., photos depict that which a witness would be permitted to describe) as to nature/extent of wounds, cause of death & identity of victim. Held, no error in admission of photographs.

RELATED CASES: Halliburton, 1 N.E.3d 670 (Ind. 2013) (autopsy photos showing skin and hair pulled away from victim's skull were necessary to demonstrate pathologist's testimony); Jackson, 973 N.E.2d 1123 (Ind. Ct. App 2012) (Tr. Ct. did not abuse its discretion by admitting an autopsy photograph of the victim's heart into evidence, where photograph was necessary to demonstrate pathologist's testimony regarding cause of death); Stewart, 945 N.E.2d 1277 (Ind. Ct. App 2011) (challenged gruesome autopsy and crime scene photographs were relevant and their probative value outweighed any potential prejudice); Rogers, App., 897 N.E.2d 955 (although condition of victim's body was slightly altered, all alterations were explained to jury by testimony of medical examiner, and photographs were not particularly gruesome); Camm, App., 812 N.E.2d 1127 (autopsy photograph offered by D was relevant to show how victim's blood came to rest on D's shirt); Custis, App., 793 N.E.2d 1220 (black-and-white autopsy photograph of victim's brain cavity was relevant to show trajectory of bullet & whether victim had defensive wounds); Martin, App., 784 N.E.2d 997 (photographs were probative inasmuch as key issue at trial was whether D used excessive force in defending his father; photos did not depict victim's body in altered condition); Corbett, 764 N.E.2d 622 (probable impact of erroneous admission of six autopsy photographs did not affect D's substantial rights, thus error was harmless); Swingley, 739 N.E.2d 132 (Tr. Ct. erred in admitting autopsy photograph depicting victim's windpipe removed from body & lying on sheet); Thompson, 728 N.E.2d 155 (where pathologist unequivocally testified that lividity is not reliable way to determine time of death, two autopsy photographs were not relevant to pathologist's testimony regarding time of victim's death & should not have been admitted); Turben, 726 N.E.2d 1245 (autopsy picture of bloody mass which was alleged to be victim's head was irrelevant; however, error was harmless); Willey, 712 N.E.2d 434 (admission of autopsy photos which showed pathologist holding victim's brain was error, but not fundamental error); Butler, 647 N.E.2d 631 (autopsy photos suspect if they show body in altered condition); Robinson, 693 N.E.2d 548 (photos of victim's decomposed body, partially eaten by animal, were admissible); Edgecomb, 673 N.E.2d 1185 (autopsy photos lent visual aid to pathologist's description of what caused victim's death, an issue D strongly challenged during cross-examination of physician); McLean, App., 638 N.E.2d 1344 (no error in admission of two autopsy photos because medical examiner used them to explain his testimony); Parrish, 459 N.E.2d 391 (autopsy photographs showing postmortem injuries were relevant to charge of neglect in that they established unsanitary conditions & existence of rodents in areas in which victim was confined, were used to identify victim, depicted evidence of lack of medical attention & tended to show that force used to keep victim confined may have been excessive); Dresser 454 N.E.2d 406 (state's purpose in offering

photograph of homicide victim highly suspect; photo appears to fail Hyde 451 N.E.2d 648 balancing test but error in admission is not reversible because photo had modicum of relevance); Stewart 442 N.E.2d 1026 (admission of 2 autopsy photos upheld; each showed different wounds).

TITLE: Bone v. State
INDEX NO.: O.11.a.
CITE: (1st Dist., 7-18-02), Ind. App., 771 N.E.2d 710
SUBJECT: Authentication - pictorial depictions
HOLDING: In possession of child pornography prosecution, evidence was sufficient to establish authenticity of exhibits as depicting images contained in D's computer equipment. D argued that authentication required by Indiana Evidence Rule 901(a) is a showing that exhibits depicted actual children or what appeared to be actual children, as alleged in charging information. Ct. agreed with State that authentication requirement is satisfied by showing that images contained in exhibit were recovered from Ds' computer. Detective testified as to how he generated exhibits from images found on D's computer, using a computer program to print them. He testified that he printed copies of images exactly as he found them, & stated that images fairly & accurately showed images that he had seen on computer he was using to examine D's computer. Held, judgment affirmed.

TITLE: Crain v. State
INDEX NO.: O.11.a.
CITE: (3d Dist. 6/16/86), Ind. App., 493 N.E.2d 827
SUBJECT: Photographs - taken of D at time of arrest
HOLDING: Tr. Ct. did not abuse discretion by admitting photograph of D sitting in police car with hands restrained behind back. Here, D contends prejudicial impact of photo outweighed its limited probative value. In Johnson 455 N.E.2d 897, photographs taken at time of D's arrest were admitted as graphic, probative evidence that accused perfectly matched description provided by victim. In present case, state argues purpose of photos was to corroborate verbal descriptions of assailants given by witnesses. In light of Johnson, Ct. finds no abuse of discretion. Held, conviction affirmed.

TITLE: Doyle v. State
INDEX NO.: O.11.a.
CITE: (4th Dist. 9/11/84), Ind. App., 468 N.E.2d 528
SUBJECT: Photographs - authenticated by prosecutor's testimony
HOLDING: A lawyer may testify in case he/she is trying if "testimony will relate solely to a matter of formality & there is no reason to believe that substantial evidence will be offered in opposition to the testimony." DR 5-101(B)(2). Here, prosecutor offered photocopies of document (trust indenture) for each juror's review. Only foundation was prosecutor's unsworn statement that photocopies were accurate copies of original document. Ct. notes prosecutor could have testified under oath as to authenticity of copies. 468 at 537 n.1. Held, no error.

TITLE: Forrester v. State
INDEX NO.: O.11.a.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: Photographs - crime scene; changes
HOLDING: Fact some conditions have changed at time photograph taken does not necessarily render it inadmissible; changes, if material, should be explained to jury so they will not be misled. Hubble 299 N.E.2d 612. Here, prosecution introduced photograph of scene of abduction. D objected because victim's car did not appear in photo & because police car did. Testifying officer indicated in red ink on photos where tire prints from assailant's car were found in relation to victim's car. Ct. finds jurors were not misled by photograph thus Tr. Ct. did not err in its admitting it. Parks 389 N.E.2d 286; Gill 368 N.E.2d 1159. Held, no error.

RELATED CASES: Garren 470 N.E.2d 719 (where jury was made aware that additional items in photo had not been present on day of crime & that in all other respects photo depicted scene accurately, there was no error in admission of photo).

TITLE: Goodloe v. State
INDEX NO.: O.11.a.
CITE: (12/3/82), Ind., 442 N.E.2d 346
SUBJECT: Photographs - admissibility
HOLDING: Photographs are admissible if established to be true & accurate representation of things they are intended to portray. Bray 430 N.E.2d 1164; Chambers 392 N.E.2d 1156. Relevancy determined by whether witness would be allowed to describe verbally that which photograph depicts. Bray; Clemons 424 N.E.2d 113; Rogers 383 N.E.2d 1035; White 381 N.E.2d 481; Murphy 369 N.E.2d 411. Here, D argued photographs of victim's scalp wounds were inadmissible because victim could not see wounds since they were on top of his head. Police officer identified photos as portraying wounds he observed on victim shortly after robbery occurred. Victim testified he had posed for photos; indeed, victim's head & face appear in photos. Held, no error in admission of photos.

RELATED CASES: Komyatti 490 N.E.2d 279 (photos of dismembered body were admissible in joint trial of co-Ds over one D's objection that she was not involved in dismemberment; acts of co-conspirator are admissible against & attributable to each conspirator even if acts were done in D's absence [citation omitted]).

TITLE: Groves v. State
INDEX NO.: O.11.a.
CITE: (12/13/83), Ind., 456 N.E.2d 720
SUBJECT: Photographs - regiscope; "silent witness"
HOLDING: Tr. Ct. erred in admitting regiscope pictures as substantive evidence of the criminal transaction where state failed to establish foundation for admission set forth in Bergner, App., 397 N.E.2d 1012. State must make strong showing of photograph's competency & authenticity. State must prove photograph has not been altered in any significant respect. State should prove date photograph was taken. Where picture is taken by automatic camera, state should present evidence re: (1) how & when camera was loaded; (2) how frequently camera was activated; (3) when photographs were taken; (4) processing & chain of custody of film after its removal from camera. Bergner. Here, state submitted no evidence re processing & there were missing links in chain of custody. Photo was admitted following statement by police officer that he was acquainted with D & picture looked like her. This is the foundation for admitting photographs for demonstrative purposes. In order for photograph to qualify for admission as substantive evidence, its probative integrity first must be established. Ct. finds other evidence of D's guilt was circumstantial. Photo combined with improperly admitted opinion of officer "cinched" D's conviction. Held, reversed; remanded for new trial. DeBruler DISSENTS without opinion.

RELATED CASES: Stark 489 N.E.2d 43 (Crim L 444; testimony sufficient to establish competency/authenticity of picture taken when D used bank teller machine; Shephard CONCURS IN RESULT, finding no chain of custody as required in Groves); Averhart 470 N.E.2d 666 (photographs taken by automatic camera during bank robbery properly authenticated & admitted); Knight, App., 495 N.E.2d 747 (Ct. distinguishes case from Groves; here, tellers testified photos accurately depicted robbery events & identified D as person in photos; photos also indicated date & time of exposure; held, conviction affirmed).

TITLE: Halliburton v. State

INDEX NO.: O.11.a.

CITE: (12/19/2013), 1 N.E.3d 670 (Ind. S. Ct. 2013)

SUBJECT: Autopsy photos showing skin and hair pulled away from skull were necessary to demonstrate pathologist's testimony

HOLDING: Autopsy photos showing murder victim's hair and skin pulled away from her skull demonstrated forensic pathologist's testimony regarding his efforts to determine extent of injuries were properly admitted into evidence during his testimony. Victim had more than 50 stab wounds, and pathologist testified she also had bruises on her head not associated with any sharp force injuries, and that she also had a skull fracture. Photos in question illustrated this testimony, and trial court did not abuse its discretion in admitting them.

TITLE: Humphrey v. State
INDEX NO.: O.11.a.
CITE: (5-29-97), Ind., 680 N.E.2d 836
SUBJECT: Photograph of victim - during life
HOLDING: Picture of victim taken during life is marginally relevant in murder prosecution as proof that alleged victim is actually dead & was alive before date & time of alleged killing. However, picture of victim with his young child in this case smacks of victim impact evidence & is to be discouraged due to its possible emotional impact on jury. Kelley, 470 N.E.2d 1322. Although Tr. Ct. probably should have excluded this evidence under Indiana Evidence Rule 403, abuse of discretion or likelihood of prejudice was not sufficient to order new trial. Held, conviction affirmed.

RELATED CASES: Sauerheber, 698 N.E.2d 796 (pre-death photograph was relevant to show that D's denial & subsequent confession related to same murder with which he was charged); Butler, 647 N.E.2d 631 (autopsy photographs of victims were relevant under Rule 401, even where D offered to stipulate to circumstances surrounding murder, because photographs helped establish victims' identity & fact of death).

TITLE: Melendez v. State
INDEX NO.: O.11.a.
CITE: (8/20/87), Ind., 511 N.E.2d 454
SUBJECT: Photographs - surgical marks
HOLDING: Tr. Ct. did not err in admitting photographs of murder victim taken after doctors had performed surgery & sutured wounds in attempt to save victim's life. Photographs that show victim's body altered by attempts at resuscitation are inadmissible unless accompanied by testimony which differentiates wounds caused by physicians from those attributed to D. Romine 455 N.E.2d 911; Simpson 381 N.E.2d 1229. Here, D argues pictures are inadmissible because neither surgeon nor pathologist testified. D had stipulated to pathologist's report, & victim's nephew testified, pointing out wounds he observed before treatment had been rendered. Tr. Ct. excluded photograph depicting wound nephew could not identify. Held, no error in admission of photographs.

RELATED CASES: Pilarski, App., 635 N.E.2d 16 (Photo of victim hooked up to life support system admissible); Spinks 507 N.E.2d 567 (Crim L 438(6); surgical scars resulted from attempts to save victim's life after she was shot; testimony correlated gunshot wound with victim's death; held, no error in admission of photographs); Brown 448 N.E.2d 10 (Crim L 438(5); photographs showing covered with white powder for embalming did not show body in altered state).

TITLE: Mulligan v. State
INDEX NO.: O.11.a.
CITE: (1/27/86), Ind., 487 N.E.2d 1309
SUBJECT: Photographs - notations on back
HOLDING: Tr. Ct. erred in admitting photographs containing notation of another unrelated offense; however, because unrelated offense was minor offense (traffic violation) unlikely to weigh appreciably against D, reversal is not required. Haun 451 N.E.2d 1072. Here, officer wrote notations on photographs of D's car, including date & cause #, make & model of car & plate # (issued to different car) & discovery of property stolen from victim's home. Ct. finds notation re changed license plate raised implication of minor offense & was not limited in any way. However, it was not so prejudicial as to require reversal. Held, burglary convictions affirmed.

TITLE: Paige v. State
INDEX NO.: O.11.a.
CITE: (11/10/82), Ind., 441 N.E.2d 438
SUBJECT: Photographs - crime scene; cumulative
HOLDING: Admission of photographs is within sound discretion of Tr. Ct. Crane 380 N.E.2d 89. If photograph is material & relevant, fact it might inflame jury is not sufficient, standing alone, to justify its exclusion from evidence. Photographs of crime scene admissible even if cumulative of one another, if competent & relevant aids to understanding evidence & to orienting jurors to crime scene. Patterson 324 N.E.2d 482. Here, photographs corroborated testimony concerning location of shooting, impact on victim, victim's resting position & that objects carried by victim (half full beer bottles) were carried from bar to be consumed rather than as weapons. Held, no error.

RELATED CASES: Butler, 647 N.E.2d 631 (no error in admitting photographs of cadavers depicting multiple stab wounds & videotape of crime scene where victims were found); Wagner 474 N.E.2d 476 (although exhibits (picture of gun & latex casting material used to make footprint impressions) were somewhat repetitive & cumulative, they were not of such a prejudicial nature that their probative value was outweighed).

TITLE: Rogers v. State
INDEX NO.: O.11.a.
CITE: (4th Dist., 03-17-09), 902 N.E.2d 871 (Ind. Ct. App. 2009)
SUBJECT: CD copy of videotape surveillance admissible under silent witness theory
HOLDING: In theft prosecution, Tr. Ct. did not abuse its discretion in admitting evidence a compact disk of surveillance footage created by CVS store supervisor. D argued that State failed to lay proper foundation for admission of disc because supervisor admitted he left out portions of hard drive for relevant time period and that he never checked the CD against the hard drive. In order for substantive photographic evidence to be admitted to "speak for itself" under silent witness theory, there must be a strong showing of authenticity and competency. Edwards v. State, 762 N.E.2d 128 (Ind. Ct. App 2002). Here, disks and photographs introduced into evidence were admissible as duplicates of supervisor's original recording created by prosecutor's office pursuant to Ind. Evidence Rule 1001(4). Supervisor testified that he had viewed disk and agreed that it was a fair and accurate portrayal of disk he had created. He testified extensively regarding CVS's security system and procedure he used to view, edit, copy, and edit the footage. Although discs and photographs were redacted versions of original, there is no evidence that they were altered or changed. See Bergner v. State, 397 N.E.2d 1012, 1017 (Ind. Ct. App 1979).

Even if Tr. Ct. erred in admitting evidence, error was harmless. State presented evidence that D appeared to be hiding something and triggered the CVS store's alarm as he exited the store. Shortly thereafter, police officer discovered two bottles of whiskey and two bottles of perfume in D's possession. CVS employees identified the security sensors on the whiskey bottles as those used by CVS. Held, judgment affirmed.

TITLE: Roose v. State
INDEX NO.: O.11.a.
CITE: (2nd Dist., 02-11-93), Ind. App., 610 N.E.2d 256
SUBJECT: Photos of injured dog not prejudicially inadmissible
HOLDING: Admission of photos of injured dog in D's trial for criminal mischief & cruelty to animal was not error, as photos, although gruesome, assisted jury in determining extent of dog's injuries & understanding expert veterinarian's testimony. Ct. rejected D's argument that photos were unduly prejudicial because they tended to inflame & impassion jury against D. Admission of photos is matter of Tr. Ct. discretion, & they are generally admissible if they assist jury in understanding witness' testimony, Eddy, 496 N.E.2d 24. If photo is material & relevant, gruesomeness alone is not sufficient ground to exclude it from evidence, Green, 587 N.E.2d 1314, Fozzard, 518 N.E.2d 789. Neighbor of dog's owners identified two of photos as depicting dog's condition when he was dragged down street by D, & owner testified that other photos accurately represented dog's condition after he was injured. Veterinary assistant identified other pictures as accurately depicting dog's condition after being washed with antiseptic. Photos were not merely cumulative, as they depicted different aspects of dog's injuries & treatment. Although some were gruesome, they clearly aided jury in understanding dog's injuries & treatment.

RELATED CASES: Caley, App., 650 N.E.2d 54 (even assuming that photos of partially clad adult women were irrelevant & inadmissible, D opened door to their admission when he introduced into evidence a letter which referenced pictures).

TITLE: State v. Swinton
INDEX NO.: O.11.a.
CITE: 847 A.2d 921 (Conn. 2004)
SUBJECT: Admission of Computer-Enhanced Photos -- Testifying Expert's Knowledge of Process
HOLDING: Computer-enhanced photographs of bitemarks on murder victim that were digitally overlaid with impressions of D's teeth should not have been admitted because testifying expert did not have sufficient knowledge of process by which overlay was made. The reliability of both the photos themselves and the procedures involved in creating them must be established, and D must be afforded opportunity to cross-examine witness as to that procedure. Although the actual technician who created the overlay need not be available to testify, the expert who does testify in support of the photos and overlay must have sufficient knowledge of the procedure to afford adequate opportunity for cross-examination.

TITLE: Sutherlin v. State
INDEX NO.: O.11.a.
CITE: (2-26-03), Ind. App., 784 N.E.2d 971
SUBJECT: Computer generated photo array - admissible evidence
HOLDING: Tr. Ct. did not err in admitting computer-generated photo array, despite fact that it was not original array shown. State could not produce actual array that officer showed to eyewitness, & instead offered second computer-generated array containing same six photographs. D argued that second array was not original & was therefore inadmissible. Indiana Evidence Rule 1001(3) provides that if data are stored in computer or similar device, any printout or other output readable by sight, shown to reflect data accurately, is an original. Because D did not contend that second array did not accurately reflect data stored in computer, his argument failed. Held, judgment affirmed.

TITLE: Torres v. State
INDEX NO.: O.11.a.
CITE: (12/14/82), Ind., 442 N.E.2d 1021
SUBJECT: Photographs - silent witness theory
HOLDING: Silent witness theory (originated in Bergner, App., 397 N.E.2d 1012) permits admission of photographs at trial as substantive evidence rather than as merely demonstrative of witness testimony. Here, as in Bergner, victim's mother testified as to identity of persons in photograph, identified background in pictures as D's residence & approximated date photos taken. Expert testified photos were not altered or retouched. D contends photographs depicting sexual intercourse with victim are insufficient to support conviction without any supporting testimony or other evidence. No witness is required to testify that photograph is accurate representation of witness' observation. Photograph "speaks for itself." Held, evidence sufficient; conviction affirmed.

RELATED CASES: Shepherd, App., 690 N.E.2d 318 (videotape entered into evidence to illustrate witness's testimony was not offered as "silent witness" but as demonstrative evidence); Smith 491 N.E.2d 193 (case discusses distinction in foundation requirements for demonstrative & substantive evidence); Averhart 470 N.E.2d 666 (held, photographs taken by automatic camera during bank robbery properly authenticated/admitted).

O. EVIDENCE

O.11. Real/demonstrative evidence

O.11.b. X-rays

TITLE: Labelle v. State
INDEX NO.: O.11.b.
CITE: (3/7/90), Ind., 550 N.E.2d 752
SUBJECT: X-ray - foundation
HOLDING: Tr. Ct. did not err in allowing shooting victim to lay foundation for admission of x-ray of his head & neck. D was convicted of attempted murder, & evidence showed that D had shot victim in neck, where bullet remained lodged. During victim's testimony, state offered x-ray of victim's head & neck, & Tr. Ct. admitted it based on foundation laid by victim. On appeal, D argues that lay witness cannot lay proper foundation for admission of x-ray. Foundation necessary for admission of photographic evidence, including x-rays, is testimony by witness that picture is true & accurate representation of evidence portrayed. Shelton 490 N.E.2d 738. Most x-rays are authenticated by physician or x-ray technician who testifies that x-ray being offered truly & accurately depicts internal structure of particular person. Here, victim testified to location of bullets, & further testified that he has artificial eye held in place by gold orb & that he was wearing neck brace made partially of metal when x-ray was taken, & he pointed to places on x-ray indicating presence of foreign objects in those locations. While it is true that generally lay witnesses will not be sufficiently acquainted with infrastructure of their anatomy to be able to confirm x-ray as true & accurate depiction of that infrastructure, victim, here, was able to do so due to foreign objects shown. Testimony as to time & location of x-ray matched information on x-ray label. Victim also properly testified that x-ray being offered in Ct. looked like one he was shown right after being x-rayed. Tr. Ct. did not abuse discretion in allowing this lay witness to provide foundation for admission of x-ray. Held, conviction affirmed.

TITLE: Lewis v. State
INDEX NO.: O.11.b.
CITE: (6-28-00), Ind., 730 N.E.2d 686
SUBJECT: X-ray - sufficient foundation
HOLDING: Tr. Ct. did not abuse its discretion in finding that x-ray was properly authenticated. Evidence Rule 901(a) provides that requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support finding that matter in question is what its proponent claims. Rule does not alter requirement that sponsoring witness must establish that x-ray is true & accurate representation of evidence portrayed. LaBelle, 550 N.E.2d 752. Here, as in LaBelle, there is much, if not more, evidence that x-ray exhibit was what sponsoring witness claimed it to be. X-ray bore D's name, hospital, & date on which it was taken. Each of these items was corroborated by witness who testified that he was present at taking of x-ray, had placed standard in x-ray, & had identified that standard in exhibit. Held, judgment affirmed.

TITLE: Meisberger v. State
INDEX NO.: O.11.b.
CITE: (9/26/94), Ind. App., 640 N.E.2d 716
SUBJECT: Using unauthenticated x-rays to identify body
HOLDING: Tr. Ct. did not err in permitting dentist to identify decomposed body as that of victim by comparing teeth of body with dental x-rays which were never properly authenticated. Absent some question as to accuracy of dentist's identification, it was competent for dentist to rely on hearsay information, which consisted of unauthenticated dental x-rays. Ordinarily, it is proper for expert to rely upon reports & results obtained by another expert & to offer opinion based upon those reports. Documents relied upon need not be admitted. Lockhart, 609 N.E.2d 1093. Hearsay evidence customarily relied upon by expert in the practice of his profession may be admitted & relied upon as legitimate accumulation of that expert's knowledge. Bixler, 471 N.E.2d 1093. When factual content of medical report is admitted in conjunction with detailed findings of witness who has performed autopsy as basis for his own medical conclusions, testimony reflecting that content is not hearsay. Wilber, Ind., 460 N.E.2d 142.

Moreover, Court noted that the x-rays need not have been admitted into evidence to ensure that D was not deprived meaningful opportunity to cross-examine the expert witness. Best evidence available to trier of fact is not x-rays themselves but testimony of expert skilled in interpretation. Pinkerton, 283 N.E.2d 376. D is entitled to examine films for purposes of cross- examination or to enable his own expert witness to offer his opinion, if different from that of State's witness. Id. Held, no error.

O. EVIDENCE

O.11. Real/demonstrative evidence

O.11.c. Motion pictures/video

TITLE: Bickford v. State
INDEX NO.: O.11.c.
CITE: (2/13/2015), 25 N.E.3d 1275 (Ind. Ct. App 2015)
SUBJECT: Restitution to horse rescue shelter affirmed despite no "impoundment"
HOLDING: In animal cruelty prosecution, Tr. Ct. did not abuse its discretion in ordering D to pay $692 in restitution to horse rescue organization. Ind. Code § 35-46-3-6 provides that, if owner of an impounded animal is convicted of animal cruelty, he or she shall reimburse the animal shelter for the expense of the animal's care and keeping. Because D voluntarily surrendered her horses to the shelter without any possibility of return, they were not "impounded," thus Tr. Ct. could not order her to pay restitution under the animal cruelty statute. However, restitution was nevertheless proper under Indiana's general restitution statute (Ind. Code § 45-50-5-3(a)), as the horse rescue organization incurred costs for care of the horses as a result of D's neglect. As a result, the shelter can be considered a "victim" under the statute. Held, judgment affirmed.

TITLE: Desjardines v. State
INDEX NO.: O.11.c.
CITE: (12-6-01), Ind., 759 N.E.2d 1036
SUBJECT: Videotape evidence - doctrine of completeness
HOLDING: All modes of conveying information, including videotapes, constitute writings or recordings & fall within scope of Indiana Rule of Evidence 106 & doctrine of completeness. Rule 106 provides that if party introduces a part of writing or recorded statement & fairness requires that additional portions of it be introduced, then adverse party may require that additional parts be admitted. Evans v. State, 643 N.E.2d 877 (Ind. 1994). Completeness doctrine is independent of medium & applies to any mode of conveying information. Here, in child molesting prosecution, D argued that once State showed several minutes of videotape showing D committing offenses, he then should have been allowed to show remaining four hours of videotape to jury. Although Rule 106 was applicable to videotapes, D failed to demonstrate relevance of excluded portions. Thus, Tr. Ct. did not commit reversible error in denying D's request to play videotapes in their entirety. Held, transfer granted, opinion of Ct. App. at 751 N.E.2d 323 on all other issues summarily affirmed.

RELATED CASES: Lewis, App., 754 N.E.2d 603 (Tr. Ct. did not err in admitting testimony regarding only part of videotape because admitted portion clearly conveyed D's denial of crime & not admitting entire videotape did not distort D's version or otherwise exclude substantial exculpatory information).

TITLE: Flowers v. State

INDEX NO.: O.11.c.

CITE: 154 N.E.3d 854 (Ind. Ct. App. 2020) (09/23/2020)

SUBJECT: Police officer's testimony sufficient to admit surveillance video under silent witness theory

HOLDING: In murder prosecution, trial court did not abuse its discretion in admitting apartment complex's video surveillance footage as well as police sergeant's testimony about the videos. The surveillance footage was admissible as substantive rather than merely demonstrative evidence under the silent witness theory, which holds that the trial court must be persuaded of the authenticity and competency of the evidence by relative certainty. As in McAllister v. State, 91 N.E.3d 554 (Ind. 2018), the police officer testified about what he knew regarding the security cameras at the apartment complex where he worked part-time security, and his testimony provided sufficient grounds to admit the surveillance video. The officer's opinion testimony regarding the contents and identity of the person in the video was not an abuse of discretion because Defendant opened the door to the testimony when cross-examining the police officer. Although Defendant filed pro se motions for speedy trial while represented by counsel, the trial court did not abuse its discretion by taking no action on the pro se pleadings and in granting the State's motion for continuance because defense counsel did not object to the motion and stated that significant investigation was needed to prepare for trial. Distinguishing Iltzch v. State, 972 N.E.2d 409 (Ind.Ct.App. 2012), the Court also found no abuse of discretion in ordering Defendant to pay $5,000 in restitution to the victim's family for his funeral expenses. Lastly, the Court rejected Defendant's appropriateness challenge to his aggregate 85-year sentence based on the nature of the offense (shooting victim in the fact at a party) and his character.

RELATED CASES: Stott, 174 N.E.3d 236 (Ind. Ct. App. 2021) (State did not satisfy the silent-witness theory's foundation for admitting cellphone photographs of restaurant surveillance footage; see full review, this section).

TITLE: Hamilton v. State

INDEX NO.: O.11.c.

CITE: (02/28/2022), 182 N.E.3d 936

SUBJECT: Homeowner's testimony about the copy of a surveillance video was sufficient to establish authenticity and Defendant was unable to show admission of copy of surveillance video was unfair.

HOLDING: Homeowner checked his surveillance camera and saw an unknown man enter his house and leave with a B.B. gun. Homeowner copied the surveillance video on his phone, put it on his computer and then put it on a memory stick and gave it to police. Police viewed the video and recognized Defendant who was arrested and charged with burglary. At the bench trial State's Exhibit 1, a copy of the surveillance video made by someone using a hand-held video-recording device to record a playback of the video on a screen was admitted into evidence over objection. Defendant objected to the video under IRE 1002, the best evidence rule, and argued the recording of the video cropped out the time and date stamp and did not fully show the edges of the video and that the recording of the video was poor quality, and that an original is required to prove content unless a rule of evidence or statute provides otherwise. The Court of Appeals first noted the exhibit was admissible under IRE 1003 which provides that a duplicate is admissible unless a genuine question is raised about the authenticity or circumstances making it unfair to admit the duplicate and here Defendant had not shown that its admission was unfair. Also, the Court of Appeals found the testimony of the homeowners regarding the video sufficient to provide authenticity to a relative certainly which is the standard for the video to be admitted under the silent witness theory IRE 901 (b)(9).

TITLE: Lamotte v. State
INDEX NO.: O.11.c.
CITE: (7/31/86), Ind., 495 N.E.2d 729
SUBJECT: Videotapes - admissibility
HOLDING: Tr. Ct. did not abuse discretion by admitting videotape of crime scene, depicting D's route of travel after attack upon victim. Videotape of event which corroborates testimony of state's witness is relevant & admissible as evidence at trial. Newland 459 N.E.2d 384. Here, Ct. analogizes videotape to photographic evidence of crime scene. Ct. rejects D's objection that videotape was inadmissible because not contemporaneously made, finding videotape was not offered as representation of crime scene as it existed at time of attack. Ct. finds videotape did not contradict D's testimony concerning particular path he traveled in leaving crime scene. Held, no error.

RELATED CASES: Timberlake, App., 679 N.E.2d 1337 (no error in admitting surveillance videotape of robbery; tape was relevant because it depicted scene which witness had described verbally); Ross, App., 665 N.E.2d 599 (no error in admitting videotape outlining general procedures utilized in DNA analysis; tape was offered & properly admitted as demonstrative evidence); Davis, App., 635 N.E.2d 1117 (It was not error to admit silent videotape of crime scene, taken when victim's body was discovered more than month after death, because it could not be said that prejudicial effect of tape outweighed its probative value).

TITLE: Lee v. State
INDEX NO.: O.11.c.
CITE: (8/3/88), Ind., 526 N.E.2d 963
SUBJECT: Videotape - recording of crime scene
HOLDING: Tr. Ct. did not err in admitting into evidence videotape recording of crime scene, with narration by police officer. On appeal, D argues first that Tr. Ct. should have previewed the tape before admitting it. However, because D's objections did not go to any particular content of tape, it was not necessary for Tr. Ct. to view tape before ruling on them. Larimer 326 N.E.2d 277. Next, D argues that allowing narration into evidence was improper, since D could not cross-examine tape. However, narrating officer made no remarks which would not have been proper had they been made in person in Ct. Further, he was on witness stand when tape was admitted & was available for cross-examination by D. Finally, D argues that Tr. Ct. erred in denying D's instruction to jury to disregard tape because it was designed to inflame & was full of narrating officer's opinions & conclusions. Narration made reference to "double murder" & unidentified voice asked that flashlight be directed to pool of blood. Neither of these references should have inflamed jury seated in murder case. As for any conclusions or opinions contained in narration, opportunity to cross-examine narrating officer was sufficient to address this. Held, conviction affirmed. DeBruler, J., DISSENTS, arguing that foundation was lacking. There was no evidence that videotape, filming of which is controlled by subjective judgments of camera person, was fair & accurate representation of crime scene. Further, State had burden of showing that narration contained only relevant & admissible statement.

TITLE: Meisberger v. State
INDEX NO.: O.11.c.
CITE: (1st Dist., 09-26-94), Ind. App., 640 N.E.2d 716
SUBJECT: Autopsy videotape admissible
HOLDING: Although jury should not have been allowed to view portion of autopsy videotape where doctor was attempting to remove fluid from remains of brain, or portion where maggots were infesting body because both portions had greater prejudicial impact than probative value; Tr. Ct. did not abuse discretion in allowing entire videotape, because other portions had highly probative value. Videotape was admitted over objection during testimony of evidence technician & was also used during pathologist's testimony. Tape showed pathologist attempting to remove decedent's clothing from area of his chest, depiction of damage to skull, & scenes mentioned above. As general rule, standards applicable to photos apply to videotape, & to exclude either, D must show improper influence on jury outweighs probative value. Ind. case law stresses difference between photos showing victim in natural state following death & those showing body after alteration by autopsy. Autopsy photos are not admissible if they show body in altered state & don't tend to prove or disprove material fact in issue. Test for determining relevance is whether witness would be permitted to verbally describe what is depicted. Here, portions showing pathologist's actions had no tendency to prove any material fact. Additionally, although there was testimony about maggot infestation, witness would not have been allowed to testify in graphic detail shown in videotape. Therefore both parts of tape should have been excised. Ct. found, however, that because much of tape was either unobjectionable because it depicted body without alteration or contained evidence relevant to accidental or unintended killing, admission of entire videotape was not abuse of discretion. Held, conviction affirmed.

TITLE: Shepherd v. State
INDEX NO.: O.11.c.
CITE: (12/29/97), Ind. App., 690 N.E.2d 318
SUBJECT: Admission of videotape
HOLDING: In prosecution for OWI resulting in death, D claimed Tr. Ct. erred in admitting videotape of accident scene because State failed to show that tape had not been altered in any way or that portions of tape had not been deleted. Foundation for admissibility of photographs offered as substantive evidence, as opposed to demonstrative evidence, under Asilent witness" theory require strong showing of authenticity & competency including proof that photographs have not been altered in any way. Berger, App., 397 N.E.2d 1012. This standard is applied in situations where there is no one who can testify as to photo's accuracy & authenticity because photograph must "speak for itself" & because such "silent witnesses" cannot be cross-examined. Id.

D claimed videotape was being used as silent witness & thus, standard for admission for substantive evidence applies. Ct. disagreed, holding that videotape was offered as demonstrative evidence. Photographs introduced in conjunction with testimony are admitted not as direct evidence of the scene depicted, but to assist jury in visualizing testimony of witness. State Through Highway Dept. v. Snyder, 594 N.E.2d 783. Demonstrative evidence is evidence offered for purpose of illustration & clarification. Underly v. Advance Mach. Co., App., 605 N.E.2d 186.

Here, videotape was shown to jury to illustrate testimony of witness. Based on what videotape illustrated, witness testified about his personal observations of accident scene & explained his theory of how accident occurred. Photographs offered as demonstrative evidence are admissible when it can be shown that they are true & accurate representation of scene which they purport to represent. To be admissible, demonstrative evidence need only be sufficiently explanatory or illustrative of relevant testimony to be of potential help to trier of fact. Stuckman, 506 N.E.2d 1079. Witness testified that videotape was accurate depiction of accident scene as it existed while it was being taped. Held, no abuse of discretion.

RELATED CASES: Sheckles, 24 N.E.3d 978 (Ind. Ct. App 2015) (the line of cases that allows the admission of photographs and videos as substantive evidence under the silent witness theory was not overruled by Crawford v. Washington); Mays, App., 907 N.E.2d 128 (video of drug transaction was admissible under "silent witness" theory even without testimony of CI that video accurately represents what occurred; there only need be shown evidence on how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera); Pritchard, App., 810 N.E.2d 758 (no error in admitting testimony of two prison officials regarding what they saw in a video recording that was later destroyed; not hearsay because testimony merely recounted what they saw in recording; "silent witness theory."

TITLE: Stanage v. State
INDEX NO.: O.11.c.
CITE: (3rd Dist., 12-13-96), Ind. App., 674 N.E.2d 214
SUBJECT: Redaction of videotaped interview - doctrine of completeness
HOLDING: Tr. Ct. did not err in allowing only portions of D's videotaped interview to be admitted into evidence. During his testimony, D denied making various incriminating statements to police. On rebuttal, State moved to admit portions of his videotape as impeachment evidence. Tr. Ct. allowed portions of videotape to be played to jury, but excluded portions it determined were prejudicial to D. Under doctrine of completeness, when one party seeks to admit portion of document or recorded statement into evidence, opposing party can place remainder of statement into evidence. Evans, 643 N.E.2d 877, *reh. denied*; Indiana Evidence Rule 106. However, immaterial, irrelevant or prejudicial material must be redacted from portions of statement that are admitted. Evans. Here, Tr. Ct. properly determined that omitted portions of videotape were prejudicial to D because they contained statements concerning prior bad acts committed by him. Held, no error.

TITLE: State v. Blank
INDEX NO.: O.11.c.
CITE: 955 So.2d 90 (La. 2007)
SUBJECT: Video of polygraph should have been admitted in relation to coercion
HOLDING: Louisiana Supreme Court held that a general rule barring the admission of references to polygraph examinations of witnesses should not have precluded a criminal D from presenting a videotape of a polygraph exam to prove that a post-exam confession was involuntary. D was questioned about a series of burglaries and murders for a few hours before agreeing to take a polygraph test. The test took about two and one-half hours. The examiner and other officers then used results of the test to elicit confessions over the next six hours. At his murder trial, D sought to introduce videotaped recordings of all the questioning to show that his incriminating statements were coerced. The Tr. Ct. let in videotapes of the other questioning, but excluded the polygraph questioning. State agreed with courts from other jurisdictions that have rejected contentions that interrogation based on polygraph results is necessarily coercive, but decided D's statutory right to insist on admission of the entire videotape of a confession was violated when the exam portion was removed for the jury. Also, the Tr. Ct. should have allowed D to question the examiner regarding the circumstances leading to his confession even if doing so meant the jury would learn D was given a polygraph exam.

TITLE: Stott v. State

INDEX NO.: O.11.c.

CITE: 174 N.E.3d 236 (Ind. Ct. App. 2021) 8/13/2021

SUBJECT: Erroneous admission of radio traffic recording and surveillance footage - hearsay and insufficient authentication

HOLDING: In resisting law enforcement prosecution, trial court abused its discretion in admitting an audio recording of police-officer radio traffic that began after the truck fled the traffic stop, in which anonymous witnesses spoke with law enforcement, and police officer's cellphone photographs of a restaurant's surveillance footage. Law enforcement officers were surveying an area of Indianapolis due to a "recent uptick in violence" when they saw an exchange of a handgun between two drivers at a local gas station. Officers followed the vehicles as they left to an apartment and then to a McDonald's, where the officers stopped to watch them. Eventually they conducted a traffic stop when one of the vehicles turned left with its right turn signal on. The car stopped but sped off and later crashed into a tree, with two men running out of the vehicle, including Defendant. An officer viewed the McDonald's surveillance footage, taking several pictures of the video on a cellphone. He "believed" that a man depicted in the footage, who appeared to be wearing an all-denim outfit like the driver, was Defendant. That belief was based on a picture of Defendant the officer had previously received via "an e-mail communication."

Court of Appeals held that the radio traffic audio recording constituted inadmissible hearsay and State failed to demonstrate that the present sense impression hearsay exception applied. It was unclear whether the witnesses made the statements to police during or immediately after the events described or whether the witnesses personally perceived those events. And at least one anonymous declarant had time to deliberate. These circumstances distinguish the police-radio evidence here from the properly admitted hearsay evidence in the cases relied on by the State.

Further, the State did not satisfy the silent-witness theory's requirement on the issue of the admitted cellphone photographs of the McDonald's surveillance footage. The State here did not produce any evidence about the McDonald's security system or how it operated. Noting that it is "increasingly easier in today's digital age to manipulate or distort images," Court reiterated "that it is the proponent's burden to establish the strong showing of authenticity and competency for the admissibility of photographs used as substantive evidence under the silent-witness theory. The State did not do so here." Error in admission of these two pieces of evidence was not harmless, as the identity of the all-denim-wearing driver of truck was the critical issue in this case. Thus Court reversed and remanded for a new trial.

O. EVIDENCE

O.11. Real/demonstrative evidence

O.11.d. Sound recordings

TITLE: Bryan v. State
INDEX NO.: O.11.d.
CITE: (6/28/83), Ind., 450 N.E.2d 53
SUBJECT: Sound recordings - transcript to jury
HOLDING: Permitting jury to read transcript of substance of recorded conversation while they listened to tape was not error where D failed to demonstrate prejudice, jury was instructed to ignore transcript & rely on tape in case of doubt as to accuracy, jury was instructed that transcript was not in evidence & transcript was not permitted into jury room during deliberations. US v. McMillan (CA8 1974), 508 F.2d 101 details standards for use of transcripts of tape recordings. These standards were adopted in Duncanson, App., 391 N.E.2d 1157. Here, D contends allowing jury to read transcript was error because its accuracy was not verified, as required in McMillan. D's failure to identify statements in transcripts that differ from tape plus Tr. Ct.'s admonitions to jury render error harmless. Held, conviction affirmed.

RELATED CASES: Romo, 943 N.E. 2d 504 (Ind. 2011) (written English translations of audio recordings of three drug transactions conducted in Spanish were admissible as substantive evidence, not merely to help jury understand inaudible portions of recording); Small, 736 N.E.2d 742 (Tr. Ct. erred in admitting transcript as exhibit as opposed to serving only as aid to jury in interpreting inaudible or indistinct portions of tape-recorded statement).

TITLE: Bryan v. State
INDEX NO.: O.11.d.
CITE: (6/28/83), Ind., 450 N.E.2d 53
SUBJECT: Sound recordings - foundation
HOLDING: Tr. Ct. did not err in admitting tape recording where voices were distinguishable from background noise. Lamar 282 N.E.2d 795 sets forth 5 foundation requirements. (1) Authentic/correct; (2) testimony elicited was freely/voluntarily made; (3) all required warnings were given, all necessary acknowledgements/waivers were knowingly/intelligently given; (4) includes no matter otherwise inadmissible; (5) clear/intelligible enlightening to jury. Here, D challenges 2, 3, 5. Ct. holds tape clear. Requirements 2 & 3 apply only when tape recording is of a statement by accused made during custodial interrogation requiring Miranda warnings. Winningham 432 N.E.2d 24. Tape recordings were of D's telephone conversations with police concerning location of body. Conversations occurred prior to taking D into custody, thus no warnings were required. Held, no error.

RELATED CASES: Hall, App., 897 N.E.2d 979 (although challenged recording was not of perfect sound quality, it was of sufficient quality that jury was not likely to have speculated about its contents); Benavides, App., 808 N.E.2d 708 (Tr. Ct. did not err in admitting into evidence the audiotape of robbery victim's 911 call, even though portions of call were unintelligible); Lahr, App., 640 N.E.2d 756 (error in admitting tape recording of D's conversation with informant harmless because additional testimony corroborated informant's story); Hobson 471 N.E.2d 281 (no error in admission of tape of police radio/telephone transmissions despite unintelligible background voice); Landers 464 N.E.2d 912 (where adequacy of advisement is not in dispute, an express waiver is made; where D fails to show that waiver was not voluntary/intelligent, statement is deemed voluntary); Schoffstall, App., 488 N.E.2d 349 (no error in admitting D's tape recorded statement, despite fact it was largely inaudible; D has burden of showing inaudible portions contained crucial remarks contradicting/changing nature of conversation).

TITLE: Hennings v. State
INDEX NO.: O.11.d.
CITE: (1/12/89), Ind., 532 N.E.2d 614
SUBJECT: 911 tape
HOLDING: Admission of 911 tape of victim's description of her attacker in rape prosecution was not error where D set up consent as defense, & both description, & emotional state of victim, were pertinent & 911 tape carried substantial degree of reliability as to those facts. Affirmed.

RELATED CASES: Porter, App., 700 N.E.2d 805 (tape of 911 call made by victim from her home while burglary was in progress was properly admitted under "excited utterance" exception to hearsay rule; see card at O.9.c.2); Young, 696 N.E.2d 386 (circumstantial evidence sufficient for authentication where authorities responding to 911 call confirm substantive portions of events heard during call); King 540 N.E.2d 1204 (911 tape, on which sexual attack for which D was charged was audible, was admissible at trial); Atkins, App., 499 N.E.2d 1180 (recording is not admissible unless voices contained therein are identified; circumstantial evidence may be used for identification purposes).

TITLE: Hunt v. State
INDEX NO.: O.11.d.
CITE: (2/23/84), Ind., 459 N.E.2d 730
SUBJECT: Sound recordings - audio portion of videotape
HOLDING: Tr. Ct. did not err in admitting videotape & excluding simultaneously recorded audio portion which was inaudible & thus inadmissible under standards established in Lamar 282 N.E.2d 795. Here, D urges Ct. to adopt less restrictive standard where audio tapes are recorded simultaneously with videotapes. D contends such audio tapes should be admissible if at all distinguishable & tending to make video more understandable. Tr. Cts. have discretion to determine audibility. Winningham 432 N.E.2d 24; Lamar. An inaudible tape cannot be "intelligible & enlightening to jury" (Lamar). An inaudible tape would not even meet D's proposed standard. Ct. notes D failed to provide tapes for review. Held, no abuse of discretion.

RELATED CASES: Grimes, App., 633 N.E.2d 262 (Decision discusses admissibility of audio & video tapes, & use of unadmitted transcript of tape. Police officer's verification of accuracy of tapes was sufficient for admission because he was present to monitor & partially observe transactions involved); Roller, App., 602 N.E.2d 165 (Audio tape was of insufficient quality to be admissible, but although it was error to admit tape, error was harmless. Decision contains extensive discussion of standard of review of admissibility of audio tapes, with considerable case law citation & is recommended as summary of law in this area).

TITLE: Lee v. State
INDEX NO.: O.11.d.
CITE: (4th Dist, 11-16-09), (Ind. App. 2009) 916 N.E.2d 706
SUBJECT: Authentication - taped jail phone call
HOLDING: Tr. Ct. did not abuse its discretion by admitting taped telephone calls made by D from the jail to the victim. Indiana Evidence Rule 901(a) provides that the requirement of identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent clams. Evidence Rule 901(b)(6) provides that telephone conversations can be identified "by evidence that a call was made to the number assigned at the time by the telephone company to a particular person' if' circumstances, including self-identification, show the person answering to be the one called'." Evidence Rule 901(b)(5) provides for admission of "identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker."

Here, in trial for invasion of privacy, Tr. Ct. permitted State to introduce taped telephone conversations between D from jail and the victim to show D violated the protective order. The investigating detective learned of the phone number from which a 911 call in the case originated. He called the number, and a woman identified herself as the victim. She gave the names and birth dates of her children and discussed the case. The investigator could testify on the basis of his familiarity with the victim=s voice that she was the person whom D called from the jail. Moreover, the investigator=s calling the number which initiated the 911 call was the functional equivalent of establishing that it was the number assigned at the time by the telephone company to the victim. Thus, State properly identified the phone calls as between the victim and D. Held, judgment affirmed.

TITLE: McCollum v. State
INDEX NO.: O.11.d.
CITE: (12/12/91), Ind., 582 N.E.2d 804
SUBJECT: Sound recordings in non-custodial setting - foundation
HOLDING: Tr. Ct. did not err in admitting tape-recorded phone conversation between D & witness during drug transaction. Foundational requirements for admission of tape recording made in non-custodial setting are: 1) that recording is authentic & correct; 2) that it does not contain inadmissible evidence; and 3) that it be of such clarity as to be intelligible & enlightening to jury. Cf. Freeman, 541 N.E.2d 533. Tr. Ct. has wide discretion in determining whether these criteria have been met. Hobson, 471 N.E.2d 281.

In this case, sufficient foundation was laid. Witness testified that he listened to recording & that it was true & accurate recording of his conversation. Recording did not contain any otherwise inadmissible evidence, nor was there any problem with its clarity. Ct. also rejected D's chain of custody argument, stating that no such requirement existed for admission of tape recordings. Held, tape recording properly admitted.

RELATED CASES: Higgason, 210 N.E.3d 868 (Ind. Ct. App. 2023) (digitized recording of cassette tapes recording a 1998 phone call between D and an accomplice met the foundational requirements of McCollum and were properly admitted under the best evidence rule when the accomplice testified the digitized recording accurately reflected the contents of his calls with a second party he testified was D); Coleman, 750 N.E.2d 370 (standard of quality expected of recording in interrogation room cannot be used to judge recording of person wearing wire transmitter).

TITLE: Reed v. State
INDEX NO.: O.11.d.
CITE: (4/7/86), Ind., 491 N.E.2d 182
SUBJECT: Sound recordings - establishing identity of speaker
HOLDING: Tr. Ct. did not err in admitting into evidence transcript of telephone conversation allegedly occurring between D & insurance company representative. D contends state did not lay sufficient foundation to identify him as one of the speakers. Identity of declarant in telephone conversation may be established by circumstantial evidence. [Citations omitted.] Proof may take form of testimony that witness is familiar with D's voice & that caller was D. Or authentication may be accomplished by circumstantial evidence pointing to D's identity as caller, i.e., communication reveals speaker had knowledge of facts only D would likely know. McCormick Evidence Section 226 (3d ed. 1984). Ct. finds transcript reveals speaker knew D's address, telephone number, social security number, & reported theft of truck, along with details & features, all of which D would have known. Held, no error.

RELATED CASES: Motley, App., 860 N.E.2d 1264 (officer's two brief conversations with D, along with remarks during the telephone conversation referring to D's name & nickname & circumstances of the crime, was sufficient to establish identity of D as caller); Resnover 460 N.E.2d 922 (Tr. Ct. properly allowed witness to testify re identity of speakers & explain jargon/radio codes).

TITLE: Romo v. State

INDEX NO.: O.11.d.

CITE: (02-09-11), 941 N.E.2d 504 (Ind. 2011)

SUBJECT: Playing foreign language recording for jury

HOLDING: In an issue of first impression, Court found no abuse of discretion in Tr. Ct.'s refusal to play audio recordings of three drug transactions conducted solely in Spanish, because D failed to explain why playing the recording would "provide discernable, relevant evidence" and also conceded at trial that he did not "see any point" in playing the Spanish audio tape. However, in exercise of its general supervisory authority, Court held that "it is generally the better practice to play . . . foreign language recordings to the jury upon a reasonable request by a party" because jurors who only understand English may nevertheless be able to reliably interpret oral demeanor, tone, inflection, hesitation, enthusiasm, reluctance, submission, etc." "We are not persuaded that such discernable clues regarding demeanor, which could be significant in individual cases, are necessarily impervious to listeners who do not understand the language spoken. This consideration would be particularly relevant if we were considering a video recording of statements made in a foreign language." But see United States v. Grajales-Montoya, 117 F.3d 356, 367 (8th Cir. 1997) and United States v. Estrada, 256 F.3d 466, 473 (7th Cir. 2001).

Here, even though Tr. Ct. refused to play the foreign language recording, it correctly admitted English transcript translations of the drug transactions. Nonetheless, under different circumstances, playing the audio tape could have helped the jury gauge the demeanor of the participants in the drug transaction. Held, transfer granted, Court of Appeals' opinion at 929 N.E.2d 805 vacated, judgment affirmed.

TITLE: Tingle v. State
INDEX NO.: O.11.d.
CITE: (4/5/94), Ind., 632 N.E.2d 345
SUBJECT: Sound recordings
HOLDING: D claimed that Tr. Ct. erred in admitting his tape-recorded confession absent proper foundation. D did not challenge tape's clarity but argued that tape and its transcript were not shown to be authentic & correct. In Bryan, 632 N.E.2d 355, Court held that where accuracy is issue, person who prepared transcript must testify to verify that transcript is accurate recital of recorded conversation. Although detective testified that transcript & tape were not identical, he nevertheless indicated that recording was authentic & that he had reviewed transcript & found it to be accurate, & that transcript was not identical to tape only where portions were inaudible. Ct. noted that accuracy was not real issue in case. Moreover, jury was instructed to disregard transcript & focus on tape in case of any discrepancies. Finally, D pointed to no specific inaccuracies or prejudice flowing therefrom. Held, no error.

TITLE: Wade v. State
INDEX NO.: O.11.d.
CITE: (4/3/86), Ind., 490 N.E.2d 1097
SUBJECT: Sound recordings - best evidence
HOLDING: Tr. Ct. did not err in allowing state to read redacted version of his first statement & then play tape recorded versions of second & third statement. Here, D contends such inconsistency inherently imparted to jury they were not hearing all of first statement. Best evidence of conversation is clearly audible tape recording of it. Duncanson, App., 391 N.E.2d 1157. Exceptions exist to rule: (1) recording is lost, Boyd 430 N.E.2d 1146 (transcript may be read to jury in lieu of playing tape recording if accuracy of transcript is established); & (2) where tape must be redacted. Ct. finds D testified transcript was accurate representation of recorded statement, as did police officer. Held, no error.

RELATED CASES: Lawson, App., 619 N.E.2d 964 (Although CI wore recording device when dealing with D & original of tape recording was available, it was not error to admit copy of tape that had been edited. Original tape contained other extraneous matters, including social conversations, & officers testified that entire conversation between CI & D was transferred to copy & was not edited. D did not contend that any discrepancies existed between original & copy of tape).

TITLE: Young v. State
INDEX NO.: O.11.d.
CITE: (6/29/98), Ind., 696 N.E.2d 386
SUBJECT: Authentication - sound recording; 911 call
HOLDING: D claimed Tr. Ct. erred in admitting recorded 911 call because call was not properly authenticated under IRE 901. Generally, identities of both parties must be authenticated before admitting a telephone call. King, 560 N.E.2d 491. Caller's identity can be established by circumstantial evidence & need not be proven beyond reasonable doubt. Lock, 567 N.E.2d 1155. Call to 911 system may not always require such authentication where reason of submitting it as evidence is not to establish identification of caller. State submitted evidence in this case largely to demonstrate where call originated & how police discovered crime scene. Court found that foundation was adequate for this purpose.

Identity of victim as caller was established by several circumstances surrounding call. Dispatcher testified that he received non-responsive call on October 23, 1995. Caller identification equipment listed victim's name, phone number, & address. Dispatcher then dialed that number & woman answered. Voice frantically screamed something about her children & name "Tracey." Dispatcher also heard man's voice & breaking glass. When police arrived moments later, they found three victims, including caller victim, and glass on front door. Considering this evidence, Court concluded that State sufficiently authenticated fact that victim caller was woman who answered phone. Held, no error.

RELATED CASES: Thomas, 734 N.E.2d 572 (although Tr. Ct.'s reliance on D's pretrial admission that voice on recording was his own was improper for purposes of authenticating recording, circumstantial evidence established D's identity & was sufficient to authenticate recording).

O. EVIDENCE

O.11. Real/demonstrative evidence

O.11.e. Demonstrations

TITLE: Andrews v. State

INDEX NO.: O.11.e.

CITE: 811 A.2d 282 (Md. 2002)

SUBJECT: Foundation for Doll Demonstration of Shaken Baby Syndrome

HOLDING: Before state's expert witness uses doll to demonstrate shaken baby syndrome and testify on basis of that demonstration, state must first establish demonstration's substantial similarity to event at issue. Tr. Ct. ruled that differences between demonstration and event went only to weight of testimony, but Maryland S.Ct. holds that there must be "ample evidence" of similarity before demonstration is allowed. Defense was able to cross-examine expert on differences between doll and infant victim, but Court holds that cross-examination is not a substitute for the offering party's burden of showing that a proffered demonstration or experiment offers a fair comparison to the contested events.

TITLE: Andrews v. State
INDEX NO.: O.11.e.
CITE: (1/17/89), Ind., 532 N.E.2d 1159
SUBJECT: Courtroom demonstration
HOLDING: Tr. Ct. did not err in permitting State to use chart showing dates necessary to prove his prior convictions as aid during final argument in habitual offender portion of trial. Tr. Ct. is vested with discretion to control final arguments. Jenkins, 335 N.E.2d 215. Courtroom demonstrations are admissible subject to Tr. Ct.'s sound discretion. Van Orden, 469 N.E.2d 1153. Absent abuse of discretion, Tr. Ct.'s ruling regarding final argument will not be disturbed. Newland, 459 N.E.2d 384.

Charts & diagrams may be received into evidence after laying proper foundation, if fact to be evidenced by chart or diagram is itself otherwise relevant, material & competent. Jenkins. Use of chart here is similar to use of blackboard, which has been approved. Powers, App., 211 N.E.2d 781; Edwards, App., 130 N.E.2d 91. Thus, use of admitted evidence in different forms during summation has been permitted for demonstrative purposes. Held, no error.

TITLE: Lambert v. State
INDEX NO.: O.11.e.
CITE: (12/6/94), Ind., 643 N.E.2d 349
SUBJECT: Allowing courtroom demonstrations - Factors to consider
HOLDING: In determining whether to allow demonstration, Tr. Ct. should consider: 1) ability to preserve record of demonstration for appeal purposes; 2) degree of accuracy in recreating actual prior condition; 3) complexity & duration of procedure; 4) other available means of proving same facts; & 5) risk of unfairness to D. Peterson, 514 N.E.2d 265. Here, D alleged Tr. Ct. erred by admitting videotape of staged "reenactment" of crime. State sought person of D's height & weight to demonstrate obvious difficulty of handcuffed person in backseat of police car obtaining gun from his clothing & firing 5 shots into back of officer's head. Peck, 563 N.E.2d 554. Ct. found ability to restage action was "exceedingly simple" & little variation could have occurred from actual incident since there were only 2 people in automobile. Ct. found no abuse of discretion in permitting videotape of demonstration which clearly showed ability of handcuffed person to produce & fire gun at officer. Held, judgment affirmed.

RELATED CASES: Fry, 25 N.E.3d 237 (Ind. Ct. App 2015) (no abuse of discretion in allowing witness to demonstrate how to load and unload D's gun; demonstration was relevant to State's claim that D shot victim); Smoote, 708 N.E.2d 1 (although shotgun demonstration was, at best, of marginal relevance & marginal probative value, demonstration did not prejudice D or mislead jury); Peck, 563 N.E.2d 554 (no error to permit & reflect in record demonstration in which, at witness' direction, prosecutor moved distance away from witness until he stood approximately as far from witness as witness said witness was from victim when victim was shot); O'Connor, 529 N.E.2d 331 (no error in refusing to allow D to stage demonstration by rape victim to show how drinking game was played to assist jury in determining victim's intoxication immediately preceding alleged rape); Peterson, 514 N.E.2d 265 (no abuse of discretion in denying D's motion to order State's witness to stand back-to-back with D, or 10 ft. apart from him, before jury, to permit jury to compare heights; Tr. Ct. could have given weight to considerations such as ease of showing height of 2 men by other means, inability to duplicate conditions at time of crime, & possible threat to fairness of trial posed by having to take precautions for safety of witness during demonstration); Van Orden, 469 N.E.2d 1153 (no error to allow officer to demonstrate position of victim's body when bullets entered it); Harris, 481 N.E.2d 382 (no error in allowing demonstration of preparation of composite picture).

TITLE: Miller v. State
INDEX NO.: O.11.e.
CITE: (2nd Dist., 10-30-09), 916 N.E.2d 193 (Ind. Ct. App. 2009)
SUBJECT: Demonstrative aid- YouTube video shown in closing was reversible error
HOLDING: Tr. Ct. erred when it allowed the State to use as a demonstrative aid in closing argument, a YouTube video that did not reflect the facts of D's case. In deciding whether to permit a demonstration, a court should consider such factors as the ability to make a faithful record of the demonstration for appeal purposes, the degree of accuracy in the recreation of the actual prior conditions, the complexity and duration of the procedures, other available means for proving the same facts, and the risk the conduct of such a procedure may pose to the fairness of the trial. Moreover, only exhibits that were properly admitted into evidence or based on evidence properly admitted may be shown to the jury during final argument.

Here, D was being tried for armed robbery. Over objection, the prosecutor played a YouTube video of a person removing ten to twelve concealed firearms from his clothing to illustrate that firearms can easily be concealed. The prosecutor admitted that the video had nothing to do with the instant case. In fact, the video presumably could not have been properly admitted into evidence in light of its conceded irrelevance and obviously prejudicial effect. Although D's defense at trial was mistaken identity and had nothing to do with whether the robber had a gun, the video brought alive the passions of the jury and suggested that D was not only the robber but that he also had multiple firearms on his person and intended to use them to cause injury and death. Thus, Tr. Ct. committed reversible error by allowing the State to show the YouTube video which was not based on evidence presented in the case; Barnes, J., concurring on basis that video was the proverbial evidentiary harpoon that skewed the ability of the jury to fairly and impartially decide the case; Baker, J., dissenting on basis that the video was harmless error because it was irrelevant to D's defense of mistaken identity.

TITLE: Newton v. State
INDEX NO.: O.11.e.
CITE: (2d Dist. 11/29/83), Ind. App., 456 N.E.2d 736
SUBJECT: Demonstrative evidence - dolls; child molesting
HOLDING: Tr. Ct. did not err in allowing prosecutrix (7 years old) in child molesting & incest case to use anatomically correct dolls to demonstrate crime. Here, D contends that once witness was deemed competent by Ct., she did not need to use demonstrative evidence & that he was denied opportunity to confront/cross-examine witness when she practiced with dolls before trial. D likens practice to hypnotic session: Ct. rejects analogy. Ct. notes fact witness practiced with dolls is a factor properly considered in determining her credibility. D did attack credibility at trial on this basis. Held, no error.

RELATED CASES: Cleaveland, App., 490 N.E.2d 1140 (Tr. Ct. has discretion to allow child witness to use doll as testimonial aid, even if doll is not anatomically correct).

TITLE: Partlow v. State
INDEX NO.: O.11.e.
CITE: (9/22/83), Ind., 453 N.E.2d 259
SUBJECT: Courtroom demonstrations - requiring D to make demonstration
HOLDING: Tr. Ct. did not err by requesting D to put on sweater jacket (state's exhibit) & demonstrate wearing & zipping it. Here, victim's purse was found wrapped in sweater jacket which D's uncle had loaned him day before murder. Tr. Ct. has discretion to permit physical demonstration if it does not require D to incriminate himself/herself. Bivins 433 N.E.2d 387. Demonstration was not conducted in an abusive manner. Held no error.

RELATED CASES: Sipress, App., 562 N.E.2d 758 (in neglect of dependent trial, no error to require D to demonstrate how he had allegedly accidentally immersed his infant daughter in scalding water, despite D's testimony that he could not duplicate incident; fact that D had difficulty re-creating incident went to his credibility as witness).

TITLE: Yamobi v. State
INDEX NO.: O.11.e.
CITE: (10/29/96), Ind., 672 N.E.2d 1344
SUBJECT: Courtroom demonstration during closing argument
HOLDING: Tr. Ct. did not err in allowing prosecutor to demonstrate physical sequence of events in which victim was shot. D claimed conditions in front seat of victim's car were not reasonably duplicated in courtroom but failed to explain how discrepancy prejudiced him or influenced outcome of trial. Appellate courts review admissibility of courtroom demonstrations for abuse of discretion. Lambert, 643 N.E.2d 349. Cts. look to the following factors in determining whether to admit demonstration: 1) difficulty in preserving demonstration for challenge on appeal; 2) degree of accuracy of re-creation; 3) complexity & duration of procedure; 4) other available means of proving same facts; & 5) risks of unfairness to D. Id. Applying these factors, Court found that demonstration was within Tr. Ct.'s discretion.

At trial, D testified that he found victim pointing gun at him when he returned to victim's vehicle, & that D pushed victim's gun away, causing it to discharge. Exact physical position of D & prosecutor during demonstration was unclear from record, but demonstration sufficiently comported with mechanics of confrontation that led to victim's death. Demonstration enabled D to show jury exactly how gun was pointed at him, & what D did to push gun away. Simulating this exchange was not complex, & Tr. Ct. ensured its accuracy by repositioning prosecutor & D to resemble seating arrangement in victim's car. Thus, Tr. Ct. did not abuse its discretion when it permitted prosecutor, with D's assistance, to demonstrate for jury shooting incident that occurred in front of victim's seat. Held, no error.

O. EVIDENCE

O.11. Real/demonstrative evidence

O.11.g. Other

TITLE: Hill v. State
INDEX NO.: O.11.g.
CITE: (1/5/89), Ind., 531 N.E.2d 1382
SUBJECT: Bloodhound evidence - harmless error
HOLDING: Evidence of result of using tracking dogs is not admissible, Brafford 516 N.E.2d 45, but testimony in this case that dog had tracked scent from laundromat to place where D was detained was not so misleading as to require reversal, where speculative nature of such evidence was placed before jury, & other evidence sufficiently probative of guilt was introduced. Gill 467 N.E.2d 724. Affirmed. DeBruler & Shepard, in DISSENT, argue that majority failed to apply harmless error analysis to improperly admitted bloodhound evidence, other evidence was circumstantial, &, in particular, force of statement by D that he could not be convicted if not caught within building was diminished by possibility he was referring to other mischief in area.

TITLE: Jernigan v. State
INDEX NO.: O.11.g.
CITE: (4th Dist., 04-28-93), Ind. App., 612 N.E.2d 609
SUBJECT: Identity of telephone caller sufficiently established
HOLDING: Although witness was not familiar with D's voice, there was circumstantial evidence to establish foundational requirement of identity of caller. D was charged with possession of cocaine with intent to deliver after receiving package he had mailed to himself. Officers & postal workers knew that D was expecting package, & dog sniff of package in transit was positive for drugs. Postal worker testified that on day before D received package, worker received two phone calls from person identifying himself as D. In first call, he asked if overnight express mail package from Los Angeles had arrived for him, finding out that it had not. In second call, D again identified himself & inquired about package, giving his address & express mail package identification number, a number which is unique & generally known only to sender. Witness also testified that caller sounded like black male, & that calls were made locally. Ct. found evidence presented, corroborated by fact that when package was delivered, D said he had been waiting for it, was sufficient to establish caller possessed knowledge of facts only person to whom package was addressed would know, & was sufficient to establish D's identity as caller, thus rendering evidence properly admissible. Held, conviction affirmed.

TITLE: Morgan v. State
INDEX NO.: O.11.g.
CITE: (8/18/86), Ind., 496 N.E.2d 400
SUBJECT: Experiments
HOLDING: Tr. Ct. did not err in admitting exhibit & testimony re experiment performed by investigating police officer. Here, D testified when he saw co-D beat victim, D stopped attack, grabbed towel, wet it with water, & placed it on victim's face to stop bleeding. Police investigator found blood-stained towel at scene. As rebuttal witness, state recalled investigating officer. Officer had conducted experiment using 2 pools of human blood & a towel, ½ dampened & ½ dry. Officer did not testify re any opinions/conclusions to be drawn from experiment. Both blood-stained towel found at murder scene & experimental towel were admitted into evidence. From photograph of exhibit in record it appears that experimental towel tended to show that blood stain was more diffused on wet side, but Ct. is unable to discern from photographs whether towel found at scene is more similar to wet or dry half of experimental towel. At trial, D objected to admissibility of exhibit based upon officer's lack of expertise. On appeal, he *cited* Miller 236 N.E.2d 585 (experimental evidence rejected as inconclusive because murder weapon itself was not used to perform test & because of other variables not adequately provided for in experiment). As general rule, use of experimental evidence may be admitted if such is to aid jury & not merely to add confusion. Ct. notes Jones 296 N.E.2d 407 (any weakness in techniques & methods of testing should be established either by cross-examination or through employment of one's own expert witness). Held, no error.

TITLE: Yeagley v. State
INDEX NO.: O.11.g.
CITE: (9/6/84), Ind., 467 N.E.2d 730
SUBJECT: Demonstrative evidence - diagrams
HOLDING: Tr. Ct. did not err in admitting diagrams of house where shooting occurred. Diagrams are admissible to represent objects/places that cannot otherwise be clearly shown/described. When offered in connection with testimony of witness, such documents are admissible as legitimate aids to Ct./jury. Brown 417 N.E.2d 333; Sexton 319 N.E.2d 829. Here, because interior layout of victim's house could not be brought before jury, diagrams were legitimate aid for jury. Diagrams were introduced during investigator's testimony, who testified diagrams were not to scale but did accurately depict layout of house & position of furniture at time of investigation. Held, no error.

RELATED CASES: Wagner 474 N.E.2d 476 (Crim L 438(1,2); no error in admitting photographs as aid to jury in understanding concept of gun residue; witness was explaining neutron activation analysis); Owensby 467 N.E.2d 702.

O. EVIDENCE

O.12. Scientific evidence

TITLE: Barnhart v. State
INDEX NO: O.12.
CITE: (8/25/2014), 15 N.E.3d 138 (Ind. Ct. App 2014)
SUBJECT: No error in exclusion of witness's negative drug screen
HOLDING: In child molesting prosecution, Tr. Ct. did not abuse its discretion by excluding evidence that complaining witness (C.W.) submitted to a drug screen and that the results were negative. C.W. testified D had given her marijuana several times, including the night before he molested her. D argued the negative drug screen was reliable and went to C.W.'s credibility. But the urine sample was taken eight days after D allegedly provided marijuana and the witness used to support the introduction of the evidence was a probation officer who merely took custody of the sample. This failed to provide the proper scientific basis under Evid. Rule 702(b). In any event, D's substantial rights were not affected. The evidence directly related to the contributing to delinquency of a minor charge, for which D was acquitted. Held, judgment affirmed.

TITLE: Daubert v. Merrell Dow Pharmaceuticals Inc.
INDEX NO.: O.12.
CITE: 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)
SUBJECT: Scientific evidence - standard for admission
HOLDING: Frey standard for admissibility of scientific evidence, that evidence has gained general acceptance in relevant scientific community, was superseded by adoption of Federal Rules of Evidence. Fed.R.Evid. 702 permits admission of expert testimony pertaining to "scientific, technical, or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue."

TITLE: Doolin v. State
INDEX NO.: O.12.
CITE: (07-16-12), 970 N.E.2d 785 (Ind. Ct. App 2012)
SUBJECT: No foundational evidence for in-court field test for marijuana
HOLDING: Tr. Ct. abused its discretion in admitting results of in-court "field test" conducted by arresting officer of the plant substance that had been seized from the car where D was a passenger. This courtroom field test was the only test performed on the substance, and State failed to present sufficient foundation for the reliability of the field test as required by Indiana Rule of Evidence 702(b). Officer provided a general overview of the several steps he intended to follow when conducting the test and stated that his department routinely utilizes the field test, but did not provide any specific name or otherwise identify the test, indicate its reliability or rate of accuracy or error, note the scientific principles on which it is based, or recognize any standards regarding its use and operation. To the extent Burkett v. State, 691 N.E.2d 1241 (Ind. Ct. App 1998), stands for the broad proposition that any unnamed in-court field test for marijuana is admissible, so long as the testifying officer states he or she has experience with the test and that the department routinely uses it, Court declined to follow it.

However, the error was harmless because there was substantial other evidence that the plant material in question was marijuana. The arresting officer testified D admitted "the marijuana was his," the location and condition of the substance (in a baggie inside a velvet bag in a locked glove box along with a set of scales) was consistent with D not wanting the substance found, and the officer's testimony that he recognized the odor and appearance of the substance as marijuana. Held, judgment affirmed.

TITLE: People v. Veren
INDEX NO.: O.12.
CITE: 140 P.3d 131 (Colo.Ct. App. 2005)
SUBJECT: Expert Witness - Police Testimony About Meth Precursors & Manufacture
HOLDING: Testimony regarding the significance of possession of methamphetamine ingredients and manufacture is not lay opinion but expert testimony that is admissible only if the witness has been properly qualified as an expert. The distinction between lay opinion testimony and expert opinion testimony depends on the nature of the testimony itself, and not on the identity of the witness. Lay opinion testimony results from a process of reasoning familiar in every day life. See also State v. Rothlisberger, 95 P.3d 1193 (Utah Ct. App. 2004).

TITLE: Steward v. State
INDEX NO.: O.12.
CITE: (6/23/95), Ind., 652 N.E.2d 490
SUBJECT: Scientific tests - reliability & IRE 702(b)
HOLDING: In Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), U.S. S.Ct. interpreted Fed. Rule of Evid. 702 as requiring that expert testimony "be supported by appropriate validation -- i.e., "good grounds, based on what is known," & as "establish[ing] a standard of evidentiary reliability." Concerns in Daubert coincide with express requirement of IRE 702(b) that Tr. Ct. be satisfied of reliability of scientific principles involved. Although not binding, Ct. found Daubert & its progeny helpful in applying IRE 702(b).

Under IRE 702(b), expert scientific testimony is admissible only if reliability is demonstrated to Tr. Ct. Reliability may be established either by judicial notice or, in its absence, by proponent of scientific testimony providing sufficient foundation to convince Tr. Ct. that relevant scientific principles are reliable. In this case, Ct. held that “child sexual abuse syndrome” evidence is presently not scientifically reliable enough to permit expert to offer conclusion or implication that child in question has been abused. See card at O.7.a.1. Held, transfer granted, Ct. App. summarily affirmed, remanded for new trial; Sullivan, J., dissenting.

RELATED CASES: Camm, 908 N.E.2d 215 (Ind. 2009) (although scientific principles have been found to be reliable in certain cases, they will not necessarily be able to be applied in all situations; D failed to prove principles relied upon by State's bloodstain pattern analysts were unreliable).

TITLE: West v. State
INDEX NO.: O.12.
CITE: (4th Dist., 4-8-04), Ind. App., 805 N.E.2d 909
SUBJECT: Erroneous admission of Draeger test results; sufficiency of evidence
HOLDING: In prosecution for illegal possession anhydrous ammonia, Tr. Ct. committed harmless error in admitting Draeger test results because State failed to establish test's reliability. Draeger refers to the manufacturer of a gas detection kit used to detect certain chemicals, including anhydrous ammonia. Reliability of Draeger test has not been established under Indiana law. Ct. found that a sheriff deputy's testimony that he received training from an environmental clean-up agency & the DEA did not establish the test as reliable scientific evidence under Ind. Evid. Rule 702(b). Although principles of Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), are not controlling under Indiana law, Ct. based its decision in part on the lack of: (1) testing of the Draeger test; (2) subjective peer review & publication; (3) known or potential error rate of the test; (4) existing standards controlling the test's operation; & (5) its general acceptance in the relevant scientific community. Improper admission of test results was harmless because deputy testified smelling what he knew from past experience was anhydrous ammonia, as well as noting a distinctive discharge from fire extinguisher. Deputy then disposed of the extinguisher by shooting it which released a white cloud, consistent with his observations from disposing of the chemical in the past. Held, judgment affirmed.

O. EVIDENCE

O.12. Scientific evidence

O.12.a. Blood tests

TITLE: Blinn v. State
INDEX NO.: O.12.a.
CITE: (5th Dist., 2-18-97), Ind. App. 677 N.E.2d 51
SUBJECT: Operating while intoxicated (OWI) - blood serum alcohol content
HOLDING: In OWI prosecution, Tr. Ct. did not err in admitting evidence of D's serum alcohol content (SAC) rather than his whole blood alcohol content (BAC) as proof of intoxication. Evidence is generally admissible in criminal proceeding if it is relevant to issue being tried, even though its tendency to prove material fact may be slight. Smith, App., 502 N.E.2d 122, trans. denied. Even if evidence is only marginally relevant, it is within sound discretion of Ct. to determine its admissibility. Martinez, 549 N.E.2d 1026. Here, D was charged under Ind. Code 9-30-5-2, which requires no specific BAC for OWI conviction. "Intoxicated" is defined as being under influence of alcohol, controlled substance, other drug or combination thereof so that there is impaired condition of thought & action & loss of normal control of person's faculties to extent that person is endangered. Ind. Code 9-13-2-86. Ct. found that conversion of SAC to BAC is not required for evidence of serum count to be relevant to issue of intoxication, despite medical evidence showing that levels of alcohol in serum may show alcohol content 18 to 20% higher than content that would be reflected by BAC test. Mehidal v. State, 623 N.E.2d 428 (Ind. Ct. App 1993). Ct. further found that expert testimony conflicting with Indiana law regarding conversion of SAC to BAC was admissible because: 1) no specific alcohol content was required for conviction, & 2) conflicts as to how alcohol content is measured can be resolved by trier of fact following presentation of evidence & cross-examination of experts. Held, conviction affirmed; Sullivan, J., dissenting.

TITLE: Burp v. State
INDEX NO.: O.12.a.
CITE: (1st Dist., 04-13-93), Ind. App., 612 N.E.2d 169
SUBJECT: Blood tests admissible under business records exception (BRE)
HOLDING: Results of D's blood tests were admissible under BRE to hearsay rule in D's trial for OWI >.10% BAC. Person who obtained, tested & sponsored sample exhibits testified that she remembered taking sample. She could not remember testing particular sample, but remembered performing tests in lab during relevant time, & Ct. found her documentation was circumstantial evidence that she did perform test. She testified that pursuant to hospital protocol she would have both obtained & tested sample. To be admissible under BRE, proponent of exhibit need only call individual with functional understanding of record-keeping to authenticate specific entry, transaction or declaration, because trustworthiness & necessity are parents of exception. Commercial world's reliance on entries coupled with regularity & continuity of record-keeping provide necessary reliability, Baker v. Wagers (1984), App., 472 N.E.2d 218. Ct. rejected argument that sponsoring witness must be able to specifically state that established protocol was followed in particular instance & found Ind. treats evidence of results of scientific testing as matter of scientific fact established by expert opinion. Reliability of procedures in particular instance goes to weight & not competency of evidence, Hopkins (1991), 579 N.E.2d 1297, Davidson (1991), 580 N.E.2d 238. Fact witness didn't recollect precise steps she took was not critical to competency of results. Where routine medical tests are involved & there doesn't appear to be any substantial irregularity in procedure used, qualification of witness as expert & foundation for BRE provide presumptive evidence of accuracy & truthfulness of entry & are sufficient to establish sample was taken in medically acceptable manner. Held, conviction affirmed.

TITLE: Datzek v. State
INDEX NO.: O.12.a.
CITE: (1st Dist., 12-14-05), Ind. App., 838 N.E.2d 1149
SUBJECT: Blood draw - least intrusive means of chemical testing not required
HOLDING: In operating a vehicle with a BAC greater than .08% prosecution, Ct. rejected D's claim that evidence from blood draw should have been excluded because it was not the least intrusive means of chemical testing available. Indiana's implied consent statute, Ind. Code 9-30-6-2, notes that an officer "may offer a person more than one (1) chemical test" & "[a] person must submit to each chemical test offered by a law enforcement officer". (Ct.'s emphasis). Chemical test is defined under Ind. Code 9-13-2-22 as an analysis of a person's blood, breath, urine, or other bodily substance. Thus, Indiana's implied consent law does not provide that officers must use the "least intrusive" chemical test but allows a wide range of tests & individuals must submit to more than one test if offered. Furthermore, in order to offer a chemical test under the implied consent law, an officer must already have probable cause of intoxication. See Ind. Code 9-30-6-2(a). Thus, the "least intrusive" language of Wilson v. State, 745 N.E.2d 789 (Ind.2001), a case involving an invalid Terry stop, does not apply. The question under the Fourth Amendment is not whether the choice of the chemical test was the least intrusive but whether it was reasonable, & Ct. found the time involved & nature of testing was not unreasonable in this case. Held, judgment affirmed.

TITLE: Davis v. State
INDEX NO.: O.12.a.
CITE: (2d Dist. 3/28/85), Ind. App., 476 N.E.2d 127
SUBJECT: Blood tests - evidence of parentage; mathematical probabilities
HOLDING: Tr. Ct. did not err in overruling Ds' motions in limine & objections seeking exclusion of expert testimony re mathematical probability of Ds' parentage based on blood test results. Here, Ds were charged with neglect of dependent after newborn infant was found abandoned by roadside. They raise 3 issues: (1) potentially exaggerated impact of Probability evidence; (2) invalidity of Bayes Theorem to calculate Ps involved; (3) absence of any foundation for Probability calculations when neither parent is known. Ct. dismisses all 3. First, where Probability testimony is based on empirical scientific evidence, rather than unsubstantiated estimates, Cts. have upheld presentation & admission of Probability testimony. Ct. *cites* KS case re blood tests, AZ case re teeth marks & IL case re hair samples, where sufficient foundation demonstrated reliability of Probability calculations based on scientific reports/tables. Ct. finds no error in foundation for evidence. Ind. allows admission of blood test results in paternity actions. Ind. Code 31-6-6.1-8. Thorough preparation & cross-examination provide adequate opportunities for clarifying that Probability of parentage does not prove guilt. Tr. Ct. has discretion to so caution factfinder. Second, Bayes Theorem is valid. Bayes Theorem is: (Probability based on nontest evidence) X (Probability based on scientific tests only) = total Probability of parentage. Third, method of calculating parentage where neither parent is known is generally accepted by scientific community. Held, no error.

RELATED CASES: Patterson, App., 729 N.E.2d 1035 (because statistical testimony derived from DNA analysis was based on published, empirical scientific data & not on mere speculation or unsubstantiated estimates, Tr. Ct. did not abuse its discretion in finding evidence reliable & admissible); Jenkins 485 N.E.2d 625 (Ct. rejects D's contention that testimony of forensic serologist should have been excluded because D was member of too large a group (30% of male population); Ct. finds fact probative value of evidence is weak goes to its weight not its admissibility; held, rape conviction affirmed).

TITLE: Glasscock v. State

INDEX NO.: O.12.a.

CITE: (1st Dist. 08/12/91), Ind. App., 576 N.E.2d 600, overruled in part on other grounds, 821 N.E.2d 375 (Ind. 2005)

SUBJECT: Blood alcohol (BAC) analysis - Best evidence rule

HOLDING: Admission of BAC lab report in lieu of machine printout from TDX analyzer was error because it was not best evidence of results, but such error was harmless because D did not identify any actual dispute over the accuracy of this secondary evidence. At trial, D objected to admission of report by stating: "I would object, Your Honor, for the sake of the best evidence of the reading would be the actual print out from the machine & not a handwritten report." Ct. App. found this objection inadequate to identify dispute with report, & that admission of secondary error is harmless when no dispute exists as to its accuracy. D did not question possibility of error in transcription of results when he objected, or when he cross-examined lab technician. Held, conviction affirmed, J. Baker concurring in result, but finding that report was not secondary evidence. **Note:** In other issue raised in appeal, D complained that he was unable to perform independent BAC analysis on blood sample because it had been destroyed by hospital 7 days after taking. D had been involved in accident & sample was taken by doctor on own initiative & results turned over to police pursuant to Ind. Code 9-11-4-6(a). Ct. noted that D did not show bad faith on part of State, & that police & prosecutors never even possessed sample.

TITLE: Martin v. State
INDEX NO.: O.12.a.
CITE: 154 N.E.3d 850, (Ind. Ct. App. 09/20/2020)
SUBJECT: Nurse's testimony laid a sufficient foundation for admission of the blood draw evidence
HOLDING: On appeal of his conviction for Level 5 felony operating while intoxicated, Defendant argued that because the State relied solely on testimony of nurse, it failed to show that the nurse conducted Defendant's blood draw pursuant to "a protocol prepared by a physician" pursuant to Ind. Code § 9-30-6-6(a). Court disagreed, noting that nurse's testimony that she was trained in legal blood draws, that her hospital had a protocol for legal blood draws, that a physician approved that protocol, and that she followed that protocol was sufficient for the trial court to find that the State laid the proper foundation for the blood draw evidence.

TITLE: Melton v. State

INDEX NO.: O.12.a.

CITE: (4th Dist. 8/11/92), Ind. App., 597 N.E.2d 359

SUBJECT: Insufficient evidence of blood alcohol content (BAC) greater than .10% - need to convert to weight of alcohol in blood

HOLDING: Where alcohol testing of D's blood plasma revealed .167% milligrams of alcohol per deciliter, but there was no evidence to translate this finding into percentage of alcohol, by weight, in whole blood, evidence was insufficient to support conviction for operating vehicle with .10% or more blood alcohol content. While blood alcohol content may be established by testing breath, blood, urine, or other bodily substances, standard set for intoxication by legislature is based on weight of alcohol in whole blood, & any results from other testing must be converted into this measure.

RELATED CASES: Newcomb, App., 758 N.E.2d 69 (because State presented no expert testimony converting blood serum figures to whole BAC, & failed to establish medical technologist as expert qualified to testify regarding D's BAC based on results of serum blood test, there was failure of proof on this element, & evidence was insufficient to sustain D's conviction); Datzek, App., 838 N.E.2d 1149 (unlike in Newcomb, expert's training & credentials were sufficiently established & he more specifically identified from what literature he was basing his conversion of serum test results into whole blood percentages).

TITLE: State v. Hunter
INDEX NO.: O.12.a.
CITE: (3d Dist. 11/17/91), Ind. App., 581 N.E.2d 992
SUBJECT: Blood Alcohol (BAC) test results inadmissible due to lack of probable cause
HOLDING: Tr. Ct. did not err in granting D's motion to suppress BAC test results because at time officer received blood sample he did not have sufficient probable cause for warrantless seizure. D & another were involved in one car crash where car spun, rolled & landed upside down. Passing motorist pulled D from driver's side of car, but D denied being driver & no one saw him driving. Other person was killed in accident, but D was taken to hospital where BAC sample was drawn & given to officer pursuant to Ind. Code 9-11-4-6(g). Sample tested .17% BAC. At hearing on motion to suppress, officer testified that he was suspicious that D was driving at the scene because of passerby's statement that he pulled him from driver's side of car, but that he did not know for sure until after he'd obtained blood sample & talked with other officer. Tr. Ct. found this was insufficient to establish probable cause for seizure, & State appealed grant of motion to suppress. Ct. App., considering substantial deference accorded to Tr. Ct.'s finding on probable cause, found Tr. Ct.'s determination was proper. Held, Tr. Ct.'s granting of motion to suppress affirmed.

TITLE: Walker v. State
INDEX NO.: O.12.a.
CITE: (3d Dist. 12/16/91), Ind. App., 582 N.E.2d 877
SUBJECT: Admissibility of blood tests - Ind. Code 9-30-6-6
HOLDING: Ind. Code 9-11-4-6(a) (now Ind. Code 9-30-6-6(a)) contains no requirement that officer request blood test, that officer have probable cause to arrest before blood test, that physician specifically request blood draw, or that patient consent. D was in accident where people were killed & seriously injured. He was taken to hospital where blood alcohol content (BAC) test revealed BAC of .21%. It was customary in hospital to give BAC tests so that alcohol could be considered when administering medication, & police customarily requested results of BAC tests whenever traffic accident was involved. Although D argued that insufficient foundation was layed to admit BAC results, Ct. noted that D had not objected on this ground at trial, & therefore state did not present evidence. Ct. found this classic example of waiver rule, but nevertheless went on to note statute did not require evidence D claimed was lacking. Held, admission of BAC results not error.

Note: This decision involved section "a" of statute, not section "g," which does require both probable cause & that another person has been seriously injured or killed.

RELATED CASES: Hunter, App., 898 N.E.2d 455 (unlike in Shepherd (below), there is absolutely no evidence that nurse who drew D's blood was acting under a protocol prepared by a physician); Shepherd, App., 690 N.E.2d 318 (officer complied with requirements of Ind. Code 9-30-6-6 by advising hospital of his reason for requesting results of blood test & hospital complied with requirements of Ind. Code 9-30-6-6 by having lab tech draw blood & physician approve protocol of technician).

TITLE: Wilson v. State
INDEX NO: O.12.a.
CITE: (09-06-12), 973 N.E.2d 1211 (Ind. Ct. App 2012)
SUBJECT: Blood tests - evidence of toxicology lab audit and its discontinuation was irrelevant
HOLDING: Tr. Ct. properly limited D's cross-examination regarding the Department of Toxicology lab audit and the discontinuation of it. Relevant evidence is that evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ind. Evidence Rule 401.

Here, D was charged with operating while intoxicated. His blood was tested by the Indiana Department of Toxicology in May and June, 2011. At trial, D cross-examined the Director of the Department at that time and the analyst who tested the blood. However, D wanted to cross-examine the Director about the audits conducted of testing results during 2007, 2008 and 2009, and the discontinuation of the audit before all the blood alcohol test results had been reviewed. The discontinuation of the audit on blood-alcohol samples and the period of time covered by the audits generally may bear upon the credibility of testing results from 2007 to 2009. But it is not clear that these questions bear upon the credibility of the Department's analysis here, where different procedures were executed by different analysts serving under a different Director more than 1.5 years beyond the chronological scope of the audits. Nor was the D denied his right to confrontation being he cross-examined both the lab director and the lab analyst who performed the test. Thus, Tr. Ct. did not abuse its discretion when it determined that the testimony D sought to introduce was not relevant to the question of the reliability of the lab analyst's testing and excluded the testimony from evidence. Held, judgment affirmed.

O. EVIDENCE

O.12. Scientific evidence

O.12.b. Breath alcohol tests

TITLE: Abney v. State
INDEX NO.: O.12.b.
CITE: (4th Dist., 1-27-05), Ind., 821 N.E.2d 375
SUBJECT: Admission of blood test results - physician's reluctance to take sample
HOLDING: On transfer. Ct. App. properly held that Ind. Code 9-30-6-6(g) permits warrantless non-consensual taking of blood samples in cases involving serious bodily injury or death, regardless of whether a physician is reluctant to take the sample. Court noted that "limiting [statute] to those instances in which a physician refuses to draw blood is inconsistent with the intent of the implied consent statutes." In so holding, Court disapproved of contrary language in other cases which suggested that Ind. Code 9-30-6-6(g) only applies to cases where a physician is reluctant to take a blood draw upon a request of a law enforcement officer who certifies he has probable cause to believe a person was involved in an accident, causing serious bodily injury or death. See Guy v. State, 678 N.E.2d 1130 (Ind. Ct. App1997); Spriggs v. State, 671 N.E.2d 470 (Ind. Ct. App1996); & State v. Robbins, 549 N.E.2d 1107 (Ind. Ct. App1990). Statute is designed as tool to acquire evidence of blood alcohol content rather than as a device to exclude evidence. Held, transfer granted, Ct. App.' opinion at 811 N.E.2d 415 adopted & denial of motion to suppress affirmed.

TITLE: Baran v. State
INDEX NO.: O.12.b.
CITE: (09-01-94), Ind., 639 N.E.2d 642
SUBJECT: Breath test sufficient to show percentage of alcohol in blood
HOLDING: Printout of Intoxilyzer 5000, showing reading of .11, was sufficient to support conviction for Operating with Blood Alcohol level (BAC) .10% or more, granting transfer & reversing decision at 622 N.E.2d 1326. Ct. rejected argument that because Ind. Code 9-11-2-1(a) requires evidence of BAC, additional evidence of breath alcohol to blood alcohol conversion process of Intoxilyzer was required, as was evidence that test result number was actually percentage by weight of alcohol in blood. Tr. Ct. was entitled to take judicial notice that Intoxilyzer automatically performs required conversion. Conversion not necessary to establish BAC because Intoxilyzer expressed results by required BAC. Daum v. State, App., 625 N.E.2d 1296. Pursuant to IAC 1.1-2-1(e)(2), breath test machines are tested for accuracy using known ethanol-water or ethanol- gas solution, measured as percent of weight by volume. Because equipment must measure BAC as percentage of alcohol by weight in blood to be properly certified, Tr. Ct. was entitled to take judicial notice of fact printout expressed result as percentage by weight in blood.

Because it was bench trial & Tr. Ct. was required by statute to take judicial notice concerning breath test machine, Tr. Ct.'s failure to notify parties it would take judicial notice was not reversible error. If trial is to jury in criminal case, Tr. Ct. must "expressly take judicial notice of effect of the Administrative Code's standards & regulations for selection & certification of breath test equipment & chemicals; & instruct the jury `that it may, but is not required to, accept as conclusive any fact judicially noticed.'" I.R.E 201(g). Held, transfer granted, Ct. App. decision vacated, & conviction for BAC > .10% affirmed.

RELATED CASES: Sturgis, App., 654 N.E.2d 1150 (failure to instruct jury about effect of Tr. Ct.'s taking judicial notice of administrative regulations was harmless error); Berry, App., 720 N.E.2d 1206; Godar, App., 643 N.E.2d 12 (conviction for operating with BAC >.10% reversed & remanded where Tr. Ct. failed to take judicial notice of effect of breath test regulations & instruct jury accordingly).

TITLE: Boothe v. State
INDEX NO.: O.12.b.
CITE: (4th Dist. 9/13/82) Ind. App., 439 N.E.2d 708
SUBJECT: Breath alcohol tests - foundation
HOLDING: Foundation for admission of results of breathalyzer test: (1) test was administered by operator certified by department of toxicology; (2) equipment used was inspected & approved by department of toxicology; (3) operator used techniques approved by department of toxicology. Ind. Code § 9-4-4.5-2, 6; Klebs, App., 305 N.E.2d 781. See also Denman, App., 432 N.E.2d 426; Hartman, App., 401 N.E.2d 723. Here, D contends insufficient foundation was laid for admission of results of either breathalyzer test or video tape recording of test because state did not offer as evidence a certified copy of document outlining required procedure for breathalyzer test as approved by I.U. School of Medicine, Department of Toxicology. Ct. finds state laid insufficient foundation, Klebs, Hartman; but admission of test results & videotape were harmless because substantial evidence of probative value supports verdict. Ct. rejected state's contention that insufficient foundation affects weight rather than admissibility (state *cited* Collins, App., 422 N.E.2d 1250; Sutton, App. 422 N.E.2d 430). Held, conviction affirmed.

RELATED CASES: Wolpert, 47 N.E.3d 1246 (Ind. Ct. App 2015) (adequate foundation for breath test as dry gas in breath test machine was adequately certified; see full review, this section); State v. Stamm, App., 616 N.E.2d 377 (Only effect of failure to conduct test within 3 hour period is loss of rebuttable presumption that if test shows BAC of at least .10%, D also had BAC of at least .10% at time he operated vehicle.); Tyner, App., 503 N.E.2d 444 (Ct. rejects D's contention that Ind. Code § 9-11-4-2 requires that breath alcohol test be given within three hours of offense); Oller, App., 469 N.E.2d 1227 (adequate foundation); Zimmerman, App., 469 N.E.2d 11 (adequate foundation despite fact that equipment used to test blood had not been certified within last six months in accordance with 260 IAC sec. 1-5-2(1) (1979); similar issue was raised & rejected in Shultz, App., 417 N.E.2d 1127)

TITLE: Bowman v. State
INDEX NO.: O.12.b.
CITE: (3d Dist. 12/19/90), Ind. App., 564 N.E.2d 309
SUBJECT: Breath alcohol test - failure to follow testing procedure
HOLDING: Tr. Ct. erred in admitting D's breathalyzer test results where test operator did not record test ampoule control number on test result form, as required by administrative code. 260 IAC 1.1-4-1(12). Admissibility of BAC test results is governed by Ind. Code 9-11-4-5, which provides that such results are not admissible if techniques used in test have not been approved in accordance with rules adopted by IU Dept. of Toxicology. Dept. of Toxicology promulgated rules specifying methods of administration of various BAC tests, requiring that these methods shall be followed. 260 IAC 1.1-3-1(b). Approved breathalyzer test method consists of 12 steps, last of which is that operator must record test ampoule control number & instrument serial number on test result form. It is undisputed that ampoule control number for D's test was not recorded on form. Requirement has purpose of facilitating verification of accuracy of test. Introduction of breath test lends aura of scientific certainty to prosecution for DUI, often sealing D's fate in mind of trier-of-fact. Thus, detailed procedures reflect determination that test should be as accurate & free from uncertainty as possible. State argues that ampoule control number could reasonably be inferred from other evidence admitted. However, it is just this sort of speculation that recordation requirement seeks to avoid. Statute & regulations clearly contemplate strict compliance, & D's conviction for driving with .10 BAC resulting in death must be reversed. Conviction for DUI resulting in death also reversed on transfer in Bowman, 577 N.E.2d 569, see card separate card at O.12.b.

TITLE: Bowman v. State

INDEX NO.: O.12.b.

CITE: (8/30/91), Ind., 577 N.E.2d 569

SUBJECT: Operating Vehicle While Intoxicated (OWI) causing death - improper breathalyzer procedures

HOLDING: Because there was substantial likelihood that erroneously admitted breathalyzer evidence contributed to conviction for OWI causing death, D was entitled to new trial on that charge, granting transfer & reversing Ct. App. decision, Bowman, 564 N.E.2d 309, on that issue only. Ct. App. had previously reversed D's conviction for operating vehicle with BAC of .10% or more resulting in death, because of admission of erroneous breathalyzer evidence, but sustained conviction for OWI causing death because, even absent erroneous evidence, there was substantial evidence of probative value to support inference of intoxication. S.Ct. holds this was incorrect standard, & that if there was substantial likelihood that erroneous evidence contributed to verdict, reversal was required. There was considerable conflicting evidence of D's degree of intoxication presented at trial. Because of conflicting evidence, Ct. was unable to find that there was no substantial likelihood that erroneous evidence contributed to verdict. Therefore error was not harmless as to OWI causing death. Ct. did find, however, that considering all trial evidence, there was sufficient evidence to support convictions & so retrial is not precluded on double jeopardy grounds. Held, cause remanded for retrial, Ct. App. decision reversed on this issue & summarily affirmed on all other issues.

TITLE: Christian v. State
INDEX NO.: O.12.b.
CITE: (2nd Dist., 4-22-99), Ind. App., 710 N.E.2d 582
SUBJECT: Erroneous exclusion of evidence - repairs to breathalyzer machine
HOLDING: Tr. Ct. abused its discretion in excluding evidence of repairs made to breathalyser machine used on D. State's motion in limine sought to exclude all evidence relating to repairs made to machine except for those repairs made within 180 days after machine had been certified. Certification of machine raised rebuttable presumption that machine was in proper working condition on date of certification & 180 days thereafter. Ind. Code 9-30-6-5(c). To rebut this presumption, D should have been permitted to present evidence that machine was not working properly in period leading up to certification. In his offer of proof, D revealed pattern of problems with circuitry of machine, & offered testimony of expert witness that this problem could have rendered D's test results inaccurate. D was entitled to present evidence that, despite certification, there was underlying problem with circuitry of machine. History of repairs was relevant evidence that jury was entitled to consider & weigh in making its decision, & Tr. Ct. erred by refusing to admit this evidence. Held, judgment reversed.

TITLE: City of Seattle v. Ludvigsen
INDEX NO.: O.12.b.
CITE: 162Wn.2d 660, 174 P.3d 43 (Wash. 2007)
SUBJECT: Ex post facto violated when OWI testing standard lowered
HOLDING: Washington Supreme Court held convicting a D of drunken driving on the basis of a breath test carried out with a device that did not meet a legally mandated quality standard at the time, but that did meet a lower standard adopted prior to trial, would violate constitutional ex post facto principles. D was arrested in 2002 on suspicion of driving while intoxicated after a breath test showed a reading of .23 percent. The municipal code then in effect made it a crime to drive at a level of .08 as shown by analyis of a person's breath or blood, but the section required that the breath-testing device have a thermometer that had been certified by a thermometer traceable to National Institute of Standards and Testing standards. D did not come to trial until 2005, by which time the municipal code had changed the test to a less rigorous standard. Court held that the code revisions amounted to a substantive change in the amount of evidence required to a support a conviction and thus violated the Constitution's ex post facto clause. When D was charged, the city had to meet a specific equipment standard if it wished to convict him using the "per se" prong of its law, i.e. on the basis of the breath test alone. The code changes held breath-testing evidence to a less exacting standard. "The City redefined the meaning of a valid test and thereby changed the meaning of the crime itself."

TITLE: Corbin v. State
INDEX NO.: O.12.b.
CITE: (10/31/2018), 113 N.E.3d 755 (Ind. Ct. App 2018)
SUBJECT: Tears in D's mouth did not constitute foreign substance invalidating test
HOLDING: On appeal of her conviction for operating a vehicle with ACE of 0.15, D claimed that her tears on the way to jail had entered her mouth and constituted a "foreign substance" introduced into her mouth less than 15 minutes before the test was administered, thus invalidating the test. Court of Appeals noted that it was unclear from the record whether any tears ever actually entered D's mouth. Furthermore, D failed to present any scientific evidence that tears would have been a "foreign substance" that could have skewed the chemical test results. Thus, the chemical test results were properly admitted and circumstantial evidence was sufficient to find that the chemical test was administered within the requisite time frame. Held, judgment affirmed.

TITLE: Crouch v. State
INDEX NO.: O.12.b.
CITE: (1st Dist., 08-15-94), Ind. App., 638 N.E.2d 861
SUBJECT: Compliance with BAC rules required at time of offense, not trial
HOLDING: Where rules for administration of B.A.C. Data master had been adopted by time of D's trial, but not at time when offense allegedly occurred, evidence of breath alcohol content (BAC) test results was inadmissible. D moved to suppress results, which Tr. Ct. denied. Rules for administration of B.A.C. Data master became effective after D's arrest, but prior to trial. Ct. rejected State's argument, relying on language of Ind. Code 9-30-6-5(d), that because method followed by arresting officer had been approved by time of trial, evidence was admissible. This language provides that BAC results aren't admissible in proceeding unless equipment & technique have been approved. State argued language focuses on admissibility of results & not administration of test, so approval of techniques only need be made by time of trial. Ct. disagreed, finding purpose of section is to ensure reliability & accuracy of test results, noting Cts. have consistently held foundation for admissibility of test results requires proof approved methods have been followed, & that subsequent approval of equipment & techniques does not meet statutory requirements, State v. Trent, App., 596 N.E.2d 272. Valid rule or regulation has force & effect of law, & generally has no retroactive effect. Here, proper test method for machine had not been approved at time test was administered, & so results were inadmissible. Under Ind. Code 9-30-6-5, method used to administer breath test must be approved by Department of Toxicology at time test is administered. Held, Tr. Ct. reversed. **Note:** In footnote, Ct. also noted that because Ind. Code 9-30-6-5(d) relates to evidence in criminal proceeding, State's interpretation would violate ex post facto prohibition, & that ex post facto law includes that "which changes the rules of evidence by which less or different testimony is sufficient to convict." Taylor v. State Election Board, App., 616 N.E.2d 380. This principle should be explored if changes in evidentiary law work against your client.

TITLE: Disabato, et al. v. State
INDEX NO.: O.12.b.
CITE: (2nd Dist., 11-30-05), Ind. App., 840 N.E.2d 1
SUBJECT: BAC test rules properly filed with Secretary of State
HOLDING: In a case ordered published on the State's motion, Ct. upheld Tr. Ct.'s denial of motions to suppress the results of Ds' breathalyzer tests. Ds argued that the tests were inadmissible because the regulations contained in Title 260 of Indiana Administrative Code were improperly promulgated pursuant to Ind. Code 9-30-6-5 & 4-22-2-44. Specifically, Ds argued that the tests were inadmissible because the director of the department of toxicology failed to submit the rules to the Secretary of State as required by Ind. Code 4-22-2-35(c)). Ind. Code 9-30-6-5 details the rules to be adopted by the director of the department of toxicology. The regulations are codified in Title 260 of the IAC, & pursuant to Ind. Code 4-22-9-3(b) this publication provides "prima facie evidence" that the rule was adopted in conformity with Ind. Code 4-22-2. Ind. Code 4-22-9-3(a) notes that rules adopted in conformity with Ind. Code 4-22-2 be "judicially noticed by all Cts. & agencies of this state." Ds attempted to rebut State's proffer of prima facie evidence & the statutory mandate of judicial notice by arguing that the regulations were not properly filed with the Secretary of State as required by Ind. Code 4-22-2-35. Ds argued that pursuant to that statute & Ind. Code 4-22-2-36 no rule may become effective until 30 days after it has been submitted to the Secretary of State, accepted for filing, & file stamped. Ds contended that the regulations in dispute here were not file stamped by the Secretary of State & were, thus, invalidly promulgated. However, the record reveals that the regulations were file stamped "received" by the Secretary of State in November of 1999. The mere fact that the relevant file stamp does not contain the word "filed" is of no moment. Ds failed to demonstrate the regulations were not file stamped under Ind. Code 4-22-2-35 & they did not overcome the State's proffer of prima facie evidence that such rules were valid due to their codification in the Administrative Code. Held, judgment affirmed.

TITLE: Gibson v. State
INDEX NO.: O.12.b.
CITE: (4th Dist., 10-25-02), Ind. App., 777 N.E.2d 87
SUBJECT: Breath alcohol test - claim of failure to follow testing procedures
HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion to suppress her refusal to submit to breathalyzer test. During each of three attempts to take breathalyzer test, D blew into machine twice, providing total of six breath samples, all of which were inadequate. Police officer determined that D was not cooperating, & he recorded refusal after third test despite D's plea to take test fourth time. D argued that officer failed to comply with approved method for giving breathalyzer test under Ind. Admin. Code tit. 260, r. 1.1-4-8(7)(D), because after second test resulted in reading of "incomplete," he should have obtained an alternate chemical test or performed test on another evidentiary breath test instrument. However, approved method also sanctions another course of action, stating that if test result of "incomplete" is caused by lack of cooperation, officer should record that test was refused. Under facts & circumstances of this case, officer could well have made refusal determination after second test. Also, officer's deviation from approved method does not raise issues concerning accuracy of D's test results. Held, judgment affirmed.

TITLE: Guy v. State
INDEX NO.: O.12.b.
CITE: (4th Dist., 03-2-05), Ind., 823 N.E.2d 274
SUBJECT: Breath test - foreign substance in mouth; tongue stud
HOLDING: Tongue stud inserted in a person's mouth more than twenty minutes before breath test did not render results of test inadmissible under 260 IAC 1.1-4-8(1). This regulation specifies that prior to a toxicology test, "[t]he person to be tested must have had nothing to eat or drink, *must not have put any foreign substance* in his or her mouth or respiratory tract, & must not smoke within twenty (20) minutes prior to the time the breath sample is taken." Ct. App. interpreted the regulation to require that the person to be tested must not have had any foreign substance in his mouth prior to testing & that a tongue stud is a foreign substance.

Highlighting the word "put" as it relates to foreign substances in the regulation, the Indiana S.Ct. found the intent of the administrative regulation was that it was to apply to objects placed in the mouth within 20 minutes of testing & not objects already there. Language *cited* in State v. Albright, 632 N.E.2d 725 (Ind. 1994), that a "subject may not have had any foreign substance in his mouth" during this time did not involve the primary issue of that case & involved no discussion of the meaning of "put." Thus, it has no precedential value in this case.

D argued that if "put" means "put," the regulation produces an absurdity in that it would allow admission of breath test results despite a person putting anything in her mouth more than twenty minutes prior to the test. However, D submitted no scientific evidence that the foreign substance in the mouth is what affects the reliability of the test. Further, the science in the public domain supports the opposite conclusion. The concern with foreign substances is the potential for it to absorb & retain alcohol in the mouth & nothing was presented here to show the tongue stud affected reliability in this way. The State could be obliged to defend the validity of the regulation if such studies or expert testimony were submitted into evidence. Held, transfer granted, Ct. App.' opinion at 805 N.E.2d 835 vacated, judgment affirmed; Boehm, J., concurring in result.

RELATED CASES: Lucas, 934 N.E.2d 202 (Ind. Ct. App 2010) (portable breath test ("PBT") mouthpiece is not a "foreign substance" that invalidated Data master test results where Data master test was administered less than 20 minutes after PBT mouthpiece was in D's mouth); Keys, App., 811 N.E.2d 961 (exposure to second-hand smoke did not equate to smoking, & at trial D did not argue that it was a foreign substance. D could have but failed to challenge evidence on reliability grounds by presenting expert testimony that showed that exposure to second-hand smoke renders a chemical breath test unreliable).

TITLE: Haddin v. State
INDEX NO.: O.12.b.
CITE: (1st Dist., 8-03-04), Ind. App., 812 N.E.2d 1057
SUBJECT: Breath test results properly admitted
HOLDING: In operating while intoxicated prosecution, Tr. Ct. properly denied D's motion to suppress, as proper procedure for admitting breath tests does not require twenty minutes of continuous observation by administering officer. Daum v. State, 625 N.E.2d 1296 (Ind. Ct. App1993). Further, record indicated that officer properly followed rules adopted by the Department of Toxicology in instructing D to remove chewing gum 20 minutes prior to testing (see Ind. Code 9-30-6- 5(d)) & the results revealed that there was no indication of a foreign substance in D's mouth at the time of the test. Held, judgment affirmed.

TITLE: Napier v. State
INDEX NO.: O.12.b.
CITE: (1st Dist., 1-06-05), Ind. App., 820 N.E.2d 144
SUBJECT: Erroneous admission of breath test results - evidentiary foundation in light of Crawford
HOLDING: State's failure to present live testimony at trial from officer who conducted breath tests violated Confrontation Clause in light of Crawford v. Washington, 124 S.Ct. 1354 (2004). However, admission of breath test instrument certification documents did not violate Crawford. State offered the Data Master "evidence ticket" into evidence displaying the breath test results, absent any witness to present the exhibit. This precluded D from conducting any cross-examination of the breath test operator's qualifications & attacking the purported results of his breath test. Ct. distinguished this case from others where an officer was present to testify.

Ct. rejected D's challenge that to Ind. Code 9-30-6-5, which permits the introduction of certificates of the director of the Department of Toxicology regarding inspection & compliance with relevant regulations of breath tests. D also challenged this process under Crawford. Prior to Crawford, the Indiana S.Ct. had upheld the process despite confrontation challenge in Platt v. State, 589 N.E.2d 222 (Ind.1992). Ct. avoided issue of whether these compliance certificates should be considered "testimonial" or "non-testimonial" evidence which was an important factor in Crawford as to whether confrontation rights applied, by stating: "We do not see how the admission of these certificates would serve to preclude any meaningful cross-examination of the breath test evidence presented against [D]." Even though the machine inspector & the Director of Toxicology who provided certification did not testify, the certification information "does not pertain to the issue of guilt." The Ct. found the information contained in the certificates was not the concern of the Crawford Ct. & to hold otherwise would create the unreasonable alternative of having a toxicologist in every Ct. daily to testify about such information. Held, conviction reversed.

RELATED CASES: Cranston, 936 N.E. 2d 342 (Ind. Ct. App. 2010) (disagreeing with Napier to the extent Napier can be read to hold the breath test printout to be hearsay; however, agreeing with Napier that the breath test operator must testify in order for the printout to be admissible, but the equipment inspector not); but see Bullcoming, 131 S.Ct. 2705 (U.S. 2011) (confrontation Clause does not allow introduction of testimonial lab results through supervisor who had no role in testing blood sample); Napier, App., 827 N.E.2d 565 (on rehearing, Ct. ordered reinstatement of D's conviction because parties had stipulated to officer's proper certification to perform breath tests).

TITLE: Nasser v. State
INDEX NO.: O.12.b.
CITE: (2nd Dist., 2-7-95), Ind. App., 646 N.E.2d 673
SUBJECT: Breath alcohol test - results admissible
HOLDING: State laid sufficient foundation for admission of Intoxilyzer 5000 test results. Ct. first rejected D's challenge to sufficiency of breath test operator's certification & authenticity of State's 3-page exhibit containing officer's name on second of attached pages. Exhibit was letter to Clerk of Ct. from Department of Toxicology which included lists of officers properly recertified as breath test operators. Ct. noted that letter qualified as "certificate" to be sent to Ct. clerk of county in which operator administers breath test, Regan v. State, Ind. App., 590 N.E.2d 640. Although stamped certification appeared only on third page of exhibit, certification did not specifically incorporate preceding pages, & there appeared to be handwritten alterations on document, Ct. concluded that document was admissible under TR 44(A)(1). Allen v. State, Ind., 518 N.E.2d 800. There was no confusion regarding authenticity of exhibit because all pages were clearly part of same document & attestation letter incorporated officer lists. Ct. clerk's stamp on third page certified document as true & complete copy of official records. Held, conviction affirmed.

TITLE: Nivens v. State
INDEX NO.: O.12.b.
CITE: (2nd Dist., 08-22-05), Ind. App., 832 N.E.2d 1134
SUBJECT: BAC Datamaster adequately tested for accuracy
HOLDING: Tr. Ct. properly denied D's motion to suppress the results of his chemical breath test. The Indiana State Department of Toxicology certified the accuracy of the BAC Datamaster used in the test. On interlocutory appeal, D asserted that the accuracy tests for the machine did not comply with Department of Toxicology's own regulations, making the results inadmissible pursuant to Ind. Code § 9-30-6-5(d). Title 250, sec. 1.1-2-1(e)(3) of the Ind. Admin. Code provides that, "For the purpose of inspecting the breath test equipment, the analytical result shall be expressed to the third decimal place." Four tests were conducted on the machine at issue with two taking results to the fourth decimal & two to the second decimal. Ct. found that ISDT's interpretation of administrative regulation was reasonable. While section (e)(1) & (2) of the same regulation infer that one or more tests must be conducted by using plural terms, section (e)(3) states, "the analytical result shall be expressed to the third decimal place." Ct.'s emphasis. Ct. also noted § 1.1-2-1 does not specify number of tests needed to determine the accuracy of machine prior to certification. Thus, Ct. concluded only two tests under ISDT regulations are necessary to properly certify a machine. Since two tests were expressed to the fourth decimal place & did not deviate more than minus eight percent from the known alcohol content of an ethanol water solution (sec. 1.1-2-1(e)(2), these two tests satisfied the requirements of Title 260, sec. 1.1-2-1(e) of the IAC. Held, judgment affirmed.

RELATED CASES: Wolpert, 47 N.E.3d 1246 (Ind. Ct. App 2015) (adequate foundation for breath test as dry gas in breath test machine was adequately certified; see full review, this section).

TITLE: Piotrowski v. State

INDEX NO.: O.12.b.

CITE: (2/18/2014), 3 N.E.3d 1051 (Ind. Ct. App 2014)

SUBJECT: No error in denying motion to exclude BAC results even though no new rules regarding BAC training and certification

HOLDING: Tr. Ct. did not err in denying D's motion to exclude BAC evidence.

D claimed no regulations are in effect about procedures to train officers or certify breath test machines. He so argued because no such rules have been adopted since the July 1, 2012 expiration of the transition period from the IU Department of Toxicology to the State Department of Toxicology under IC 10-20-2-7. Because no rules are in effect, according to D, the Tr. Ct. should have excluded the BAC evidence.

Court held that State had discretion to rely on previously-existing rules because when the legislature transferred rulemaking authority to the State, it did not specifically require the State to promulgate new rules on breath testing. See Van Allen v. State, 467 N.E.2d 1210 (Ind. Ct. App. 1984) ("where the legislative intendment requires that prior legislation remain in force until the administrative body has enacted substitute regulations, a repeal [of the old rules and regulations] takes place only at the time the [new] administrative regulations go into effect"); see also Ind. Code 9-30-6-5.5(b) (rule adopted effective when filed with secretary of state and expires on latest of the following: (1) the date director adopts another emergency rule to amend or repeal previous emergency rule; 2) the date director adopts permanent rule to amend or repeal previous emergency rule). Held, judgment affirmed.

TITLE: Priest v. State

INDEX NO.: O.12.b.

CITE: (01/25/2022), Ind. Ct. App., 181 N.E.3d 1046

SUBJECT: Denial of motion to suppress evidence of BAC reversed because State only entered the traffic citation itself which was inadmissible hearsay

HOLDING: In a motion to suppress, Defendant argued the "breath-test results" were inadmissible hearsay in his trial on the traffic offense of operating a commercial motor vehicle with an ACE of .042. On interlocutory appeal, the Court noted that the trial court and the parties "seemed to assume a breath-test result was in the record" while in fact the only evidence in the record related to Defendant's ACE or B.A.C. is the traffic citation itself. That citation was completed and signed by an officer who did not appear at the hearing or otherwise testify. The Court found that statement, alone, is clearly inadmissible hearsay and the trial court's denial of the motion was not supported by substantial evidence of probative value. Held, reversed.

TITLE: Rembusch v. State
INDEX NO.: O.12.b.
CITE: (2nd Dist., 11-8-05), Ind. App., 836 N.E.2d 979
SUBJECT: BAC inspection certificate not implicated by Crawford
HOLDING: Ct. reiterated its holding in Napier, App., 820 N.E.2d 144 *modified on rehearing* 827 N.E.2d 565, that certificates of inspection & compliance of breath instruments are not testimonial in nature, & thus, do not violate D's confrontation rights under Crawford v. Washington. The certificates serve an administrative function & are prepared in a routine manner rather than for the purpose of an individual case. Further, Ct. does not believe such documents belong to the class of testimonial evidence contemplated by Crawford. Ct. also rejected D's challenge to sufficiency of evidence because the date listed on the certification of inspection was later than when a breath test was administered to D. Thus, D argued no evidence existed to show the machine was ever inspected before the test. Although D framed issue under sufficiency grounds, it was "apparent" to Ct. "that he is actually contending that the State failed to lay a proper foundation for the admission of the breath test instrument certification under Ind. Code 9-30-6-5 (C)." Consequently, Ct. found that issue was waived for failure to issue contemporaneous objection to certificate's admissibility, as such a rule promotes a fair trial by precluding a party from sitting idly by & only crying foul when a ruling goes against him. Ct. also rejected argument that the breath test ticket was improperly admitted at trial as hearsay evidence. In Sales, 723 N.E.2d 416, it was recognized that our legislature was attempting to validate the use of breath tests in prosecutions with Ind. Code 9-30-6-15(a). Moreover, the provisions of Ind. Code 9-30-6-15 provide that analysis of a person's breath is an acceptable method of measuring the amount of alcohol in a person's blood & the statute mentions breath analysis as an admissible method of proving BAC without mentioning the need for an expert. Ct. also rejected argument that State was not entitled to the statutory presumption that an who tests .15% or more within three hours of operating a vehicle was .15% at time vehicle was operated. In examining Ind. Code 9-30-6-15(b), Ct. found statute clearly applies to situations where test results indicate a BAC of at least .08% & D's .18% certainly fits within this provision. Ct. would not reweigh the sufficiency of the evidence as to a public intoxication conviction. Held, judgment affirmed.

RELATED CASES: Jones, 982 N.E.2d 417 (Ind. Ct. App 2013) (D's confrontation rights under 6th Amendment not violated by admission of certificate of inspection about accuracy of chemical breath test device, even though the person who certified the device did not testify at trial, because the certificate was non-testimonial.); Ramirez, 928 N.E.2d 214 (Ind. Ct. App 2010) (after Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), Ct. reaffirmed position that certificates verifying routine inspection of breath test instruments are nontestimonial); Jarrell, App., 852 N.E.2d 1022 (certificate of inspection of breath test machine are non-testimonial and not governed by Crawford).

TITLE: Sharber v. State
INDEX NO.: O.12.b.
CITE: (4th Dist., 5-29-01), Ind. App., 750 N.E.2d 796
SUBJECT: Results of portable breath test inadmissible - offered by D
HOLDING: Tr. Ct. did not err in preventing D from cross-examining police officer as to results of portable breath test that had been administered following his arrest. Result of test revealed that D had blood alcohol content of .099 percent. Foundational requirements for admission of breath alcohol test results include showing that test was administered by operator certified by State Department of Toxicology, equipment used in test was inspected & approved by Department, & operator used techniques approved by Department. Ind. Code 9-30-6-5; Hornback v. State, 693 N.E.2d 81 (Ind. Ct. App 1998). Breath test results are generally inadmissible for benefit of either party if Department has not approved some aspect of test. Mullins v. State, 646 N.E.2d 40 (Ind. 1995). Here, D presented no evidence demonstrating that portable breath test satisfied requirements of Ind. Code 9-30- 6-5. Moreover, he did not establish any of foundational requirements for admission of those results. Held, judgment affirmed.

RELATED CASES: Curley, App., 777 N.E.2d 58 (no error in excluding results of passengers' PBTs, as they were irrelevant to show whether D was intoxicated & D as not prevented from questioning passengers).

TITLE: Spriggs v. State
INDEX NO.: O.12.b.
CITE: (3rd Dist., 10-4-96), Ind. App., 671 N.E.2d 470
SUBJECT: Blood Alcohol (BAC) test results admissible
HOLDING: BAC test results obtained at hospital were properly admitted into evidence, despite police officer's failure to comply with Ind. Code 9-30-6-6(g). Statute provides mechanism to compel reluctant physician to draw blood sample, but does not require law enforcement officer to make written certification that person from whom blood sample is to be drawn was involved in accident that resulted in serious bodily injury of another. State v. Robbins, 549 N.E.2d 1107 (Ind. Ct. App 1990). Statute did not apply in this case because attending physician was not reluctant to draw blood sample & gave BAC results to investigating police officer when requested. Held, no error.

RELATED CASES: Abney, 821 N.E.2d 375 (Ct. disapproved of language in Spriggs & other cases that suggest Ind. Code 9-30-6-6(g) only applies to cases where a physician is reluctant to take a blood draw upon request of a law enforcement officer); Guy, App., 678 N.E.2d 1130 (certification requirements of statute are merely tool to acquire BAC evidence, & only apply when physician refuses to draw blood sample).

TITLE: State v. Johanson
INDEX NO.: O.12.b.
CITE: (5th Dist., 4-30-98), Ind. App., 695 N.E.2d 965
SUBJECT: Breath test results inadmissible – inadequate foundation
HOLDING: Tr. Ct. did not abuse discretion in refusing to admit breathalyzer test results into evidence, where breathalyzer machine malfunctioned, did not print results, & test operator wrote down time & results of test on print card. Failure to follow techniques approved by toxicology department & set forth in 260 IAC 1.1-4-4 renders breath tests results inadmissible. Bowman, 577 N.E.2d 569. Here, although D's blood alcohol content registered on Intoxilyzer screen, it did not print properly onto print record. Step 5 of 260 IAC 1.1-4-4 directs breath test operator to check "print record" to make sure it is correct. State argued that operator complied with step 5 by looking at print card, regulation did not prohibit him from manually recording test results, & operator's testimony was sufficient to establish foundation for admission of test results. In rejecting State's argument, Ct. noted that Ind. Code 9-30-6-5 & regulations governing administration of breathalyzer tests clearly contemplate strict compliance & there is no indication that this requirement can be circumvented by introduction of inherently less reliable evidence. Id. Regardless of credibility of test operator, step 5 directs operator to check "print record" & does not include consideration of other evidence. Print card is independent evidence that is mandated by regulations. Therefore, testimony of operator was not sufficient to demonstrate foundation for admission of test results. Held, judgement affirmed.

RELATED CASES: Connor, 114 N.E.3d 901 (Ind. Ct. App 2018) (without direction from the Department of Toxicology on how to properly proceed following a "maximum flow exceeded" error message, Ct. could not say that officer's decision to simply wait three minutes before administering a second test using the same machine was correct; thus, breath test results were erroneously admitted; see full review at K.9); RC to Hurley, K.9.d (Hurley did not interpret the entire regulation as requiring an officer to administer a second test if the first test should fail for any reason; rather, that holding was limited to procedure officer should follow if instrument displays "insufficient sample" message; see full review at K.9.a).

TITLE: State v. Molnar
INDEX NO.: O.12.b.
CITE: (3rd Dist., 2-13-04), Ind. App., 803 N.E.2d 261
SUBJECT: Breath test - foreign substance in mouth; tobacco residue
HOLDING: Tr. Ct. erroneously granted D's motion to suppress results from breath test. D's motion to suppress breath test results was based on premise that test was not properly administered because he had chewing tobacco residue in his mouth at time of test. After D removed tobacco from his mouth, arresting officer asked him if he had any foreign substance in his mouth, to which D replied that he did not. It was undisputed that D did not place any foreign substance in his mouth within twenty minutes of test. 260 IAC 1.1-4-8 provides that person to be tested "must have had nothing to eat or drink, must not have put any foreign substance in his or her mouth or respiratory tract, & must not smoke within twenty minutes to time a breath sample is taken." Reason for twenty-minute rule is to prevent a foreign substance from affecting breath test results.

The word "put" is not defined in regulation, & must be given its plain & ordinary meaning, which is "to place in a specified location." By using word "put" in regulation, Department of Toxicology prohibited placement of a foreign substance in subject's mouth prior to test. Regulation makes no provision for residue remaining from matter removed from subject's mouth before twenty-minute period begins & does not invalidate breath test results due to residue remaining in subject's mouth. It was improper for Tr. Ct. to expand upon plain language of regulation to affect such a result. State satisfied its burden to show that test was properly administered, & D failed to present sufficient evidence that tobacco residue, if any in fact remained by time test was administered, affected outcome of test in such a way as to call in to question propriety of test's administration. Held, judgment reversed.

Note: D would not be precluded from presenting evidence at trial that a test result was actually skewed by residue remaining in his or her mouth. Here, no such evidence was presented.

RELATED CASES: Fields, App., 807 N.E.2d 106 (Ct. disagreed with Molnar, to extent it held that 260 IAC 1.1-4-8(1) only requires that a person not place any foreign substance in his mouth within the 20 minute deprivation period; person cannot have any substance in his mouth during that period -- whether placed there or not); Fields, 811 N.E.2d 978 (on rehearing, Ct. clarified earlier opinion and noted that deputy followed the proper procedure by having the tobacco removed from D's mouth).

TITLE: State v. Rumple
INDEX NO.: O.12.b.
CITE: (5th Cir.; 2-9-00), Ind. App., 723 N.E.2d 941
SUBJECT: OWI - DOT not required to independently test & certify simulator solutions
HOLDING: Tr. Ct. erred in suppressing results of D's BAC DataMaster test because simulator solution used to calibrate machine does not have to be independently tested & certified by Department of Toxicology. Chemical breath tests are not admissible in evidence if: . . . (3) chemicals used in test, if any, . . . have not been approved in accordance with rules adopted under subsection (a). Ind. Code 9-30-6-5(d)(3). Ind. Code 9-30-6-5(a) requires Department of Toxicology to promulgate rules governing inspection & certification of breath test equipment. When possible, every word is to be given effect & no part of statute is to be construed so as to be meaningless, if it can be reconciled with rest of statute. Hensley, App., 716 N.E.2d 7. Here, because chemicals are always used in calibrating breath test machine, but only sometimes used in administering actual breath test itself, construing Ind. Code 9-30-6-5(d)(3) to include solution chemicals used to calibrate machines would render "if any" in that provision superfluous. Only construction of Ind. Code 9-30-6- 5(d)(3) which gives meaning to "if any" is to conclude that "chemicals" means only chemicals used in administering breath test. Thus, because Ind. Code 9-30-6-5(d)(3) does not refer to simulator solution used to test & calibrate BAC Data Master, Ind. Code 9-30-6-5(a), which governs approval & certification of chemicals used in BAC breath test, is not applicable. Held, grant of suppression reversed.

TITLE: Smith v. State
INDEX NO.: O.12.b.
CITE: (2d Dist. 12/31/86), Ind. App., 502 N.E.2d 122
SUBJECT: Breath alcohol tests - level of intoxication at time of offense; extrapolation
HOLDING: Although blood alcohol test results obtained some time after alleged violation are admissible, such test results, alone, are not sufficient to support conviction under Ind. Code 9-11-2-2 (DWI). Here, D contends breathalyzer test results should not have been admitted because they failed to reflect his level of intoxication at time of offense. Evidence that D's BAC measured .12% shortly after arrest does tend to prove that at some time prior to arrest, D consumed some quantity of alcohol which might have resulted in intoxication; therefore, evidence was relevant & properly admitted. In order to show BAC at time of offense, state must present evidence extrapolating back from time of test. [In footnote 5, Ct. expresses concern that although extrapolation is required by clear language of statute, Ct. is troubled by fact evidence necessary for proper extrapolation may be solely in hands of D. Ct. comments: "despite our concern, this is not proper case & we are not proper body to rectify statute's deficiencies."] However, in prosecution for DWI it is not necessary to show BAC at time of offense so long as there is sufficient evidence of intoxication at time of offense. Ct. finds sufficient evidence (failure to exhibit normal balance or control in performing field tests) of intoxication. Held, conviction affirmed.

RELATED CASES: Jarrell v. State, 852 N.E.2d 1022 (Ind. Ct. App 2008) (noting that legislature essentially expressed its disapproval of Smith and its implication that the State always had to present independent extrapolation evidence in order to prove a D's BAC at the time he or she was driving and could not simply rely on the BAC at the time of a later chemical test. Rather, IND. CODE9-30-6-13(b), , clearly allows proof of a D's BAC at the time of driving to rest on proof of his or her BAC at the time of a test, so long as it was conducted within a defined time period); Tyner, App., 503 N.E.2d 444 (Autos 353; Crim L 474; expert witness testified re rate of absorption: peak level of absorption of alcohol is 1 to 1 and ½ hours after consumption; alcohol leaves blood stream at 0.015% per hour; both factors are subject to weight, age, prior food consumption & chronic alcohol intake; from 0.013% BAC at time of test, expert extrapolated that D's BAC at time of offense was 0.18%).

TITLE: State v. Albright
INDEX NO.: O.12.b.
CITE: (04-14-94), Ind., 632 N.E.2d 725
SUBJECT: Breathalyzer results admissible - procedures proper
HOLDING: Decision reversed Ct. App. decision at 622 N.E.2d 995, that upheld grant of motion to suppress Intoxilyzer test results. Ct. App. found 20-minute observation period required by IAC 260, r. 1.1-4-4(1) had not been followed & therefore results were properly suppressed. S.Ct. looked at record on transfer & found regulation had been followed & that Tr. Ct. erred in suppressing results DeBruler & Dickson, JJ., dissenting, finding facts did not support majority's decision.

RELATED CASES: Nasser, App., 646 N.E.2d 673 (State met its burden of establishing 20-minute observation period before officer administered test).

TITLE: State v. Hayes
INDEX NO.: O.12.b.
CITE: (4th Dist., 10-6-95), Ind. App., 655 N.E.2d 627
SUBJECT: Selection criteria for breath test equipment
HOLDING: Tr. Ct. erred in suppressing results of D's breath test. In his motion to suppress, D argued that approval of Intoxilyzer 5000 breath test machine was invalid due to absence of selection standards. Relying on recent holding in Key v. State (1995), App., 651 N.E.2d 1190, Ct. noted that Indiana Administrative Code sets forth sufficient performance requirements for breath test equipment. Further, 260 IAC 1.1-4-4 provides appropriate techniques for administering breath test using Intoxilyzer 5000, thus ensuring reliability of breath test results. Here, there was no evidence that test operator, equipment, chemicals, or technique used to administer D's breath test were not approved pursuant to standards set forth by Department of Toxicology. Ind. Code 9-30-6-5(d). Held, judgment reversed.

RELATED CASES: Sales, App., 714 N.E.2d 1121, revs'd on the grounds 723 N.E.2d 416 (Tr. Ct. properly denied D's motion to suppress Intoxilyzer 5000 results expressed in grams in breath, although such expression of alcohol content was different from that prescribed under I.A.C. 1.1-5-1(a)(1)); Key, App., 651 N.E.2d 1190 (D presented no evidence to suggest that D's breath test results were in any way unreliable or inaccurate); Storrjohann, App., 651 N.E.2d 294.

TITLE: State v. Johanson
INDEX NO.: O.12.b.
CITE: (5th Dist., 4-30-98), Ind. App., 695 N.E.2d 965
SUBJECT: Breath test results inadmissible - inadequate foundation
HOLDING: Tr. Ct. did not abuse discretion in refusing to admit breathalyzer test results into evidence, where breathalyzer machine malfunctioned, did not print results, & test operator wrote down time & results of test on print card. Failure to follow techniques approved by toxicology department & set forth in 260 IAC 1.1-4-4 renders breath test's results inadmissible. Bowman, 577 N.E.2d 569. Here, although D's blood alcohol content registered on Intoxilyzer screen, it did not print properly onto print record. Step 5 of 260 IAC 1.1-4-4 directs breath test operator to check "print record" to make sure it is correct. State argued that operator complied with step 5 by looking at print card, regulation did not prohibit him from manually recording test results, & operator's testimony was sufficient to establish foundation for admission of test results. In rejecting State's argument, Ct. noted that Ind. Code 9-30-6-5 & regulations governing administration of breathalyzer tests clearly contemplate strict compliance & there is no indication that this requirement can be circumvented by introduction of inherently less reliable evidence. Id. Regardless of credibility of test operator, step 5 directs operator to check "print record" & does not include consideration of other evidence. Print card is independent evidence that is mandated by regulations. Therefore, testimony of operator was not sufficient to demonstrate foundation for admission of test results. Held, judgment affirmed.

RELATED CASES: Cioch, 908 N.E.2d 1154 (Ind. 2009) (officer in this case followed each of required steps of procedure & did not do anything that calls into question the reliability of the instrument or the evidence ticket when he noticed the erroneous timestamp & wrote the actual time of day on it).

TITLE: State v. Johnson
INDEX NO.: O.12.b.
CITE: (1st Dist. 1/29/87), Ind. App., 503 N.E.2d 431
SUBJECT: Breath alcohol tests - alco-sensor
HOLDING: Tr. Ct. erred in not admitting alco-sensor test results (.15%) at suppression hearing to establish probable cause. Results of alco-sensor tests are inadmissible at trial because test is not approved of Department of Toxicology. At suppression hearing, probable cause can be established by evidence which would not be admissible at trial. Layman, App., 407 N.E.2d 259. Ct. finds no difference in officer's use of alco-sensor test than in use of manual dexterity tests. Here, D later took breathalyzer test & registered .115% BAC. Held, judgment suppressing results of breathalyzer test reversed; cause remanded for trial. Robertson DISSENTS, arguing officer did not have probable cause to even offer also-sensor test, having stopped D for speeding. Officer noticed "moderate odor of alcohol emanating from" D. Taking of D's breath sample, without probable cause to arrest him for DWI, cannot be justified on basis of D's actual implied consent to tests. Dissent contains excellent discussion of law on this issue.

TITLE: State v. Trent
INDEX NO.: O.12.b.
CITE: (3d Dist. 07/28/92), Ind. App., 596 N.E.2d 272
SUBJECT: Suppression of breath alcohol results - no established procedures
HOLDING: Although officer administering breath alcohol test with BAC Data Master Instrument followed pro- posed procedures later adopted, & machine was identical to machine which had procedures, except for keyboard, Ct. did not err in suppressing test results because of lack of compliance with Ind. Code 9-11-4-5(d) [recodified at Ind. Code 9-30-6-5]. Test was administered to D on June 29, 1991. At that time there were no rules or regulations of the Department of Toxicology of the Indiana University School of Medicine directing operational procedures for the machine used. Such procedures were adopted in September 1991, effective October 1991, & apparently procedures used would have been in compliance with standards later adopted. Ct. App. held, however, that unequivocally & without exception, Ind. Code 9-11-4-5(d) states that breath test results are inadmissible if equipment or techniques have not been approved by Department of Toxicology. Subsequent approval does not meet statutory requirement. Statute's construction, providing for inadmissibility of evidence, does not show any intent to create exceptions. See also: Crouch v. State, Ind. App., 638 N.E.2d 861.

RELATED CASES: Storrjohann, App., 651 N.E.2d 294 (no error in denying motion to suppress breath test results; Ct. rejected argument that Dept. of Toxicology failed to adopt standards & regulations for selection of breath test equipment).

TITLE: Sturgis v. State
INDEX NO.: O.12.b.
CITE: (4th Dist., 8-18-95), Ind. App., 654 N.E.2d 1150
SUBJECT: Effect of breath test regulations - failure to instruct jury
HOLDING: Failure to instruct jury about effect of Tr. Ct.'s taking judicial notice of administrative regulations was harmless error. In jury trials, Tr. Ct. must expressly take judicial notice of breath test regulations & instruct jury "that it may, but is not required to, accept as conclusive any fact judicially noticed." Baran v. State (1994), Ind., 639 N.E.2d 642. Here, notwithstanding Tr. Ct.'s error, there was other evidence properly admitted that printout from breath test machine was report of blood alcohol content as percentage of alcohol by weight in blood. Error is not grounds for reversal unless Tr. Ct.'s refusal to take action is inconsistent with substantial justice. Ind.Trial Rule 61. Held, conviction affirmed.

RELATED CASES: Berry, App., 720 N.E.2d 1206; Godar, App., 643 N.E.2d 12 (conviction for operating with BAC >.10% reversed & remanded where Tr. Ct. failed to take judicial notice of effect of breath test regulations & instruct jury accordingly).

TITLE: Thurman v. State
INDEX NO.: O.12.b.
CITE: (5th Dist., 2-29-96), Ind. App., 661 N.E.2d 900
SUBJECT: Breath test results admissible - sufficient foundation
HOLDING: Tr. Ct. did not err in admitting results of D's breath test. For results of breath test to be admissible, test operator, equipment, chemicals used in test, & techniques used in test must have been approved by department of toxicology. Ind. Code 9-30-6-5(d). Here, certified breath test operator testified that he observed D from time of initial stop until administration of test, that he did not see D place anything in his mouth, & that he did not observe anything in D's mouth. Operator also testified that he was specifically trained to watch test subject so as not to allow placement of any foreign substances into subject's mouth or respiratory tract. This evidence established sufficient foundation from which Tr. Ct. could conclude that proper procedures under 260 Ind.Admin. Code 1.1-4.5 were followed. In so holding, Ct. rejected D's argument that test operator had affirmative duty to open & visually inspect D's mouth. Held, judgment affirmed.

TITLE: Upchurch v. State
INDEX NO.: O.12.b.
CITE: (1st Dist., 12-30-05), Ind. App., 839 N.E.2d 1218
SUBJECT: BAC evidence ticket stating "INVALID" is not a refusal
HOLDING: Tr. Ct. erred in denying D's verified petition for judicial finding of no refusal in operating while intoxicated case. D twice submitted to BAC tests with the evidence ticket stating "SUBJECT SAMPLE INVALID" on both occasions. D informed administering officer that she suffered from asthma & officer replied anyone could take test, even someone with emphysema. The officer did not offer D an alternative chemical test, but rather found that D refused to take the test & arrested her. Ct. found that officer failed to comply with Title 260, section 1.1-4-8 of the Indiana Administrative Code, which states that if "SUBJECT SAMPLE INVALID" is printed on the evidence ticket of a second breath test, a testing officer should *obtain an alternate chemical test for ethanol or perform the breath test on another evidentiary breath test instrument. (Ct.'s emphasis).* An evidence ticket with "SUBJECT SAMPLE INVALID" on it does not permit an officer to enter the test as a refusal, only when "SUBJECT SAMPLE, INCOMPLETE" is printed may the officer do so. Held, Tr. Ct.'s denial of D's petition for judicial finding of no refusal reversed; Barnes, J., dissenting without opinion.

[Ed **note:** Based on its ruling, Ct. did not address D's argument that mouthpiece from first breath test was foreign object requiring officer to wait 20 minutes prior to testing D again. But in footnote, Ct. noted "support" for D's position in instructions of IAC.]

TITLE: Van Allen v. State
INDEX NO.: O.12.b.
CITE: (2d Dist. 8/27/84), Ind. App., 467 N.E.2d 1210
SUBJECT: Breath alcohol tests - certification statute; rules
HOLDING: Interlocutory appeal. Refusal to suppress D's breathalyzer test results (because of lack of rules/regulations governing certification of test results) was not error. Rules promulgated under old certification statute remained effective until new certification statute's rules & regulations were officially promulgated. Simultaneous repeal & reenactment on 9/1/83 of now Ind. Code 9-11-4-5 resulted in previous informal rules adopted by Dept. of Toxicology (260 IAC 1) being applicable to D's test taken on 9/10/83. New, formal rules were not effective until 1/12/84. D contends repeal of old certification statute (Ind. Code 9-4-4.5) voided effect of old certification rules/regulations because agency's authorization to adopt rules no longer existed. Ct. finds administrative law principles do not support D's contention. NOTE: Ct. does not address issues of adopting rules under Indiana Administrative Adjudication Act & variance of new statute (requiring certification of procedure).

RELATED CASES: Hartman, App., 615 N.E.2d 455 (Rejecting numerous challenges to admissibility of various certification documents & presumptions of breath alcohol statutes, including challenges to constitutionality based on confrontation issues, & to instructions given); English, App., 603 N.E.2d 161 (discusses various aspects of procedures relating to certification); Smith, App., 502 N.E.2d 122 ("red card" was sufficient to prove officer was certified breathalyzer operator, *citing* Grogan, App., 482 N.E.2d 300); Grogan, App., 482 N.E.2d 300 (Ct. rejects D's contention that Breathalyzer Operational Check List fails to prove that test was administered by certified method & that only certified copy of rules adopted by Department pursuant to Ind. Code 9-11-4-5(c)(3) can establish foundational requirement for admission of test).

TITLE: Wolpert v. State
INDEX NO.: O.12.b.
CITE: (12/21/2015), 47 N.E.3d 1246 (Ind. Ct. App 2015)
SUBJECT: Dry gas in breath test machine adequately certified
HOLDING: D's breath test results were adequately certified. After being pulled over for drunk driving, D agreed to submit to a chemical test. Both test samples from the Intox EC/IR II exceeded .150 grams per 210 liters of breath, so D was charged accordingly under Ind. Code § 9-30-5-1(b). At trial, he objected to admission of the test results, claiming the State failed to certify the dry gas used to calibrate the breath test machine. See Ind. Admin. Rule 2-3-5. However, the State used an equally valid method to certify the dry gas by providing a certificate showing that the breath test machine itself was properly certified. See 260 Ind. Admin. Rule 2-3-2. This certificate is *prima facie* evidence that the dry gas was inspected and approved by the Department of Toxicology. See Fields v. State, 807 N.E.2d 106, 111 (Ind. Ct. App 2001), trans. denied. Held, judgment affirmed.

TITLE: Wray v. State
INDEX NO.: O.12.b.
CITE: (1st Dist., 5-14-01), Ind. App., 751 N.E.2d 679
SUBJECT: Breath alcohol tests - police training; erroneous admission of certification letter
HOLDING: Tr. Ct. abused its discretion in admitting into evidence a letter from department of toxicology indicating D's arresting officer was certified by department of toxicology to operate breath test instruments. Ind. Code 9-30-6-5(a) provides that the department of toxicology shall adopt rules concerning standards & regulations for the selection, training, & certification of breath test operators. Subsection (d) of statute provides that results of chemical tests that involve analysis of person's breath are not admissible if test operator has not been approved in accordance with rules adopted under Ind. Code 9-30-6-5(a). At trial, D objected to admission of department of toxicology's recertification letter on basis that it was hearsay & did not fall within public records hearsay exception because letter lacked trustworthiness. Letter stated that officer was certified breath test operator "[p]ursuant to authority granted by Ind. Code 9-30-6-5, & regulations promulgated thereto, 260 IAC 1.1..." However, officer unequivocally testified that he had not received training in four of five areas that regulations require breath test operators to receive: pharmacology of alcohol, theory & care of breath test equipment, legal aspects of breath testing, & interpretation of test results.

Legislature delegated responsibility for setting standards for training of breath test operators to department of toxicology, & in promulgating Section 1.1-1-2 of Title 260 of Indiana Administrative Code, department set forth training that it believes breath test operators should receive before they can be considered certified &, therefore, before results of tests that they administer may be admitted into evidence. Ct. will not second-guess these training rules & whether training in all five of specified areas are truly required in order for breath test operator to reliably administer test. In order to give effect to requirements of Ind. Code 9-30-6-5, Ct. must hold that where, as here, there is uncontradicted evidence that a "certified" breath test operator was in fact not trained in accordance with department of toxicology's regulations regarding training, a breath test operator certificate that indicates otherwise is not admissible under statute. Held, conviction reversed.

RELATED CASES: Lloyd, App., 800 N.E.2d 196 (Tr. Ct. abused its discretion in refusing to admit breath tests & the testifying officer's certification into evidence; administrative rule *cited* in Wray on which Tr. Ct. relied was amended to require only 12 hours of certification training).

O. EVIDENCE

O.12. Scientific evidence

O.12.c. Drug analysis

TITLE: Burkett v. State
INDEX NO.: O.12.c.
CITE: (2/12/98), Ind., 691 N.E.2d 1241
SUBJECT: Field tests - marijuana
HOLDING: In possession of marijuana case, Tr. Ct. did not err by holding field test to detect marijuana was reliable under Ind. R. Evid. 702(b). D argued that State failed to provide a sufficient foundation for reliability of field test for presence of marijuana. There is no specific test or set of prongs which must be considered in order to satisfy IRE 702(b). McGrew, 682 N.E.2d 1289. Rather, possible means by which reliability may be established include judicial notice or sufficient foundation to convince Tr. Ct. that relevant scientific principles are reliable. Id. Here, Ct. found that results of this type of test have been admitted in prior cases. See e.g., Houston, 553 N.E.2d 117; Bellamy, 286 N.E.2d 401. Officer testified that he had been trained to administer field test, that he followed proper procedures, that test consisted of three ampules of acid that change color to show presence of marijuana, and that field test was used routinely by sheriff's department. Held, no error.

RELATED CASES: Doolin, 970 N.E.2d 785 (Ind. Ct. App 2012) (to the extent Burkett stands for the broad proposition that any unnamed in-court field test for marijuana is admissible, so long as the testifying officer states he or she has experience with the test and that the department routinely uses it, Ct. declined to follow it).

TITLE: Carter v. State
INDEX NO.: O.12.c.
CITE: (3-3-99), Ind., 706 N.E.2d 552
SUBJECT: Admission of urinalysis evidence - probation revocation proceedings
HOLDING: Tr. Ct. did not err in admitting urinalysis evidence during probation revocation proceeding, notwithstanding claim that State failed to qualify lab technician as expert & urinalysis equipment as reliable. In probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability. Cox, 706 N.E.2d 547. This includes expert testimony & scientific evidence.

S.Ct. rejected Ct. App.' conclusion that lab technician did not qualify as expert because he could not explain scientific basis for test. At hearing, technician testified that he had been responsible for operation of urinalysis equipment for more than five years & tested more than ten thousand samples. Technician further testified that he had received all training necessary to become operator of urinalysis machine used in D's case. Moreover, he demonstrated that he possessed expertise in use of equipment, testifying as to how urinalysis machine worked, how it was operated, how often it was tested, substances it tested, & how results of such tests were interpreted. Regardless of whether these credentials are sufficient to qualify technician as expert under either Frye test or Rules of Evidence, Ct. found them adequate for consideration by Tr. Ct. under evidentiary standards applicable to probation revocation hearings.

As for reliability of urinalysis equipment, Ct. noted that urinalysis technology is hardly novel & has become conventional means of drug-testing, results of which have been deemed reliable in Ind. Cts. Penrod, App., 611 N.E.2d 653. Held, transfer granted, Ct. App.' decision at 685 N.E.2d 1112 vacated, revocation of D's probation affirmed.

RELATED CASES: Holmes, 923 N.E.2d 479 (Ind. Ct. App 2010) (urinalysis report was substantially trustworthy and admissible in home detention revocation hearing, despite absence of testimony from toxicologist and certifying scientist); C.S., App., 817 N.E.2d 1279 (Ct. rejected juvenile's claim that his confrontation rights to cross-examine his accuser were violated because the testing information was presented by a probation officer without knowledge of the testing procedures employed); Black, App., 794 N.E.2d 561 (Tr. Ct. erroneously excluded an independent urinalysis from evidence in D's probation revocation hearing; see full review at F.1.e.2.c); Black, App., 794 N.E.2d 561 (Tr. Ct. erroneously excluded an independent urinalysis from evidence in D's probation revocation hearing; see full review at F.1.e.2.c).

TITLE: Mediate v. State

INDEX NO.: O.12.d.

CITE: (10/16/86), Ind., 498 N.E.2d 391

SUBJECT: Fingerprints - quantum of additional evidence necessary to sustain conviction based upon fingerprint

HOLDING: Where possibility of legitimate access was adequately foreclosed, evidence of D's fingerprint on object within home was sufficient to sustain burglary conviction. Here, D's fingerprint was found on box of shotgun shells moved from closet to floor of garage during burglary. Homeowner also owned gun shop. Victim testified he sold this type of shell at his store but stated he did not believe this box had ever been offered for sale. Ct. notes when principle evidence of commission of crime is latent fingerprint, sufficiency of evidence is important/difficult question. Often, state presents additional direct evidence which alone would sustain conviction. Ct. may consider legitimate access to fingerprinted object, relocation of object from its point of origin & authorization to enter dwelling/structure. Only time fingerprint evidence alone is sufficient to sustain conviction is when print is found at point of entry. Case summarizes numerous cases concerning fingerprint evidence. Held, conviction affirmed.

RELATED CASES: Meehan, 7 N.E.3d 255 (Ind. 2014) (DNA found on glove at scene is sufficient to sustain conviction where D had no legitimate access to burglary scene and N13the glove was found near point of entry; see full review at K.4.c); Kenney, App., 908 N.E.2d 350 (Ind. Ct. App 2009) (D's fingerprint left on car at crime scene, along with the fact that D was dating shooter's sister and matched general description of second person witnessed at scene, was sufficient to convict D of felony murder); Curry, App., 440 N.E.2d 687 (see card at K.4.c).

TITLE: Penrod v. State
INDEX NO.: O.12.c.
CITE: (2nd Dist., 03-25-93), Ind. App., 611 N.E.2d 653
SUBJECT: ADX Abbott machine for urine testing meets Frye test
HOLDING: Results of urinalysis performed with ADX Abbott machine were properly admitted in D's probation revocation hearing, because machine has reached appropriate level of acceptance in scientific community to meet test of Frye v. U.S. (D.C. Cir., 1923), 293 F. 1013. After D was placed on probation, probation officer (PO) ran two tests on D's urine sample using ADX Abbott machine, & results were positive for marijuana. After hearing, D's probation was revoked. Ct. rejected D's argument that results were inadmissible due to inadequate showing of scientific reliability of machine. In Jones v. U.S. (1988), D.C. App., 548 A.2d 35, Ct. found similar equipment, EMIT system, to have reached requisite level of acceptance required by Frye. D himself stated that systems were basically same technology, & that there was no difference between Abbott machine & EMIT Cobus. Based on Jones & D's statement, Ct. found no error in admitting test results over D's objection. Held, judgment affirmed.

TITLE: Sciaraffa v. State
INDEX NO.: O.12.c.
CITE: (4/7/2015), 28 N.E.3d 351 (Ind. Ct. App 2015)
SUBJECT: Lack of confirmatory test for meth does not invalidate preliminary test
HOLDING: In dealing in methamphetamine prosecution, Tr. Ct. did not abuse its discretion in admitting presumptive positive test for methamphetamine. Presumptive test results indicated that a milky, oily residue in a glass bottle was methamphetamine, but there was too little a sample to confirm the presumptive testing's result, so the Indiana State Police forensic expert was not scientifically certain it was meth. But the fact she could not conduct a confirmatory test does not invalidate the preliminary test or prevent its admissibility, but rather reflects on the weight of the testimony.

Distinguishing Doolin v. State, 970 N.E.2d 785, 787 (Ind. Ct. App. 2012), Court held that the State properly established foundation and reliability underlying scientific principles of the presumptively positive test performed under Evid. R. 702(b). Held, judgment affirmed.

O. EVIDENCE

O.12. Scientific evidence

O.12.d. Fingerprints

O. EVIDENCE

O.12. Scientific evidence

O.12.e. Firearms/toolmarks

TITLE: Smith v. State
INDEX NO.: O.12.e.
CITE: (4/16/87), Ind., 506 N.E.2d 31
SUBJECT: Powder residue tests
HOLDING: Tr. Ct. did not err in sustaining state's objection to D's expert's testimony re powder residue tests performed on handgun which was not murder weapon. Tr. Ct. relied on Miller v. State 236 N.E.2d 585, which dealt with issue of powder residue experiments conducted on weapon different from murder weapon. Miller recognized factors to be considered before allowing testimony from expert for purpose of showing distance between gun barrel & target. Factors are: (1) whether murder weapon is used to conduct tests; (2) if "similar" weapon is used, whether it is in same relative condition as murder weapon; (3) whether same make & grade of ammunition is used; & (4) whether conditions prevailing at experiment were substantially similar to those at time of homicide. Despite fact D's witness apparently complied with guidelines set forth in Miller, Ct. finds evidence was properly excluded because it would not have added anything of substance nor detracted from testimony of doctor who performed autopsy & conjectured concerning angle at which gun was fired. Held, no abuse of discretion. Dickson CONCURS IN RESULT without opinion.

TITLE: Turner v. State
INDEX NO.: O.12.e.
CITE: (09-28-11), 953 N.E.2d 1039 (Ind. 2011)
SUBJECT: Firearms evidence - testimony reliable
HOLDING: Indiana Rule 702(b) requires that expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable. Although the factors set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) to determine the reliability of scientific evidence are helpful, they are not controlling. Here, D was charged with seven counts of murder. The police found at the house where D was staying an unfired cartridge of the same brand, caliber and type as the fired cartridge casing at the crime scene. Eventually, after repeated examinations, a firearms expert opined that a tool mark on the unfired cartridge matched tool marks found on four of the discharged cartridge casings found at the scene and the marks were made by the same tool of unknown origin. The expert claimed he could not say with certainty that the marks were made from chambering the cartridges in the same gun. But, the expert failed to present any articles, studies or anecdotal reports in which an examiner was able to identify unfired to fired cartridges based on sidewall tool marks with no suspect weapon available. Although the Texas Court of Appeals has held that such opinions are unreliable because they are not supported by the Daubert factors, in Indiana, lack of formal testing and the inability to pinpoint other research, all inform the fact finder's judgment on weighing this evidence, but does not render the evidence inadmissible. The fact that the linkage demonstrated is simply weaker where no weapon is available for comparison purposes also goes to the weight, not the admissibility, of the evidence. Moreover, the Court suggests that firearms examination is not scientific, and thus is not even subjected to Rule 702(b) reliability concerns. Thus, Tr. Ct. did not abuse its discretion by admitting the expert's testimony. Held, judgment affirmed.

TITLE: Yeagley v. State
INDEX NO.: O.12.e.
CITE: (9/6/84), Ind., 467 N.E.2d 730
SUBJECT: Firearms - shot patterns
HOLDING: Tr. Ct. did not err in admitting cardboard background from shooting test, admitted during testimony of state police firearms examiner. Here, examiner testified he fired D's shotgun at cardboard background to produce shot patterns, which he then compared with shot patterns in victims' screen door, clothes & flesh to determine how far away D stood when he fired. D contends use of cardboard made test inherently unreliable because of dissimilarity of materials used in comparison. Examiner testified that in making determination of distance of shot, pattern, not resistance of material, was important. Held, no error.

O. EVIDENCE

O.12. Scientific evidence

O.12.f Hair/fibers

TITLE: McGrew v. State
INDEX NO.: O.12.f.
CITE: (7/8/97), Ind., 682 N.E.2d 1287
SUBJECT: Hair analysis
HOLDING: D claimed that Tr. Ct. erred in admitting expert testimony on hair comparison analysis. Before results of scientific tests are admissible, proponent has burden to prove reliability of scientific test. IRE 702(b) provides that "[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Ct. stated that Daubert analysis regarding admissibility of scientific evidence is "helpful, but not controlling." Reliability may be established by judicial notice or sufficient foundation to convince Tr. Ct. that relevant scientific principles are reliable.

In determining reliability, there is no specific test or set of prongs which must be considered in order to satisfy IRE 702(b), & Tr. Ct.'s determination as to reliability will be reviewed for abuse of discretion. Ct. noted non-exclusive list of factors which cts. may consider: 1) whether technique has been or can be empirically tested; 2) whether technique has been subjected to peer review & publication; 3) known or potential rate of error; as well as existence & maintenance of standards controlling technique's operation; & 4) general acceptance in relevant scientific community.

Here, analyst testified that hair comparison he performed was comparison of physical characteristics, as seen under microscope. Ct. found that evidence at issue was more a matter of observations of persons with specialized knowledge than a matter of scientific principles governed by IRE 702(b). Thus, Tr. Ct. did not abuse its discretion in finding that proffered hair comparison analysis was sufficiently reliable to be admitted. Held, transfer granted, Tr. Ct. affirmed; Ct. App.'s opinion on this issue at 673 N.E.2d 787 vacated.

O. EVIDENCE

O.12. Scientific evidence

O.12.g. Handwriting

TITLE: Richardson v. State
INDEX NO.: O.12.g.
CITE: (1st Dist. 12/23/85), Ind. App., 486 N.E.2d 1058
SUBJECT: Handwriting - proof of standards
HOLDING: Admission of handwriting standards without proper proof is error; error is reversible if expert bases opinion solely on inadequately proven standards. Here, Ds were charged with forgery of a will & 6 stock certificates. Standards submitted for signature comparison purposes were 25 cancelled checks, letter written to decedent's son by her, her will & her diary. No witness testified re genuineness of signatures/writings. Ind. Code 34-3-6-1 permits evidence of comparison. Plymouth Savings & Loan Assn No. 2 v. Kassing (1919), 72 Ind. App. 1 sets forth criteria for proving genuineness of handwriting. See also Wells 261 N.E.2d 865; Snider's Executor v. Preachers Aid Society, App., 41 N.E.2d 665. Plymouth does not permit proof of standards by expert testimony or by proof by persons who claim to be familiar with questioned writings, because such evidence merely raises collateral issues. Held, convictions reversed. Case remanded for new trial over Ds' double jeopardy objection. D is not entitled to discharge where new trial is ordered to rectify trial error. Irons 397 N.E.2d 603.

O. EVIDENCE

O.12. Scientific evidence

O.12.h. Hypnosis (see also O.5.a.3)

TITLE: Daniels v. State
INDEX NO.: O.12.h.
CITE: (9/23/88), Ind., 528 N.E.2d 775
SUBJECT: Hypnosis
HOLDING: D claimed that victim's son's identification testimony violated his rights to cross-examination, confrontation, & due process of law, as a result of hypnosis of son. Hypnotically derived or renewed testimony is inherently unreliable & denies right of meaningful confrontation & effective cross-examination. Pearson, 441 N.E.2d 468; Strong, 435 N.E.2d 969. However, mere fact that witness has undergone hypnosis will not preclude that witness from testifying. Id. Determinative factor is whether or not witness has sufficient basis for identification independent of hypnosis. Here, D failed to show connection between hypnotic session & son's identification of D as assailant. Held, victim's sons's identification testimony was admissible.

TITLE: Gentry v. State
INDEX NO.: O.12.h.
CITE: (11/29/84), Ind., 471 N.E.2d 263
SUBJECT: Hypnosis - may be used to establish probable cause
HOLDING: Victim's selection of D's photo at first photo array & her identification of D during hypnosis provided sufficient basis for establishing probable cause. Here, D contends police lacked P.C. to arrest him; therefore, statement was inadmissible because product of illegal detention. Although information obtained during hypnosis is not always admissible at trial, it may establish P.C. for arrest/detention for questioning. Hypnosis is reliable investigative tool providing valuable leads for investigation. Investigator does not need to make subjective evaluations re truth/falsity of hypnotic recall, as would judge/jury, but only uses leads obtained for investigation/verification. Pearson 441 N.E.2d 468. Held, no error.

TITLE: Peterson v. State
INDEX NO.: O.12.h.
CITE: (5/11/83), Ind., 448 N.E.2d 673
SUBJECT: Hypnosis - pretrial hypnotic interview evidence inadmissible
HOLDING: Admission of witness' testimony regarding D's identification (of which witness had no recall prior to pretrial hypnotic interview) denied D his due process rights to confront & cross-examine. Here, stockboy at drugstore witnessed murder of pharmacist. Murderer told stockboy he would be killed if he identified murderer. Stockboy was unable to identify D in photographic array or lineup. Three months later, stockboy agreed to be hypnotized by police detective. After hypnotic session, stockboy identified D & a co-D from photo array. D filed a motion to suppress & a motion in limine (both denied) & objected at trial to stockboy's testimony. Ct. distinguishes Strong 435 N.E.2d 969 (witness had identified D prior to hypnotic session). Ct. relies on State v. Mack (Minn. 1980), 292 N.W.2d 764 (no recollection of cause of injury until after hypnotic session) & State v. Mena (Ariz. 1981), 624 P.2d 1274 (doctors told victim he would remember what he had told them during session after he came out of hypnosis) & on writings of Dr. Martin Orne, Professor of Psychiatry at University of PA & Director of Unit for Experimental Psychiatry at Institute of PA Hospital, who had appeared at D's trial as an expert on his behalf. Ct. notes "hypnosis is an extremely useful investigating tool when a witness is unable to remember verifiable factual information which provides new leads to the solution of a crime." Held, conviction reversed, new trial ordered.

O. EVIDENCE

O.12. Scientific evidence

O.12.j. Polygraphs/voice stress

TITLE: A.H. v. State
INDEX NO.: O.12.j.
CITE: (01-26-11), 941 N.E.2d 559 (Ind. Ct. App 2011)
SUBJECT: Sufficiency - admitted failed polygraph result
HOLDING: Evidence was insufficient to sustain D's conviction for incest with K.C. Once stipulated polygraphs are admitted, courts have looked to the results as part of the evidence sufficient to sustain a conviction, but only in conjunction with other evidence of probative value. In light of the Indiana Supreme Court's concerns about the doubtful reliability of polygraphs and the difficulty faced by juries in determining their proper weight, the normal practice- of using polygraphs only with other probative evidence - reflects a general rule that an incriminating polygraph alone will be insufficient to sustain a conviction.

Here, neither victim testified to any contact between K.C.'s penis and D's mouth or anus, nor any penetration, as is required to prove incest. However, D stipulated to a polygraph that indicated he was deceptive when he gave a negative answer to whether he made K.C. "touch [his] bare penis with [K.C.'s[mouth or tongue." After the polygraph, he admitted that he sexually abused K.C. and his sister, but did not provide specifics. D did not challenge his convictions for molest based on fondling. Viewing the record as a whole, the only evidence that suggests D engaged in deviate sexual conduct with K.C., as opposed to fondling or touching, is the polygraph results. While these indicated he was deceptive when he denied oral-genital contact, there is no other evidence he was deceptive in making this denial. Thus, the State failed to present substantial evidence of probative value that D committed deviate sexual conduct with K.C., as was required for the incest conviction. Held, incest conviction reversed.

TITLE: Brown v. State
INDEX NO.: O.12.j.
CITE: (4/27/83), Ind., 448 N.E.2d 10
SUBJECT: Polygraph - error to mention at trial
HOLDING: Tr. Ct. did not err in preventing witness from stating that communications with D took place during administration of a polygraph examination. Mere mention of fact D/witness took polygraph is error, absent stipulation by both parties that results shall be admissible. Swan 375 N.E.2d 198. Here, D's attorney requested examiner to perform polygraph. D called examiner at juvenile waiver hearing to testify regarding communications. State called examiner as witness at D's trial. After finding that D waived attorney-client privilege, Ct. holds Tr. Ct. did not err in keeping from jury fact communications occurred during polygraph. Held, no error. DISSENT by DeBruler contends Tr. Ct. denied D right to cross-examination & confrontation (Davis v. AK (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347) & would reverse & remand for a new trial.

RELATED CASES: Majors, 773 N.E.2d 231 (after defense elicited State witness's testimony about his immunity agreement, State could only rebut inference that witness was somehow implicated in crimes by demonstrating that immunity was prerequisite to polygraph exam & that exam result was consistent with witness's denial of personal involvement in crimes; at worst, admission of polygraph evidence was harmless error); Vega, App., 656 N.E.2d 497 (although State's witness disclosed that she had taken polygraph exam, no prejudice occurred where Tr. Ct. admonished jury & evidence indicated that results of exam were inconclusive); Couch, 527 N.E.2d 183 (Tr. Ct. erred in denying mistrial after officer testified that D was still suspect after taking polygraph); Baker, 506 N.E.2d 817 (Tr. Ct. erred in refusing to grant mistrial after officer testified he had asked D to take polygraph; admonition to disregard comment did not cure error; Ct. distinguishes Beal, 453 N.E.2d 190 & Farmer, App., 481 N.E.2d 154 (cases holding that admonition cured error); here, remark was not inadvertent & no evidence corroborating child molest victim's statement existed to prove guilt; held, reversed & remanded for new trial).

TITLE: Brown v. State
INDEX NO.: O.12.j.
CITE: (03/05/92), Ind., 587 N.E.2d 111
SUBJECT: Mention of polygraph in co-D's plea agreement
HOLDING: It was error to admit testifying co-D's unredacted plea agreement, which included condition that co-D take polygraph, & D did not "open door" to admission by questioning co-D about plea. Prior to trial, D's co-D entered into plea agreement, & subsequently co-D testified against D at his trial. Plea agreement required that co-D take polygraph test. During trial, State attempted to admit entire agreement which included mention of poly- graph test, & Ct. sustained D's objection. During cross-examination of co-D, he was questioned in detail concerning plea, but no mention was made of polygraph. On redirect exam, State again offered entire agreement, arguing that D had opened door to admission by D's cross-examination of co-D. Tr. Ct. allowed entire agreement into evidence & permitted State to cross-examine co-D concerning taking of polygraph, but the results of the exam were not disclosed. Ct. noted that when State has entered into plea agreement with witness, it is necessary to disclose such agreement, & that therefore agreement was clearly admissible. Ct. also noted, however, that it is error to admit facts that indicate that witness has taken polygraph. When exhibit is otherwise admissible, but contains inadmissible evidence or inferences, proper procedure is to redact those portions which are inadmissible. Ct. rejected State's argument that error was harmless because result of polygraph was not pursued, by finding that only logical conclusion jury could reach under circumstances was that co-D passed polygraph. Held, conviction reversed & remanded for retrial, Krahulick, J., dissenting.

RELATED CASES: Lay, Ind., 659 N.E.2d 1005 (where prosecutor only elicited fact witness had agreed to take polygraph test, not that witness had passed polygraph test, there was no fundamental error).

TITLE: Glenn v. State
INDEX NO.: O.12.j.
CITE: (2nd Dist., 9-24-03), Ind. App., 796 N.E.2d 322
SUBJECT: Reference to polygraph did not require mistrial
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial after witness mentioned during cross-examination by D that she had taken polygraph. Prejudice to D was mitigated by admonishment given by Tr. Ct. Question whether D is so prejudiced by statement to warrant mistrial is case specific. Here, Ct. concluded that D invited error through his own questioning; statement did not appear intentional with no mention of results; & jury may not have associated polygraph to this case, as witness noted being involved in several cases.

Ct. noted studies showing admonishments are not very effective & suggests a more specific admonishment as to the unreliability & inadmissibility of polygraph tests rather than the more general one that Tr. Ct. used to ignore witness' last remark. Ct. suggested following admonishment be given in this situation: A suggestion has been made that the witness took a polygraph examination, yet there has been no suggestion as to what the subject matter of the polygraph test was. Because scientific research has found that polygraph tests are not reliable, they are inadmissible. I would ask that you disregard the last comment made by the witness. Held, judgment affirmed.

RELATED CASES: Shriner, App., 829 N.E.2d 612 (because D opened door to polygraph evidence, Tr. Ct. did not err in allowing prosecutor to ask D questions about whether he took a polygraph & to use his previous incorrect answer for impeachment purposes before the jury).

TITLE: Greenlee v. State
INDEX NO.: O.12.j.
CITE: (1st Dist. 5/15/85), Ind. App., 477 N.E.2d 917
SUBJECT: Admissibility of statements made during polygraph
HOLDING: "Although results of polygraph examination [are] not admissible into evidence, statements made in response to questioning during course of polygraph examination [are]." Wyrick v. Fields (1982), 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214. Here, Ct. rejects numerous arguments by D that such statements are not admissible. Ct. finds case similar to Fields in which U.S.S.Ct. found Fields waived 5th Amend. rights with regard to polygraph examination itself & that transition from polygraph examination to post-test interview did not represent serious change in circumstances that would then render Fields' answers involuntary. D in present case was informed verbally & in writing of Miranda rights, & signed waiver. Waiver was effective as to 6th Amend. rights as well. Held, no error.

TITLE: Hare v. State
INDEX NO.: O.12.j
CITE: (8/22/84), Ind., 467 N.E.2d 7
SUBJECT: Polygraph - instruction re jury use
HOLDING: Tr. Ct. erred in refusing to give D's instruction re how jury should consider polygraph examination (admitted by stipulation), but error was harmless because other evidence sustained D's conviction. Here, D tendered instruction based upon State v. Valdez (Ariz. 1962), 371 P.2d 894. Prerequisites set forth in Valdez (use & weight of examiner's testimony) were adopted in Owens, App., 373 N.E.2d 913. Tr. Ct.'s final instruction re credibility of witnesses did not remedy error. However, eyewitness' & prisoner's testimony re D's volunteered statement plus other evidence "strongly point[s]" to D's guilt. Held, armed robbery conviction affirmed.

TITLE: Harris v. State
INDEX NO.: O.12.j.
CITE: (8/15/85), Ind., 481 N.E.2d 382
SUBJECT: Polygraph - stipulation; validity
HOLDING: Tr. Ct. did not err in admitting evidence of polygraph in D's second trial where valid stipulation existed. Willis 374 N.E.2d 520 (stipulation applicable to second trial on same charges made necessary because D's MCE was successful). See also Alexander 449 N.E.2d 1068 & Dean 433 N.E.2d 1172 (results of polygraph are inadmissible absent valid stipulation between parties). Here, stipulation recited that D was charged with Class C robbery. Polygraph evidence was admitted at D's trial for Class C robbery, which ended in mistrial. Prosecutor then charged D with robbery Class A on same facts. D objected to admission of polygraph evidence, arguing stipulation was valid only for trial on Class C robbery. Ct. finds recitation re Class C robbery was agreement of fact, no limitation on use of polygraph. Held, no error.

RELATED CASES: Newman, 483 N.E.2d 36 (Stip 14(7); Ct. finds D's contention that he did not understand stipulation unpersuasive in light of D's certification that he had discussed stipulation with his attorney & understood its effect & meaning); Helton, 479 N.E.2d 538 (stipulation must be signed by both D & representative from prosecutor's office; counsel's failure to object to stipulation signed by D & investigating officer constituted ineffective assistance; held, reversed).

TITLE: Hovenden v. State
INDEX NO.: O.12.j.
CITE: (3rd Dist.; 12-28-99), Ind. App., 721 N.E.2d 1267
SUBJECT: Polygraph taken by witnesses - required stipulation
HOLDING: Tr. Ct. did not err in allowing State to present results of polygraph examination of witnesses. Written stipulation signed by prosecutor, defense counsel & person taking polygraph test providing for witness' submission to test & for subsequent admission at trial of results & examiner's opinion thereon on behalf of either D or State is required. However, failure to get defense counsel's signature may not be fatal if evidence shows that parties intended to agree to admissibility of results. See Pickens v. State, 292 N.W.2d 601 (Wis. 1980), *overruled on other grounds*, State v. Klessig, 564 N.W.2d 716 (Wis. 1997). Here, D, victim & victim's mother all agreed to take polygraph tests. Each signed agreement that results of his or her exam could be used in D's trial, but D did not sign agreement that victim's & victim's mother's results would be admissible in his trial. Prior to agreement, written correspondence between defense counsel & prosecutor made clear that D would not waive admissibility of his results unless witnesses would do same. Because parties clearly intended that results of all three polygraphs be admissible, absence of signature by D or his counsel on victim's & victim's mother's stipulations did not render inadmissible their polygraph test results. Held, judgment affirmed.

TITLE: Hubbard v. State
INDEX NO.: O.12.j.
CITE: (1-16-01), Ind., 742 N.E.2d 919
SUBJECT: Exclusion of polygraph evidence upheld - right to present defense
HOLDING: Tr. Ct. did not err in excluding results of polygraph examination administered to person whom D argued committed murders. D offered this evidence to show that person committed crimes & argued that exclusion of polygraph examiner's testimony violated his federal constitutional right to put on defense & contravened Indiana Rule of Evidence 702. D does not enjoy unlimited constitutional right to offer exculpatory evidence. Roach v. State, 695 N.E.2d 934 (Ind. 1998). Exclusion of polygraph results absent stipulation does not violate D's constitutional right to put on defense. Perry v. State, 541 N.E.2d 913 (Ind. 1989). Ct. noted well- documented disagreement among experts regarding reliability of polygraph tests & concluded that government interest in ensuring fair trials outweighs D's limited interests in presenting inherently unreliable evidence. United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 110 L.Ed.2d 413 (1998). As to D's alleged violation of Indiana Evid. R 702, Ct. reaffirmed its longstanding view that polygraph test results are not sufficiently reliable to warrant admission absent stipulation. Held, judgment affirmed.

TITLE: Inman v. State
INDEX NO.: O.12.j.
CITE: (8/29/85), Ind., 482 N.E.2d 451
SUBJECT: Polygraph - state's witnesses; discovery by D
HOLDING: State did not violate discovery order by failing to reveal fact that key witness took polygraph test & answers indicated "an attempt at deception." Here, Ct. finds issue waived. D knew of polygraph during trial but made no objection & took no remedial steps but waited until MCE to raise issue. Ct. addresses merits because of "particular sensitivity to any claim that conviction has been obtained by fraudulent means employed by State." Record does not compel conclusion that answers were false, or if false, that state knew it. State's failure to provide information revealed by test did not hamper defense. Polygraph report is set forth in opinion. Conclusions of operator were not admissible (Smith 455 N.E.2d 346; Zupp 283 N.E.2d 540), so report could not be used to discredit witness. Answers given were consistent with witness' testimony, so report could not be used to impeach him. Held, no error.

TITLE: McVey v. State
INDEX NO.: O.12.j.
CITE: (4th Dist., 03-30-07), Ind. App., 863 N.E.2d 434
SUBJECT: D's post-polygraph statements admissible
HOLDING: In child molesting prosecution, Tr. Ct. did not abuse its discretion by admitting D's statements made during a polygraph examination. D argued that because both parties agreed in advance that polygraph would be non-stipulated, the agreement amounted to a promise of immunity & as a result of this promise, he was coerced into making an incriminating admission. Court held that voluntary statements made during course of polygraph test are not excludable per se as evidence at trials, & current procedures for testing the voluntariness of such statements are adequate to insure that an unreliable statement or statement obtained without a knowing & intelligent waiver of a D's rights will not be admissible at trial.

Here, State's agreement on a non-stipulated polygraph was precipitated by D's specific request, to which State acceded. Thus, Ct. found D's resulting statement to be freely determined & not induced by any State action. Bivens, 642 N.E.2d 938. Further, distinguishing Ashby, 354 N.E.2d 192, Court noted that D was not in custody when he made incriminating statement during post-polygraph phase of examination. Prior to examination, D consulted with an attorney, signed a polygraph waiver & indicated he understood his rights. D was at liberty to stop questioning at any time or not to respond at all. When D made statement, polygraph examiner was not interrogating him but was merely asking questions that had arisen during technical phase of examination. Confronting a suspect with polygraph results is not coercive or unreasonable. Wyrick v. Fields, 459 U.S. 42, 103 S.Ct. 394 (1982). Evidence did not establish, nor even suggest, that potentially incriminating statement resulted from police coercion or inducement, rather than from D's free will. Held, judgment affirmed in part, reversed in part & remanded on other grounds.

TITLE: Minneman v. State
INDEX NO.: O.12.j.
CITE: (11/12/82), Ind., 441 N.E.2d 673
SUBJECT: Polygraph tests - evidence of willingness to take/exculpation
HOLDING: Ct. finds no error in Tr. Ct. grant of prosecutor's motion in limine prohibiting defense from stating D had taken or was willing to take polygraph. "[I]n view of unreliability of polygraphs, Vacendak [340 N.E.2d 352] `the rule prohibiting reference to polygraph evidence absent waiver or stipulation ... is properly applied to prohibit a D from stating that he offered to take a polygraph test.' Moore [369 N.E.2d 628]." Ct. refuses to overrule Robinson 317 N.E.2d 850 & Zupp 283 N.E.2d 540. Held, no error.

RELATED CASES: Kinser, 501 N.E.2d 1041 (Crim L 730(3), 783«; where D opened door by stating during cross-exam his willingness to take polygraph, prosecutor's questioning after D took polygraph (no stipulation) re D's truthfulness, does not require grant of mistrial; although improper, D's objection was sustained & jury was admonished); Johnson, 472 N.E.2d 892 (no error in Tr. Ct.'s exclusion of testimony/reference to polygraph by victim; Ct. rejects Ds' view that third party polygraphs should be admitted because potentially exculpatory to D); Howell, App., 493 N.E.2d 473 (Tr. Ct. did not err by granting state's motion in limine to prohibit D from offering evidence of his willingness to take polygraph; in Helton, 402 N.E.2d 1263, Ct. rejected D's argument that such action denies D opportunity to prove innocence).

TITLE: Music v. State
INDEX NO.: O.12.j.
CITE: (5/24/83), Ind., 448 N.E.2d 1082
SUBJECT: Polygraph - admonition to cure
HOLDING: Tr. Ct.'s failure upon comment by state's witness regarding polygraph to immediately explain to jury that reason polygraph evidence is inadmissible is because it is unreliable was not error where Tr. Ct. immediately admonished jury to disregard any mention of a polygraph examination & gave final instruction (tendered by D) on unreliability of polygraph. Here, Ct. finds D fails to rebut presumption that admonition, reinforced by final instruction, did not rectify harm, if any, from witness' unsolicited & irrelevant testimony. Held, no error.

RELATED CASES: Farmer, App., 481 N.E.2d 154 (Crim L 867; inadvertent reference by state's witness to D's refusal to take polygraph was cured by Tr. Ct.'s admonishment, *citing* Randolph 378 N.E.2d 828; to rebut demonstration that admonition cured error, D must demonstrate that error had probable impact on verdict, *citing* Davis 418 N.E.2d 203; here, D made no showing of probable impact).

TITLE: Sanchez v. State
INDEX NO.: O.12.j.
CITE: (12-13-96), Ind., 675 N.E.2d 306
SUBJECT: Failure to instruct jury on use of polygraph evidence
HOLDING: When polygraph examination results are admitted due to stipulation, jury must be instructed that, at most, polygraph examiner's testimony tends only to show whether D was being truthful at time of examination, & that it is for jury to determine weight & effect to be given such testimony. Davidson, 558 N.E.2d 1077. However, Tr. Ct.'s failure to give this instruction is not fundamental error & is waived where, as here, D does not object to final instructions or does not tender his own instruction at trial. Held, transfer granted, Ct. App.' decision at 650 N.E.2d 734 vacated, & Tr. Ct. affirmed.

TITLE: Stafford v. State
INDEX NO.: O.12.j.
CITE: (2d Dist. 10/26/83), Ind. App., 445 N.E.2d 402
SUBJECT: Polygraph - admissibility; trial to Ct.
HOLDING: Tr. Ct. did not err in refusing to admit into evidence at bench trial results of D's polygraph examination. Here, D concedes Indiana cases hold results of polygraphs are admissible only upon stipulation by both parties. Dean 433 N.E.2d 1172, supplemented 441 N.E.2d 457. D contends primary reason polygraphs are inadmissible is that a jury might place undue weight on results of polygraph which are not deemed sufficiently reliable. D argues this reason is irrelevant when trial is to Ct. This argument was rejected in Filler, App., 421 N.E.2d 1146. Held, no error.

RELATED CASES: Moritz, App., 465 N.E.2d 748 (Crim L 986.2(1); post-trial polygraph report inadmissible at sentencing).

TITLE: State v. Blank
INDEX NO.: O.12.j.
CITE: 955 So.2d 90 (La. 2007)
SUBJECT: Video of polygraph should have been admitted in relation to coercion
HOLDING: Louisiana Supreme Court held that a general rule barring the admission of references to polygraph examinations of witnesses should not have precluded a criminal D from presenting a videotape of a polygraph exam to prove that a post-exam confession was involuntary. D was questioned about a series of burglaries and murders for a few hours before agreeing to take a polygraph test. The test took about two and one-half hours. The examiner and other officers then used results of the test to elicit confessions over the next six hours. At his murder trial, D sought to introduce videotaped recordings of all the questioning to show that his incriminating statements were coerced. The Tr. Ct. let in videotapes of the other questioning but excluded the polygraph questioning. State agreed with courts from other jurisdictions that have rejected contentions that interrogation based on polygraph results is necessarily coercive, but decided D's statutory right to insist on admission of the entire videotape of a confession was violated when the exam portion was removed for the jury. Also, the Tr. Ct. should have allowed D to question the examiner regarding the circumstances leading to his confession even if doing so meant the jury would learn D was given a polygraph exam.

TITLE: State v. Wroe
INDEX NO: O.12.j.
CITE: (9/9/2011), 16 N.E.3d 462 (Ind. Ct. App 2014)
SUBJECT: Polygraph stipulation valid
HOLDING: In child molesting prosecution, Court reversed Tr. Ct.'s suppression of polygraph results, finding that D's stipulation was valid. Even though D was not represented by counsel when he signed the stipulation, his Sixth Amendment right to counsel had not attached because he was neither detained nor charged. See Dullen v. State, 721 N.E.2d 241, 242 (Ind. 1999). To the extent that the right to counsel under the Indiana Constitution, under some circumstances, attaches before someone is charged - Casada v. State, 544 N.E.2d 189 (Ind. Ct. App. 1989) and Caraway v. State, 891 N.E.2d 122 (Ind. Ct. App. 2008) - D waived that right by signing the stipulation, which specifically advised D he was waiving the right to counsel.

The stipulation was not ambiguous for its failure to advise that the trial judge would retain discretion regarding the admissibility of the stipulation; such an advisement is not required. See Jackson v. State, 735 N.E.2d 1146, 1152-53 (Ind. 2000).

The stipulation was not unconscionable for supposedly providing an illusory promise regarding filing charges. Even though D is correct that if he had passed the test the State would have had no choice to drop the case for lack of other evidence, the State made an additional promise that was not illusory, i.e., that it would cease to investigate D if he passed the polygraph test.

Finally, even though the Court sympathized with D's argument that the stipulation was unconscionable for other reasons - e.g., his 8th grade education, lack of counsel, waiver of multiple constitutional rights - the stipulation met the Indiana Supreme Court's prerequisites to be a valid stipulation. See Sanchez v. State, 675 N.E.2d 306, 308 (Ind. 1996). Held, judgment affirmed.

RELATED CASES: Holden, 149 N.E.3d 612 (Ind. Ct. App. 2020) (admission of stipulated polygraph result signed without consulting with counsel was not fundamental error and met the four prerequisites to admissibility under Wroe).

TITLE: U.S. v. Scheffer
INDEX NO.: O.12.j.
CITE: 523 U.S. 303, 118 S.Ct. 1261 (1998)
SUBJECT: Blanket Rule Excluding Polygraph Evidence Upheld
HOLDING: An evidentiary rule that prohibits admission of all evidence related to polygraph examinations does not violate 6th Amendment right to present a defense. A D's right to present relevant evidence is subject to reasonable restrictions to accommodate other legitimate interests in the criminal trial process. Evidentiary rules do not abridge this right so long as they are not "arbitrary" or "disproportionate to the purpose they are designed to serve." Rock v. Arkansas, 434 U.S. 44 (1987). Evidentiary rules are unconstitutionally arbitrary or disproportionate only where they have infringed upon a weighty interest of the accused. The rule in question here serves purpose of ensuring that only reliable evidence is admitted. Since conflict still exists regarding reliability of polygraph evidence, the rule does not seem disproportionate to this purpose. Further, it did not infringe upon a weighty interest of the D here. He sought to admit evidence of his own passed polygraph to bolster the credibility of his testimony that substances found in his urine were the result of "innocent ingestion." He was not prevented from presenting any factual evidence or even testifying in support of this claim, but merely barred him from introducing expert testimony to bolster his own credibility. Kennedy, O'Connor, Ginsburg, and Breyer, JJ., CONCUR, writing separately to note that while the remaining controversy concerning reliability of polygraph evidence does not make the blanket exclusion here so arbitrary or disproportionate as to be unconstitutional, they do not view the per se exclusion rule as wise, and that some later case might present a more compelling case for the introduction of polygraph evidence than the instant case. They acknowledge the tension between this holding and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, concerning the discretion given to Tr. Ct.'s in admitting or excluding scientific evidence. Stevens, J, DISSENTS, arguing that the Court undervalues the D's right to present a defense, and overvalues the government's interest.

TITLE: U.S. v. Castillo
INDEX NO.: O.12.j.
CITE: 1997 U.. Dist. Lexis 12073 (E.D.Pa. 1997)
SUBJECT: Polygraph Evidence -- Not Admissible as Opinion as to D's Character for Truthfulness
HOLDING: Federal District Court for Eastern District of Pennsylvania holds that polygraph expert's testimony regarding testifying D's performance on polygraph test is not admissible pursuant to Fed. R. Ev. 608 as opinion evidence as to D's character for truthfulness. As practical matter, polygraph results are not sufficient basis for opinion that D is truthful or honest person. Quite the opposite, test showed that D responded truthfully to certain questions. Further, overwhelming impact of polygraph results, and conclusion that jurors would likely draw, goes not to D's credibility, but to culpability. Any probative value of test results as credibility evidence is far outweighed by its prejudicial impact.

TITLE: Watkins v. State
INDEX NO.: O.12.j.
CITE: (1st Dist. 05/21/91), Ind. App., 571 N.E.2d 1262
SUBJECT: Polygraph examinations
HOLDING: It was not denial of due process for State to refuse to stipulate to admission of D's polygraph results, or to fail to adequately justify its refusal. D took & passed independent polygraph without first attempting to obtain stipulation or waiver. He then filed motion to make State justify its refusal to agree to admission of results. D also agreed to take second polygraph with State-chosen examiner, but State refused. Ct. rejected D's argument that Morris v. Israel (7th Cir. 1981), 643 F.2d 458, (where Ct. held that D's due process rights may have been violated by State's refusal to stipulate to polygraph, without justifiable reasons), should be persuasive authority for Indiana. Ct. found that Wisconsin had determined that polygraphs had achieved level of scientific recognition that unconditional rejection was no longer appropriate, but that Indiana had not so found. Ct. noted that many other jurisdictions had disagreed with Morris, & that Indiana law also holds that State has no duty to stipulate to test results. Hestand 491 N.E.2d 976. Held, convictions affirmed.

Note: Conviction on Count I reversed on transfer on other grounds, see Watkins 575 N.E.2d 624, at K.3.e.3.

RELATED CASES: Albrecht, 737 N.E.2d 719 (no error in excluding results of witness's polygraph exam; State's failure to consent to admission of results did not deny D fair trial).

TITLE: Willey v. State
INDEX NO.: O.12.j.
CITE: (6-17-99), Ind., 712 N.E.2d 434
SUBJECT: Polygraphs - inadmissible due to invalid stipulation
HOLDING: Tr. Ct. erred by permitting, over D's objection, polygraph examiner to testify as to D's truthfulness. One of four prerequisites to admission of polygraph results is that prosecution, D & defense counsel all sign written stipulation providing for D's submission to examination & for subsequent admission at trial of results. Sanchez, 675 N.E.2d 306. Because stipulation is contract between State & D, contract law principles control its use & interpretation, including well-settled doctrine that ambiguity is to be construed against party who prepared contract. Contract is ambiguous only if it is susceptible to more than one interpretation & reasonably intelligent persons would differ as to its meaning.

Here, because State prepared stipulation, any ambiguity had to be construed against State. Paragraph four of stipulation read: "questions of examiner, answers by individual [&] any interrogation or other things relating to said examination may be admitted as evidence..." Language "other things" was too vague to alert reasonable D that polygraph examiner would be permitted to give opinion that D was deceptive or liar. Other provisions of stipulation compounded to ambiguity of whether stipulation provided for admissibility of examiner's conclusion as to truthfulness. In addition, prior to entering into polygraph stipulation, police told D that his co-conspirator implicated him in crime, but co-conspirator actually never implicated D. Although police deception does not automatically invalidate Miranda waiver, it does constitute misrepresentation of fact which, under contract law, nullifies contract. Thus, because stipulation was ambiguous & result of misrepresentation of fact, expert's opinion as to D's truthfulness was inadmissible; however, error was harmless in light of D's two other confessions. Held, conviction affirmed.

RELATED CASES: Caraway, App., 891 N.E.2d 122 (Tr. Ct. erred in denying D's motion to suppress when D was not advised of his right to counsel prior to signing an Agreement to Take Polygraph & stipulation agreement; see full review at Y.2.i); Davies, App., 730 N.E.2d 726 (polygraph stipulation created no ambiguity re: what would be admissible at trial); Kochersperger, App., 725 N.E.2d 918 (Ct. rejected D's argument that his decision to sign polygraph stipulation was based on misrepresentations & other improper inducements by police).

O. EVIDENCE

O.12. Scientific evidence

O.12.k. Psychiatry/Psychology

TITLE: Byrd v. State
INDEX NO.: O.12.k.
CITE: (6/18/92), Ind., 593 N.E.2d 1183
SUBJECT: Psychiatry - personality profile
HOLDING: D contended that results of MMPI personality test should have been admitted to prove that his character was inconsistent with committing intentional murder. Evidence of D's character is not admissible to prove that D acted in accordance with character on occasion in question. Miller, Indiana Practice, § 404.101. D's intent to commit crime is not proper subject for expert opinion, as this matter is question of fact for jury. Reichard, 510 N.E.2d 163; Seeglitz, 500 N.E.2d 144. Moreover, experts are not permitted to give opinion on guilt or innocence of D. Ross, 516 N.E.2d 61. Indiana generally permits evidence of D's good character to be proven only by testimony about his reputation in community. Anderson, 471 N.E.2d 291. Here, psychiatrist's opinion that D's personality profile as measured by MMPI was inconsistent with crime of murder was not evidence of character for a particular trait &, therefore, was inadmissible. Whether based on personality profile or not, expert opinion is inappropriate way to prove D's character for particular trait. Held, psychiatrist's opinion that D's personality profile was inconsistent with crime of murder was inadmissible.

TITLE: Commonwealth v. Crawford
INDEX NO.: O.12.k.
CITE: 706 N.E.2d 289 (Mass. 1999)
SUBJECT: Battered Woman Testimony -- Voluntariness of Confession
HOLDING: Expert testimony that battered woman syndrome rendered murder D's incriminating statement involuntary should have been admitted at both suppression hearing and trial. D's statement was the only evidence against her in her trial for the murder of her allegedly abusive boyfriend. Tr. Ct. refused to allow testimony, either at suppression hearing or at trial, from expert who would have explained that battered woman's syndrome rendered her incapable of refusing to answer questions during police interrogation. Appellate Court reverses, disagreeing with trial judge that his own and jurors' likely prior exposure to general subject of battered women's syndrome rendered expert testimony unnecessary.

TITLE: State v. Buechler
INDEX NO.: O.12.k.
CITE: 253 Neb. 727; 572 N.W.2d 65 (Neb. 1998)
SUBJECT: Expert Testimony on Mental State With Regard to Confession
HOLDING: Tr. Ct. violated D's confrontation and due process rights by excluding psychologist's testimony that he was in the throes of methamphetamine withdrawal and depression at the time of his confession to murder and that this mental state rendered him particularly suggestible. Without expert testimony, ordinary citizens might not understand seriousness of withdrawal or its effect, combined with depression, on suggestibility.

TITLE: Watson v. State

INDEX NO.: O.12.k.

CITE: (5th Dist., 3-4-03), Ind. App., 784 N.E.2d 515

SUBJECT: Admission of Minnesota Multi-Phasic Personality Inventory (MMPI) - waiver of doctor-patient privilege

HOLDING: In battery prosecution, Tr. Ct. did not err in admitting results of MMPI completed by D in course of CHINS action because D waived doctor-patient privilege by using his mental condition as affirmative defense. D presented expert testimony to support claim that his statement to police was result of coercion. At trial, expert testified that D's statement to police was not voluntary & could not be relied upon based on his performance on MMPI. In response, State presented results of another MMPI completed by D in course of CHINS investigation that arose from actions that caused current criminal charges against D.

Court held that doctor-patient privilege attached to State's doctor's assessment of D, because: 1) D was compelled to seek treatment from State's doctor; 2) D believed communications would be kept in confidence; 3) compliance with court order dictated that D disclose potentially incriminating evidence, & 4) D's non-compliance would have resulted in court finding D in contempt of court. However, D waived this privilege by voluntarily putting in issue his mental condition as affirmative defense. As a result, State was allowed to introduce evidence to rebut D's assertion that he was mentally disturbed. Held, judgment affirmed.

O. EVIDENCE

O.12. Scientific evidence

O.12.l. Voice spectrography

TITLE: Cornett v. State
INDEX NO.: O.12.l.
CITE: (7/1/83), Ind., 450 N.E.2d 498
SUBJECT: Voice spectrography (VS)
HOLDING: Tr. Ct. erred in admitting VS evidence presented by state during rebuttal; however, error was harmless. Here, D's ex-wife Phyllis testified against him. Defense counsel called Phyllis' attorney who played tape in which woman identifying herself as Phyllis Cornett denied any knowledge about the murder. On rebuttal, state introduced 2 VS experts who concluded, after listening to original tape & voice exemplar provided by Phyllis & examining spectrograms produced by tapes, Phyllis did not make call to attorney. Defense introduced Dr. Harry Hollin, professor of linguistics, speech & criminal justice at U. of FL who attacked introduction of spectrograms & testified that only law enforcement & people working exclusively with spectrogram believed in its reliability. Standard regarding admissibility of scientific evidence is whether thing from which deduction is made is sufficiently established to have gained general acceptance in particular field to which it belongs. Frye v. US (D.C. Cir. 1923), 293 F. 1013. Relevant scientific community re VS should be composed of linguists, psychologists, engineers & people who use VS for identification purposes. State's 2 experts testified VS had gained recognition only among those people who use it for identification purposes. Ct. reviews testimony in record, opinions from other jurisdictions (citations omitted) & law review & scientific journal articles & holds VS has not gained general acceptance in scientific community. Error, in admission is harmless because VS was cumulative of Phyllis, denial she made call & because her detailed testimony concerning murder was corroborated by a co-D. Held, conviction affirmed.

RELATED CASES: Hyppolite, App., 774 N.E.2d 584 (in 20 years since Cornett, advances could have been made in field of voice analysis; here, D, as proponent of evidence, failed to demonstrate that scientific principles upon which his voice expert's testimony rested was reliable). See also U.S. v. Brown, 289 F. 3d 989, 994 (7th Cir. 2003) (voice stress tests are if anything less reliable than polygraphs, & the evidence was simply that Kelly failed to show up for the interview without explanation, not that he had affirmatively refused to take the test. The jury therefore could have read more into this than there was).

O. EVIDENCE

O.12. Scientific evidence

O.12.m. DNA

TITLE: Blake/Thompson v. State
INDEX NO.: O.12.m.
CITE: 395 Md. 213, 909 A.2d 1020 (Md. Ct. App. 2006)
SUBJECT: Maryland addresses DNA testing issues
HOLDING: The Maryland Court of Appeals (the state's highest court) held that a prisoner seeking post-conviction testing of DNA evidence has a right to notice and a hearing on prosecutors' claim that the State no longer possesses testable DNA. The Court also limited the circumstances in which a trial judge may condition post-conviction DNA testing on the retention of a portion of a sample for the State to subject to independent testing. However, the Court rejected an argument that prisoners have a right to the assistance of counsel while pursuing post-conviction DNA testing. The Court's rulings came in a pair of cases involving prisoners who were convicted of rape in the 1980s. Following their convictions, they each filed a petition to have certain evidence seized by the police subjected to DNA testing. In one case, the State responded to the prisoner's petition with an unsworn memorandum stating that the police evidence locker did not contain any evidence related to prisoner's case and the Tr. Ct. dismissed the petition for DNA testing. Court noted that while the statute Petitioner moved under presumes that evidence in fact exists, a liberty interest is involved and the Tr. Ct.'s failure to provide any notice to appellant of the State's filing for dismissal and its dismissal without affording Petitioner any opportunity to respond violated his due process rights. "Fundamental fairness requires that a petitioner be given an opportunity to respond and to challenge the State's representation." However, Court did not require an oral hearing in every case and a paper hearing will be all the process due some prisoners. The Court placed the burden on the State to prove that it is no longer in possession of DNA although statute was silent on issue, noting that prisoners generally do not have access to such information. Further, at a minimum, a motion to dismiss a DNA testing petition should be supported by affidavit and suggested that a representation that a police evidence locker does not contain testable evidence would not, even if sworn, be sufficient to sustain an order to dismiss. The Court pointed to a 1999 study by the National Institute of Justice that concluded that "finding the evidence is the most difficult part of the process" and recommended that "no final decision or notification should be made until it has been carefully verified that evidence did not or does not still exist." The report also identified a number of places, other than police evidence lockers, that testable evidence is likely to be found. For this same prisoner, the Court also denied appointment of a state-paid attorney noting that neither the Sixth Amendment nor the state constitution guarantees right to counsel in post-conviction proceedings.

In the other case, the prisoner complained that the record in his case did not support the trial judge's order that a portion of the DNA material be set aside for independent testing by the State, contending also that the Tr. Ct. lacked authority to prohibit him from presenting DNA test results if no portion of the DNA material was set aside. Court noted trial judges have the power, under the statute and their inherent authority over admission of evidence, to set reasonable conditions on the testing of DNA evidence. Additionally, the statute specifically states a condition might be the retention of a sample portion for retesting by the State. Court stated this power should be used judiciously and only when the trial judge finds that retaining a sample will leave a prisoner enough material for the initial testing. In

cases where the available DNA evidence would be entirely consumed by the prisoner's test, an order excluding evidence of the results of the prisoner's test would be "tantamount to a sanction of dismissal. Retaining a portion is a good idea but should not stand in the way of the essential purpose of the statute, which is to exonerate innocent prisoners. Court noted that where entire sample is destroyed during the prisoner's testing, prosecutors have other ways to challenge the test results such as attacking the conclusions reached by a prisoner's expert based on the test results.

TITLE: Deloney v. State

INDEX NO.: O.12.m.

CITE: (12-17-10), Ind. Ct. App, 938 N.E.2d 724

SUBJECT: Accompanying statistical data required for DNA evidence that does not constitute a match

HOLDING: In murder and Class A robbery/burglary prosecution, Tr. Ct. erred in admitting DNA evidence from a hat found at the crime scene, where DNA technician was unable to exclude D as a contributor to the DNA profile on the hat, and she was unable to give any statistical analysis whether the crime scene DNA came from D. Without statistical data, evidence of a non-match is meaningless, and does not assist the trier of fact in determining the guilt or innocence of D, as required for admissibility of the DNA evidence under Evidence R. 401 and expert testimony thereon under Evid. R. 702. Therefore, DNA evidence that does not constitute a match or is not accompanied by statistical data regarding the probability of a D's contribution to a mixed sample is not relevant under Evid. R. 402 and should not be admitted.

Here, DNA technician testified she could not exclude D or Co-D as one of the people who deposited DNA on the hat, but neither could she include them. She further testified she could not calculate the statistical significance of any matches between D's profile and the DNA profiles found on the hat because the mixed sample did not allow for statistical analysis; thus, she could not calculate the probability the sample on the hat from the crime scene had nor had not come from D. Court held that technician's testimony could not assist the jury in understanding the evidence or make the existence of some fact more probable or less probable. Thus, the DNA evidence and corresponding testimony lacked relevancy and should not have been admitted. However, given the substantial independent evidence of D's guilt, error in the admission of this evidence was harmless. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Ex parte Hutcherson
INDEX NO.: O.12.m.
CITE: (Ala. S.Ct. 12/8/95), 677 So.2d 1205
SUBJECT: Improper Admission of DNA Evidence Can Never Be Harmless Error
HOLDING: Alabama Supreme Court finds that improper admission of DNA evidence is too inherently prejudicial ever to be harmless. Tr. Ct. admitted DNA evidence without following three-pronged test, which focuses on theory and technique of testing, and which is essential to ensure the reliability and trustworthiness of the evidence. "Harmless error" is defined as "an error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it and in no way affected the final outcome of the case." Black's Law Dictionary. DNA "matching" evidence and frequency statistics creates such a possibility for prejudicial impact upon the jury that the admission of DNA evidence without complying with test for reliability can never be harmless.

TITLE: Hopkins v. State
INDEX NO.: O.12.m.
CITE: (10/21/91), Ind. 579 N.E.2d 1297
SUBJECT: Admissibility of DNA evidence
HOLDING: DNA evidence was admissible because D was convicted of murder & felony murder, which were merged. State admitted DNA evidence to biologically match his blood with semen found in deceased victim. DNA testing by Cellmark Laboratory indicated such a match, & D objected to admission on three grounds: 1) State had failed to make adequate showing that testing was generally accepted in the relevant scientific communities as required by Frye v. US (DC Cir. 1923), 293 F. 1013; 2) particular procedures used were not validated & did not meet applicable standards of reliability; & 3) in this case there was unacceptably high probability of a "false positive" match because Cellmark failed to follow its own protocol. Ct. appeared to accept Frye analysis from People v. Castro (1989), 545 N.Y.S.2d 985, 990, which involves three prongs, all of which must be satisfied for admissibility: "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 & 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?" Hopkins at 1302, (citing to Castro at 987). Ct. concluded that first 2 Castro prongs should be resolved in favor of admission of the evidence because of evidence & case law," & also found this was consistent with Indiana legislation passed after D was tried. Ind. Code 35-37-4-13 defines forensic evidence & provides that: "(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 & reliable method of identifying characteristics in an individual's genetic material." As to third prong, Ct. seemed to hold that testing techniques went to weight, not admissibility, of evidence, but even with legislation obviating need for Frye determination, adequate foundation must be laid before evidence is admissible. Ct. appeared, however, to reach conclusion that the more technical test is, the less particular foundation has to be, apparently deferring to the expert's discretion. Because only three labs conducted forensic DNA testing at time of D's appeal, & because procedure was so technical, Ct. held that once witness is qualified as expert, any question as to validity of evidence is simply matter for jury to decide after "battle of the experts." Its admissibility will be reviewed like any sufficiency of evidence question. Applying this standard, Ct. then looked to evidence presented, & found problems raised by D were insufficient to make admission of evidence erroneous. Held, conviction affirmed.

RELATED CASES: Davidson 580 N.E.2d 238 (it is not necessary to hold pre-trial hearing on whether DNA testing lab used accepted scientific techniques. Once expert is qualified, evaluation of evidence goes to weight, not admissibility).

TITLE: Ingram v. State
INDEX NO.: O.12.m.
CITE: (8-21-98), Ind., 699 N.E.2d 261
SUBJECT: DNA testing - polymerase chain reaction (PCR) analysis
HOLDING: Tr. Ct. did not abuse discretion in finding that proper foundation had been established as to scientific principles of PCR analysis of DNA. D argued that Tr. Ct. erred in its determination that scientific principles upon which PCR/DNA type of analysis rests were reliable. Forensic DNA analyst with Indiana State Police testified that his laboratory chose PCR testing because it can utilize smaller amounts of DNA than RFLP testing method. Analyst also stated that, because PCR works with smaller pieces of DNA, the DNA does not have to be in as good condition as is required for accurate results with RFLP. Analyst responded affirmatively when State asked whether PCR method of DNA testing is seen as reliable in scientific community. On basis of this testimony, Tr. Ct. ruled that proper foundation was laid. Held, judgment affirmed.

RELATED CASES: Overstreet, 738 N.E.2d 1140 (while State might have done more to establish scientific reliability of short tandem repeat DNA testing, D did not establish reversible error); Troxell, 778 N.E.2d 881 (based on FBI agent's testimony & cases from other jurisdictions, Tr. Ct. was well within its discretion in finding scientific principles of short tandem repeat DNA analysis testing to be reliable & generally accepted in relevant scientific community); Patterson, App., 729 N.E.2d 1035 (testimony was sufficient to establish scientific principles underlying PCR analysis are sound & that DNA supervisor for State Police was qualified to testify).

TITLE: Jenkins v. State
INDEX NO.: O.12.m.
CITE: (12-20-93), Ind., 627 N.E.2d 789
SUBJECT: Admissibility of DNA testing
HOLDING: DNA test results were admissible even though technician who performed test did not testify. Any irregularities in test when to weight, not admissibility, of test results. At trial, F.B.I. supervisor testified about how DNA testing is conducted, & explained that lab technician worked with him in conducting this particular testing. He conducted statistical analysis of testing procedure done by technician & testified that results showed semen on victim's underwear was consistent with D, but not her boyfriend. Court rejected argument that D was denied confrontation right because technician did not testify, noting that failure of State to call witness doesn't deny right to confrontation, & that State can't be compelled to call witnesses at instance of accused. Court relied in part on Reardon v. Manson (2nd Cir. 1986), 806 F.2d 39, cert. denied, where court found it unlikely that technician would have independent recollection of tests, & would probably have to rely on notes that supervisor used at trial. Court also rejected argument concerning chain of custody while samples were at F.B.I. labs, despite D's claims of mistakes made, noting there is presumption that public officials discharge duties with due care, & that whether actual techniques involved were followed in particular instance goes to weight & not admissibility of evidence, Davidson, 580 N.E.2d 238.

TITLE: Kennedy v. State
INDEX NO.: O.12.m.
CITE: (10-06-10), 934 N.E.2d 779 (Ind. Ct. App 2010)
SUBJECT: Challenge to manner in which expert conducted DNA testing
HOLDING: In Class A felony robbery prosecution, Tr. Ct. did not abuse its discretion in admitting DNA evidence tending to implicate D in the crime. D did not challenge DNA expert's credentials and conceded that the processes used by the crime lab complied with acceptable scientific principles. Expert concluded that D could not be excluded as a contributor of DNA found on a piece of asphalt used to bludgeon victim. Once the reliability of a particular scientific process is established and an expert's qualifications to carry out the testing are not in doubt, questions as to how an expert personally carried out the testing in a particular case generally go to the weight of the evidence, not its foundational admissibility. Ingram v. State, 699 N.E.2d 261 (Ind. 1998). It is only when there are substantial irregularities in a testing process that the line may be crossed into the results being inadmissible. Smith v. State, 702 N.E.2d 668 (Ind. 1998).

Here, any questions D had with respect to how State's DNA expert conducted testing on the asphalt went to the weight of the evidence and not its foundational admissibility. D was permitted to and in fact did present to jury a detailed critique of the DNA expert's methods, i.e., that she improperly exercised too much discretion in calling (or not calling) the existence of alleles recovered from the asphalt and the subsequent matching of those alleles to ones matching D's DNA profile. Held, judgment affirmed.

RELATED CASES: Ivory, 141 N.E.3d 1273 (Ind. Ct. App. 2020) ("ample evidence" to support conclusion that probative value of DNA evidence outweighed any confusion or undue prejudice).

TITLE: Lacey v. State
INDEX NO.: O.12.m.
CITE: (4th Dist., 6-23-05), Ind., 829 N.E.2d 518
SUBJECT: PCR Ct. must provide hat for DNA testing
HOLDING: Petitioner was convicted in 1998 of robbery & carrying a handgun without a license with the parties agreeing that the evidence indicated that the robber wore a hat that was recovered outside the store. The PCR Ct. denied a petition to amend Petitioner's pro-se petition to include a claim that the PCR Ct. improperly denied his motion for DNA testing & the Ct. App. affirmed the decision in an unpublished decision. On transfer, S.Ct. rejected State's contention that PCR Ct. did not have subject matter jurisdiction to consider the DNA testing request, an argument first raised on the day of oral argument. Ct. found that request was not a successive petition for PCR when made while initial petition was still pending. Further, Petitioner was entitled to employ reasonable means in order to obtain evidence in support of his petition. Ct. also rejected State's contention that Ind. Code 35-38-7-1 controls case & precludes seeking of DNA testing here. The statute which establishes detailed procedures to petition the sentencing Ct. for DNA testing in murder cases did not limit access to such testing in other cases. The legislation provides certain "convicted felons greater access to DNA testing" to exonerate themselves & does not suggest that it would provide persons convicted of a crime less access than prior to its enactment. Held, transfer granted, memorandum decision of Ct. App. vacated, judgment reversed. Post-conviction Ct. ordered to deliver hat to the State Public Defender to conduct DNA testing.

TITLE: McElroy v. State
INDEX NO.: O.12.m.
CITE: (4th Dist. 05/27/92), Ind. App., 592 N.E.2d 726
SUBJECT: Admissibility of DNA evidence
HOLDING: This decision discusses the evidentiary foundation & chain of custody required for DNA evidence. FBI agent testified as expert witness that odds were 20,000,000 to 1 that D committed rape. Agent was supervisor of 2 person analysis team, & other person on team, biological science technician, worked under his supervision according to standardized protocol which permitted no deviation. Technician consulted with agent on anything out of ordinary & kept same detailed, standard notes on procedures in case that she had in at least 250 other cases. Technician did not testify, but agent testified as to his interpretation of data gained through team analysis, & proper procedure, including that used by technician. Ct. found foundation for admission of evidence sufficient because agent established what standard procedures were, & that he & assistant followed procedures in this case. Therefore, it was not necessary for technician to also testify. Ct. also found that agent did not rely on hearsay (evidence from outside source) because information was gleaned under his direct supervision, & that even if it were hearsay, it was admissible as basis for his conclusions. Admission of lab notes & items of physical evidence was also proper as basis for conclusions, & chain of custody showing was sufficient, relying on Kennedy 578 N.E.2d 633, cert. denied, 112 S.Ct. 1299.

TITLE: Meehan v. State
INDEX NO.: O.12.m.
CITE: (4/29/2014), 7 N.E.3d 255 (Ind. 2014)
SUBJECT: Sufficiency - DNA on glove, alone, sufficient to support conviction
HOLDING: A glove with D's DNA found at the scene of a burglary constituted sufficient evidence to support his conviction for that burglary. When reviewing a claim of insufficient evidence, the court considers only the probative evidence and reasonable inferences supporting the verdict. Here, O.J.S. Building Services, a mechanical contracting business, was burglarized. The police found a glove near the point of entry which had DNA from D on it. About six months later, when D was arrested, he had tools on him that could be used to commit a burglary. He was convicted of the burglary at trial. Although the glove containing his DNA was the only evidence recovered that directly tied D to the burglary, the circumstances under which the glove was discovered, the glove itself, and D's possession of tools potentially used to commit burglary were probative evidence from which an inference reasonably tending to support the guilty verdict could have been drawn. The glove was found near the point of entry, and D had no legitimate access to O.J.S. The possibility that D's DNA was innocently transferred to the glove or he was framed does not make the evidence presented insufficient. Held, Court of Appeals' Opinion at 986 N.E.2d 371 vacated, judgment affirmed.

TITLE: People v. Pizarro
INDEX NO.: O.12.m.
CITE: 110 Cal.app.4th 530, 3 Cal.Rptr 3d 21 (Cal.Ct. App. 2003)
SUBJECT: Mixed DNA Sample -- Reliance on D's Traits in Analyzing
HOLDING: FBI analysts' reliance on a D's genetic traits when determining the perpetrator's DNA profile in mixed sample rendered inadmissible evidence that the D matched the perpetrator. Sample contained DNA of both victim and perpetrator. Because the two overlapped, analysts had trouble isolating and identifying the perpetrator's DNA profile. In doing so, they used D's DNA profile as a guide. This reliance on D's profile in identifying perpetrator's profile improperly assumed D's guilt. Court likened this to police artist using D's photograph to assist in sketching from witness description.

O. EVIDENCE

O.12. Scientific evidence

O.12.n. Other

TITLE: Bunch v. State
INDEX NO.: O.12.n.
CITE: (03-21-12), 964 N.E.2d 274 (Ind. Ct. App 2012)
SUBJECT: Newly discovered evidence - advances in forensic science
HOLDING: Post-conviction court abused its discretion by denying D's Petition for Post-conviction relief in an arson case where an expert's opinion constituted newly discovered evidence. In order to obtain a new trial based on newly discovered evidence, a D must show: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

Here, in 1996, D was convicted of felony murder based on a fire in her home that killed her three-year-old son. Since the trial, there has been advances in the field of victim toxicology analysis, i.e., the study of the effects of combustion products on fire victims. Consideration of a victim's condition did not become a recognized component of fire origin analysis until after 2001. At the post-conviction hearing, an expert, McAllister, testified that, based on the victim toxicology and eyewitness reports, the fire originated in a concealed space above the south bedroom in the ceiling and was not caused by an accelerant. Because fire victim toxicology analysis has become recognized as a scientifically reliable method to better interpret existing evidence since the time of the trial, the opinion was discovered since trial and could not have been discovered even with due diligence prior to trial. Although the conclusion of D's experts at trial and on post-conviction relief is the same, i.e., the origin of the fire is undetermined, the State specifically charged and proceeded on the theory that D started the fire in the living room of the mobile home using a liquid accelerate. Because McAllister's opinion disproves this theory, it is reasonably likely to affect the outcome of the case, and thus is material. Moreover, McAllister's opinion is not cumulative of D's trial expert because the trial expert did not arrive at his conclusion based on the child's physical condition. The opinion is not merely impeaching but offers a new, exculpatory explanation for D's child's death. Finally, McAllister's opinion is worthy of credit despite Tr. Ct.'s finding otherwise. Although the appellate courts are to defer to post-conviction court's determination of credibility when a witness's demeanor is at issue, here the post-conviction court's determination was based on McAllister's basis for opinion and not her demeanor. Contrary to the post-conviction court's conclusion, the basis for the opinion was consistent with the evidence. Thus, D has met her burden of proving the fire victim toxicology analysis meets all nine requirements of newly-discovered evidence. Held, judgment reversed; Crone, J., dissenting on basis that the victim toxicology evidence is not material, relevant or likely to produce a different result at trial, all of which hinge on the post-conviction court's determination that the evidence is not worthy of credit.

TITLE: Forrester v. State
INDEX NO.: O.12.n.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: Tire prints
HOLDING: Where plaster cast of tire print made by police with necessary training is initialed & properly identified at trial, foundation is established for its admission. Here, officer made plaster cast of tireprint found at scene of abduction. Officer initialed cast. Tire was removed from D's car, initialed by officer & placed in evidence locker. Officer performed comparison. Ct. finds tire print & tire relevant to corroborate circumstantial testimony of victim & D's accomplice. Held, no error in admission of exhibits.

RELATED CASES: Simpson, App., 628 N.E.2d 1215 (Decision found no error in admitting conclusions of blood spatter expert, including that two people were involved in commission of crime, where victim was located in house at time of injury, number of times victim was struck, tools used at different times to inflict injury, force of impact, whether victim struggled, & whether physical evidence supported or contradicted D's explanation of crime. **Note:** This type of testimony has been criticized in scientific literature & is not without controversy).

TITLE: Marlatt v. State

INDEX NO.: O.12.n.

CITE: (4th Dist., 9-9-99), Ind. App., 715 N.E.2d 1001

SUBJECT: Scientific tests - foundation; State not required to show radar test performed by certified operator

HOLDING: To lay proper foundation for admission of radar test results, State must establish that radar device was properly operated & regularly tested. Charley, App., 651 N.E.2d 300. It is not necessary for State to offer expert to explain use or theory of radar. Id. In this case, D waived issue because he failed to make any foundational objection at trial regarding admissibility of radar test results. Waiver notwithstanding, Ct. held that absence of proof of certification of radar gun operator went to weight of operator's testimony & not admissibility of test results. Thus, Tr. Ct. properly denied D's motion to dismiss & his request for judgment on evidence. Held, judgment affirmed.

TITLE: McNary v. State
INDEX NO.: O.12.n.
CITE: (3/6/84), Ind., 460 N.E.2d 145
SUBJECT: Shoe prints
HOLDING: Tr. Ct. did not err in permitting police officer to testify re his comparison of shoe prints in snow near D's house. Here, officer had training in footprint comparison methods. He testified that in his opinion the footprints leading to D's house (tracked there by police from victim's home) & those made by D after his arrest were made by same shoes. Opinion was based on visual comparison of particular diamond pattern of shoe sole & individual markings on sole showing where it was worn. D contends specific measurements (depth; angle) are necessary. Officer testified measurements were impossible because of snowfall. Johnson, App., 380 N.E.2d 566 set standard for admission of footprint comparisons: opinion testimony allowed if based on "measurements or peculiarities" of footprints. Ct. finds proper foundation laid. Held, no error.

RELATED CASES: Wade 490 N.E.2d 1097 (officer qualified as expert; admission of opinion testimony was proper); Hartlerode 470 N.E.2d 716 (Crim L 459; lay testimony is admissible if conclusion is based upon measurements/peculiarities of footprints).

TITLE: Ragland v. Commonwealth
INDEX NO.: O.12.n.
CITE: 191 S.W.3d 569 (Ky. 2006)
SUBJECT: Comparative Bullet Lead Analysis (CBLA) -- Excluded Under *Daubert*
HOLDING: The Kentucky Supreme Court has held that CBLA testimony fails the *Daubert* test for admissibility of scientific evidence. The Court noted the National Research Council (NRC) report and other recent studies by research chemists and metallurgists raising serious doubts about the two assumptions underlying CBLA -- that lead from which a single batch of bullets is made is uniform in composition, and that the lead in each batch is unique. The Court also noted that the FBI laboratory that produced the CLBA evidence in this case no longer considers such analysis sufficiently reliable to continue producing it. The Court held that a finding that CLBA evidence is scientifically reliable and relevant would be clearly erroneous, and a finding that it would be helpful to a jury would be an abuse of discretion.

TITLE: State v. Fortin

INDEX NO.: O.12.n.

CITE: 162 N.J. 517, 745 A.2d 509 (N.J. 2000)

SUBJECT: Expert "Linkage Analysis" Tying Charged Crimes to Past Acts Insufficiently Reliable for Admission

HOLDING: Expert testimony, based on "linkage analysis," that an assault to which murder D had pled guilty and charged capital offense probably had same perpetrator was insufficiently reliable for admission as scientific testimony. In reaching its conclusion, majority considered differences between two attacks, fact that linkage analysis as a field was based on study of serial killers, while there was no evidence that D was a serial killer, similarities between linkage analysis and "profiling" of rapists and murderers, which as a field is uneven, and fact that only the witness and his close associates practice linkage analysis, so that there are no peers to test his theories or duplicate his results. Nevertheless, majority held that witness could testify as to similarities between crimes for purposes of determining whether prior act was admissible as "signature" crime.

TITLE: State v. Meador
INDEX NO.: O.12.n.
CITE: 674 So.2d 826 (Fla.Ct. App. 1996)
SUBJECT: Field Sobriety Tests -- Horizontal Gaze Nystagmus (HGN) & Others
HOLDING: Because significance of HGN test is based on scientific principles concerning effect of alcohol on eye's behavior while tracking moving object, Florida Court holds that evidence regarding HGN results cannot be admitted absent foundation for scientific evidence. Because of questions regarding reliability of HGN, foundation may be difficult to establish. Results of other field sobriety tests, such as ability to balance on one foot or touch one's nose are simply lay observations, and may be admitted without foundation for scientific evidence. However, because they are merely lay observations, witnesses describing them should avoid words such as "pass," "fail," "test," or "points."

TITLE: State v. Nemeth

INDEX NO.: O.12.n.

CITE: 694 N.E.2d 1332 (Ohio 1998)

SUBJECT: Battered Child Syndrome Testimony -- Admissible on Issue Of Self-Defense in Killing of Parent

HOLDING: A young D charged with killing a parent should be allowed to present expert testimony on battered child syndrome in support of claim of self-defense or as a basis for instruction on lesser included offense. Tr. Ct. excluded expert testimony would have explained psychological effects of long-term child abuse, including effect on child's perception of danger. Such evidence would have been relevant on at least four issues: (1) whether D had mens rea required for charged offense; (2) whether he acted purposely; (3) whether he initiated the aggression; and (4) whether he had honest belief that he was in imminent danger. Testimony here also met three-pronged test of Ev.Rule 702: (1) the testimony dispels misconceptions about the way abused people act and feel; (2) the expert was qualified; and (3) the behavioral and psychological long-term effects of child-abuse have been generally accepted in the medical and psychiatric communities.

TITLE: State v. Vue
INDEX NO.: O.12.n.
CITE: 606 N.W.2d 719 (Minn. 2000)
SUBJECT: Expert Testimony Linking Ethnicity to Domestic Violence
HOLDING: Expert testimony that members of particular ethnic group have a culture that condones domestic violence and discourages reporting of it is inherently prejudicial and may not be admitted in criminal trial. D here was charged with raping woman to whom he was married at time of alleged offense. Even if testimony was needed to explain complainant's reluctance and delay in reporting rape, testimony here went beyond such explanation, extending to generalized statements about male domination and widespread domestic abuse. While some of expert's testimony was relevant to complainant's reluctance to come forward, its probative value was based on idea that D belonged to "guilty class," while complainant belonged to "victim class." Testimony boiled down to assertion that D was more likely to have raped victim because of his ethnicity, and as such was impermissible.

TITLE: Saliba v. State
INDEX NO.: O.12.n.
CITE: (2d Dist. 3/28/85), Ind. App., 475 N.E.2d 1181
SUBJECT: Public opinion polls (POP)
HOLDING: Tr. Ct. erred in excluding POP designed to determine contemporary community standards (CCS) in Marion County re depiction of sexual activities in movies & publications. Here, D employed Dr. Roderick Bell from CA to conduct poll. At trial, but out of jury's presence, Bell testified re qualifications & scientific techniques used to conduct poll. State objected & presented Dr. Brian Vargus from IN who challenged validity of poll, which was ultimately excluded. D in obscenity case is entitled to introduce relevant & appropriate expert testimony re CCS. Kaplan v. CA (1973), 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492. "Expert testimony based on POP is uniquely suited to a determination of community standards. Perhaps no other form of evidence is more helpful or concise." 475 at 1185 (citation omitted). Opinion discusses requirements for relevancy & trustworthiness (including foundational (F) criteria) of survey evidence. Any objection, other than to lack of F requisites & any testimony challenging F testimony, affects weight accorded poll, not its admissibility. Held, reversed & remanded for new trial. Sullivan CONCURS, disagreeing with implication that once proponent of evidence has qualified as expert & stated poll is accurate, poll must be admitted; & pointing out that in holding poll admissible, opinion rejects Richards, App., 461 N.E.2d 744 & Sedelbauer, App., 455 N.E.2d 1159 (cards at K.7.h). TRANSFER DENIED 484 N.E.2d 1295; Givan DISSENTS with opinion.

TITLE: Smith v. State
INDEX NO.: O.12.n.
CITE: (2d Dist. 12/31/86), Ind. App., 502 N.E.2d 122
SUBJECT: Scientific tests - foundation; radar
HOLDING: State must demonstrate radar device was properly operated & regularly tested before results of radar test may be admitted. Here, state failed to establish proper foundation for admission of radar reading. Ct. discusses foundation required for admission of scientific tests in general. Ct. finds requirement that foundational elements be established before radar readings are admissible does not require reversal in this case. D was convicted of driving while intoxicated, not speeding. Ct. finds D failed to adequately preserve error. Held, conviction affirmed.

RELATED CASES: Charley, App., 651 N.E.2d 300 (officer's testimony that he tested radar unit & checked calibration along with explanation that unit was in good working order & inspected annually has been held sufficient to meet foundational requirements).

TITLE: State v. Hungerford
INDEX NO.: O.12.n.
CITE: 697 A.2d 916 (N.H. 1997)
SUBJECT: Recovered Memory
HOLDING: New Hampshire Supreme Court has set forth eight factors to consider in determining admissibility of recovered memories of sexual abuse. Inquiry is partly one of competence -- witness' ability to remember historical facts, and partly one of validity and reliability of scientific method used to recover memories to which witness would testify. To establish reliability, proponent must demonstrate that recovered memory is as accurate as ordinary human memory. Eight factors which guide inquiry are (1) level of peer review and publication on phenomenon of recovered memory; (2) whether phenomenon has been generally accepted in psychological community; (3) whether it can and has been empirically tested; (4) potential or known rate of false recovered memories; (5) age of complainant at time of events remembered; (6) length of time between event and recovery of memory; (7) presence or absence of objective, verifiable corroboration of event; and (8) circumstances attendant to witness' recovery of memory.

TITLE: State v. St. George
INDEX NO.: O.12.n.
CITE: 252 Wis.2d 499, 643 N.W.2d 777 (Wis. 2002)
SUBJECT: Right to Present Defense -- Child Interview Expert
HOLDING: Exclusion of expert on techniques for interviewing children in sex abuse cases violated D's 6th Amend. right to present a defense at his trial for child sexual assault. Court sets out two-part test for determining when D has established right to present expert testimony. In first part, D must demonstrate: (1) the testimony of the expert satisfies evidentiary rule governing admission of expert testimony; (2) expert's testimony is clearly relevant to material issue; (3) expert's testimony is necessary to D's case; and (4) probative value of expert testimony outweighs prejudicial impact. After D satisfies part one of test, Tr. Ct. must determine whether state has compelling interest in exclusion that outweighs D's need for testimony. Here, D satisfies first prong of test, and state has no compelling interest in excluding expert's testimony.

TITLE: United States v. Ganier
INDEX NO.: O.12.n.
CITE: 648 F.3d 920 (6th Cir. 2006)
SUBJECT: Computer testimony was expert testimony; Evidence Rule 702
HOLDING: The Sixth Circuit U.S. Court of Appeals held that a government witness's proposed testimony from reports generated by forensic software that a D had searched e-mail records using search terms relevant to a grand jury investigation of his activities is expert testimony that must clear the hurdles set forth for such testimony by the federal rules of evidence. Although the software used by the witness is available to the public, the Court decided that a lay person would not be able to formulate the kinds of conclusions formed by the witness. The Court held the testimony constitutes "scientific, technical, or other specialized knowledge" within the scope of the federal rule defining expert testimony, Fed. R. Evid. 702. The Court noted that the reports generated by the forensic software display a heading, a string of words and symbols, a date and time, and a list of words, and that the witness will testify that the reports reveal three different types of searches performed with particular search terms at particular times. "Such an interpretation would require [the witness] to apply a knowledge and familiarity with computers and the particular forensic software well beyond that of the average layperson. . . . Software programs such as Microsoft Word and Outlook may be as commonly used as home medical thermometers, but the forensic tests [the witness] ran are more akin to specialized medical tests run by physicians." The Court acknowledged that it has in the past allowed witnesses to apply specialized knowledge while giving lay testimony. However, it added, a 2000 amendment to Fed. R. Evid. 701 clarified that lay opinions or inferences cannot be based on "scientific, technical, or other specialized knowledge within the scope of Rule 702." Further, even before the amendment, the Court generally did not allow witnesses who performed after-the-fact investigations to apply specialized knowledge in giving lay testimony. Thus, in this case, the proposed testimony may be offered only pursuant to Rule 702.

TITLE: U.S. v. Hall
INDEX NO.: O.12.n.
CITE: 974 F.Supp. 1198 (D.C.C.Ill. 1997)
SUBJECT: Expert Testimony on Coerced Confessions Satisfied R.Ev. 702
HOLDING: Proposed testimony by social psychologist about coercive interrogation tactics likely to produce false confessions meets Fed. R. Ev. 702's standard for admission of expert testimony. In reaching its conclusion, Court also adopted view that Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) is not wholly applicable to "soft" sciences such as social sciences. Court distinguishes hard sciences which use experimental method to validate or disprove hypotheses from "soft sciences" in which knowledge is acquired by formal instruction, experience, and observation. Court holds that testimony regarding soft sciences should not be subjected to full strictures of Daubert, but may be admitted as "specialized knowledge," instead. Court must still find that particular area of soft science is sufficiently reliable under 702, and that proposed expert is qualified to testify about it. To answer first part of inquiry, Court must evaluate reliability of methods by which experts in particular field make their findings. "Many social scientists rely primarily on real world experience rather than experimentation to make their findings. Quantitative and qualitative requirements must be placed upon those experiences before they can rise to the level of reliable specialized knowledge. There must be a threshold number of experiences from which the expert's knowledge is drawn, and their experiences must be sufficiently similar in nature to form a valid basis for comparison." See Imwinkelreid, The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony, 15 Cardozo L. Rev. 2271 (1994).

In any field of social science, expert must testify, at minimum, to longevity of field, amount of literature on subject, methods of peer review among scholarly journals, quantity of observational or other studies conducted in field, reasons why those studies are deemed valid and reliable, and general consensus or debate as to what raw data means. Particular expert must establish that he/she is sufficiently familiar with topics mentioned above to render informed opinion about them. It would be helpful, though not necessary, to demonstrate expert's own contribution to field. "[T]his list is not exhaustive, but it is a starting point."

O. EVIDENCE

O.13. Chain of custody

TITLE: Baker v. State
INDEX NO.: O.13.
CITE: (6/21/83), Ind., 449 N.E.2d 1085
SUBJECT: Chain of custody - hospital tests; rape
HOLDING: Tr. Ct. erred in allowing state's exhibit 7 (hospital exam & laboratory reports of rape victim) in evidence without proof of chain of custody; however, overwhelming evidence against D renders error harmless. Hospital records may not be used to establish questioned authenticity of conclusions stated in record (presence of sperm). State must present evidence of doctor/someone in authority present at taking of specimens from victim. State also must demonstrate chain of custody of specimens to laboratory where tests were performed & conclusions drawn. See Rinard 351 N.E.2d 20; 21 A.L.R.2d 1238. See also Arnold 436 N.E.2d 288 (chain of custody of specimens taken from rape victim established). Held, conviction affirmed.

RELATED CASES: Dabny 498 N.E.2d 1225 (lack of description of each item in kit did not render it inadmissible where examining physician & serologist identified kit & its chain of custody from origin in emergency room through analysis in lab & presentation in Ct.).

TITLE: Bell v. State
INDEX NO.: O.13.
CITE: (03-09-93), Ind., 610 N.E.2d 229
SUBJECT: Chain of Custody showing found adequate
HOLDING: Although serologist who analyzed items of evidence did not have personal knowledge of how they arrived at her lab; because of presumption that evidence is handled by public officials with regularity & due care, her testimony was sufficient to establish proper chain of custody. After each of items was seized, it was placed in custody of property officer for Kokomo Police Department. Officer then transported items to State Police lab in Indianapolis. Evidence was analyzed by serologist at State Police lab in Lowell, who testified that when Indianapolis lab had backlog of evidence to analyze, evidence was sent to Lowell. She also testified that evidence is transported by one of their chemist police officers or by evidence clerk, & that she knew which officer retrieved evidence from Indianapolis but did not personally observe its retrieval. Although serologist testified that she knew standard procedure used by State Police, there was no testimony presented by person who transported items from Indianapolis to Lowell. Items involved were tree limb, bloodstained cigarettes, blood standards from D & others, beer can, D's bloodstained coat, & bloodstained cigarette carton.

When it is less likely that exhibit is susceptible to alteration or tampering, chain of custody rule is applied less strictly. Adequate foundation can be laid by providing "reasonable assurance" that evidence was undisturbed as it passed from one person to next, Kennedy, 578 N.E.2d 633, cert. denied. Any gaps in chain would go to weight & not admissibility of evidence, & when evidence is handled by public officers, presumption exists that evidence is handled with due care & regularity, id. Because D did not offer evidence to rebut presumption of regularity, it was not error to admit evidence.

RELATED CASES: Bussberg, App., 827 N.E.2d 37 (despite absence of courier who transported urine sample, sufficient chain of custody shown where probation officer who witnessed collection testified as well as laboratory director who testified to procedure used by his laboratory in handling specimen); Muex, App., 800 N.E.2d 249 (Ct. found no error as to chain of custody of DNA evidence because of two unaccounted days from when evidence was shipped by private mail courier; FBI agent signed for evidence & sealed it in package prior to receiving it himself two days later; no signs of tampering existed).

TITLE: Dier v. State
INDEX NO.: O.13.
CITE: (12/15/82), Ind., 442 N.E.2d 1043
SUBJECT: Chain of custody - establishment of
HOLDING: Mere possibility of tampering will not render evidence inadmissible. Starkey 361 N.E.2d 902. All evidence is not subject to chain of custody rule. Woodward 366 N.E.2d 1160. "If offered item possesses characteristics which are fairly unique & readily identifiable" & if item is "relatively impervious to change, Tr. Ct. [has] broad discretion to admit it merely upon basis of testimony item is the one in question & is insubstantially unchanged condition." McCormick, Evidence '212 at 527 (2d ed. 1972). See Duncan 409 N.E.2d 597. Here, D contends chain of custody was not established on 2 fingerprint cards & a latent print (found at crime scene). D did not provide evidence latent print exhibit had been falsified. Ct., looking to record, is satisfied exhibits were not tampered with & rejects D's allegations of irregularities & possible tampering. Held, no error in admission of evidence.

RELATED CASES: Bell, App., 881 N.E.2d 1080 (fact that detective claimed he placed 5 baggies of cocaine in evidence box but lab analyst testified there were 6 baggies only raised a mere possibility of tampering and did not break the chain of custody); Sheckles 501 N.E.2d 1053 (COC established at trial provides reasonable assurance that integrity of fragments was not affected by substitution/alteration of evidence, despite variance in weight of bullet fragments measured by officer who collected them & person who examined them); Hutchinson 477 N.E.2d 850 (Crim L 444; letters placed in chief's locked file cabinet & identified by receiving officer properly admitted); Henning 477 N.E.2d 547 (although better police practice would have been to mark brick, which was used to render victim unconcious, when it was retained, officer's testimony was sufficient to satisfy requirements stated in Dier); Staggers 477 N.E.2d 539 (Crim L 339.6; chain of custody established despite lack of accounting for whereabouts of exhibits (fingerprint cards) from 4:00 to 6:30 a.m. on 5/1/86 or from 5/3/86 to 5/25/86, where prints bore no indication of tampering, *citing* Dier); Hopper 475 N.E.2d 20 (item of physical evidence may be admitted despite witness' inability to unequivocally identify object, *citing* Jordan 432 N.E.2d 9); Almodovar 464 N.E.2d 906 (held, initials/unique marks placed on piece of fungible evidence & later identified by maker satisfies identification predicate for admission).

TITLE: Donahoo v. State
INDEX NO.: O.13.
CITE: (10-4-94), Ind., 640 N.E.2d 1031
SUBJECT: Sufficient chain of custody shown
HOLDING: Ct. rejected D's claim of insufficient chain of custody in rape prosecution. Exhibits included victim's sweat suit & other items of clothing, brown trash bag, sample kit, suspect collection kit, & rape kit. Although State's burden to show continuous whereabouts of exhibits from acquisition to presentation in Ct. is enhanced when items are fungible, Gambill v. State, Ind., 479 N.E.2d 523, here items in question were not fungible but were items readily identifiable by persons who previously had seen them. State is not required to show perfect chain of evidence that would totally exclude any possibility of tampering, Kennedy v. State, Ind., 578 N.E.2d 633. Ct. examined chain of possession & concluded that no error occurred in admission of exhibits, noting that "it stretches credulity to hypothesize even a possibility of tampering" with exhibits in this case.

TITLE: Graham v. State
INDEX NO.: O.13.
CITE: (11/29/82), Ind., 441 N.E.2d 1348
SUBJECT: Chain of custody - public records
HOLDING: Chain of custody requirements do not apply to certified copies of public records.

Duncan 409 N.E.2d 597. Here, D challenged admissibility of documents concerning prior convictions because chain of custody was not proven. Held, no error; burglary conviction & habitual enhancement affirmed.

TITLE: Lee v. State
INDEX NO.: O.13.
CITE: (12-19-97), Ind., 689 N.E.2d 435
SUBJECT: Sufficient chain of custody shown - exchange of cocaine
HOLDING: To establish proper chain of custody for physical evidence, State must provide reasonable assurances that exhibit which has passed through various hands has remained undisturbed. Cliver, 666 N.E.2d 59. In providing such assurances, State need not negate every remote possibility of tampering, but must present evidence which strongly suggests exact whereabouts of evidence at all times. Bell, 610 N.E.2d 229. Here, D argued that State did not negate possibility that cocaine may have come from informant rather than from him. However, police officer identified evidence as being similar to baggie which informant handed him & testified that he observed exchange of cocaine from distance of five or six feet from D & two to three feet from informant; that he never lost sight of cocaine from time D handed it to informant & informant handed it to him; & that baggie was in informant's possession for five or six seconds before he gave it to officer. Proper chain of custody can be established through officer's identification of evidence & testimony that he observed exchange in its entirety with unobstructed view. Collins, App., 645 N.E.2d 1089. D failed to establish that State laid inadequate foundation for admission of cocaine. Held, no error.

RELATED CASES: Cockrell, App., 743 N.E.2d 799 (state adequately established chain of custody over cocaine sold by D); Whaley, App., 843 N.E.2d 1.

TITLE: Powers v. State
INDEX NO.: O.13.
CITE: (10/21/82), Ind., 440 N.E.2d 1096
SUBJECT: Chain of custody - when required
HOLDING: Chain of custody need only be established from time police take possession of object until object is laboratory tested. Graham 255 N.E.2d 652. Here, chain of custody was established from time police seized drugs until time evidence bag was placed in police safe following testing by State Police Lab. On the Friday before trial, Exhibit 11 was missing 17 bags of cocaine; Exhibit 17 was missing 4 small packets. Ct. rejects D's argument that missing evidence indicated police safe was not secure, thus exhibits could have been tampered with before tested. Held, chain of custody established; drug convictions affirmed.

RELATED CASES: Katner, App., 640 N.E.2d 388 (discrepancy over whether tube containing drug was in plastic container, bottle, or baggie, was not sufficient to show lack of reasonable assurance evidence remained undisturbed, and therefore State adequately established chain of custody to admit cocaine); Smith, App., 452 N.E.2d 160 (provided envelope containing drugs remained sealed from arrival at lab to time received by chemist for testing, other individuals at lab who may have touched package need not testify, *citing* Gilliam 383 N.E.2d 297); Klopfenstein, App., 439 N.E.2d 1181 (case contains good discussion of origin/purpose of chain of custody).

TITLE: Sheperd v. State
INDEX NO.: O.13.
CITE: (12/29/97), Ind. App., 690 N.E.2d 318
SUBJECT: Chain of custody - videotape
HOLDING: D claimed Tr. Ct. erred in admitting videotape of accident scene because State failed to show continuous whereabouts of tape from time it was made until time it was offered at trial. Although requirement to show chain of custody is quite strict concerning fungible goods that are difficult to identify, rule is less stringent on items that are readily identifiable at any given time. English, 575 N.E.2d 14. In addition, argument based on lack of chain of custody which does no more than raise possibility of tampering is without merit. Pacso, 563 N.E.2d 587. State need not establish perfect chain of custody, & any gaps go to weight of evidence, not its admissibility. Further, there is presumption of regularity in handling exhibits by public officers, & presumption that public officers discharge their duties with due care. Kennedy, 578 N.E.2d 633.

Here, videotape was not fungible item & was readily identified by witness as video of accident scene. Witness testified as to its accuracy & authenticity. Also, there was no evidence indicating tampering or alterations. Held, no error in admitting videotape.

TITLE: Willis v. State
INDEX NO.: O.13.
CITE: (4th Dist. 9/19/88), Ind. App., 528 N.E.2d 486
SUBJECT: Chain of custody - unpublished depositions cannot establish
HOLDING: Unpublished depositions cannot serve to show chain of custody for exhibits. D was convicted of dealing & conspiracy. On appeal, D argues that state failed to show chain of custody or lay proper relevancy foundations for 3 exhibits: empty capsules, police property record & receipt, & lab report showing capsules contained controlled substances. D alleges that Tr. Ct. relied on unpublished depositions in admitting these three exhibits. State argues D did not object to lack of publication & thus waived any error. Record shows state moved to publish depositions but does not show oral or written order of publication; depositions themselves are not in record. D's objection to admission of exhibits was based on inadequate chain of custody & relevancy showings. D's motion to correct errors argued that chain of custody was inadequate because depositions of possessors were not in evidence. Thus, while objection was not "model of clarity," error was preserved. Depositions must be published & made part of record before they can be considered by Tr. Ct. or reviewing Ct. for any purpose. Hales & Hunter Co. 428 N.E.2d 1225; Augustine 384 N.E.2d 1018. State had burden of establishing on record proper foundation for exhibits, & without depositions state failed to do so. Without three exhibits, record contains no evidence identifying substance sold as prescribed substance. Held, conviction reversed.

TITLE: Wrinkles v. State
INDEX NO.: O.13.
CITE: (12/31/97), Ind., 690 N.E.2d 1156
SUBJECT: Chain of Custody - ballistics samples & serological evidence
HOLDING: In murder case, D claimed State failed to establish adequate chain of custody for ballistic & serological evidence it introduced at trial. Non-fungible evidence, such as ballistics samples, requires less stringent foundation than does fungible evidence such as blood samples, because any tampering with evidence is more likely to be noticed due to unique character of evidence. Hough, 560 N.E.2d 511. Proponent of evidence does not have to establish perfect chain of custody; any gaps go to weight of evidence, not its admissibility. Bell, 610 N.E.2d 229; Kennedy, 578 N.E.2d 633.

Regarding ballistics samples, D did not rebut presumption of regularity in handling of exhibits, nor did he do more than raise mere possibility of tampering. Witness readily identified exhibits at trial, which established an adequate chain of custody for nonfungible ballistics evidence.

As for serological evidence, State accounted for evidence at each stage from its acquisition, to its testing, & to its introduction at trial. Held, no error.

O. EVIDENCE

O.14. Defense right to present evidence

O. EVIDENCE

O.14. Defense right to present evidence

O.14.a. In general

TITLE: Allen v. State
INDEX NO.: O.14.a.
CITE: (4th Dist., 8-9-04), Ind. App., 813 N.E.2d 349
SUBJECT: Erroneous exclusion of relevant evidence - right to present defense
HOLDING: In murder prosecution, Tr. Ct.'s exclusion of a defense witness's testimony indicating that someone other than D had committed the offenses was reversible error. D has a right to present evidence tending to show that someone other than accused committed the charged crime & exclusion of such evidence cannot be deemed harmless error. Joyner v. State, 678 N.E.2d 386 (Ind. 1997). Here, Tr. Ct. erroneously excluded a defense witness's statement he had given outside presence of jury indicating that Crenshaw & some other individuals were actual perpetrators of murders. Witness refused to testify for defense at trial & Tr. Ct. halted his testimony before D's direct examination had concluded, but his out-of-Ct. statements were admissible under Indiana Evidence Rule 804(b)(2), because he had been under oath & was subject to cross-examination by prosecutors who were trying the case. Record supported conclusion that this witness's testimony was exculpatory, unique, & critical to defense as there was no other source for D to rely upon to present this part of his defense that another individual had committed crimes. Ct. also found error in Tr. Ct.'s exclusion of certain reconstructive evidence & tests that had been offered by defense expert who challenged an eyewitness's identification of D while witness drove through an intersection on morning of murders. These reconstructive tests, & expert's testimony regarding results of those tests, was type of evidence that prevented D from presenting a meaningful opportunity to present a complete defense. Kubsch v. State, 784 N.E.2d 905 (Ind. 2003). Held, convictions reversed & remanded for new trial.

RELATED CASES: Townsend, 26 N.E.3d 619 (Ind. Ct. App. 2014) (D had right under 6th amendment right to compulsory process to call witness, even though she was not on witness list and defied Tr. Ct.'s witness separation order; however, error was harmless).

TITLE: Bisard v. State
INDEX NO.: O.14.a.
CITE: (3/4/2015), 26 N.E.3d 1060 (Ind. Ct. App. 2015)
SUBJECT: Ruling did not deny D's fundamental right to present a defense
HOLDING: Tr. Ct. did not deny D's right to present a defense when it ruled that if D responded to State's expert by presenting testimony that he was not a heavy drinker, D would open the door to evidence of his 2013 arrest for OWI. Responding to a dispatch to pursue a subject with an outstanding warrant, D drove 75 mph on a city street and struck two stationary motorcycles, killing one person and seriously hurting two others. First responders said D showed no signs of intoxication, but D's BAC was .19%. At trial, the State's expert testified that some heavy drinkers are "tolerant drinkers," meaning that they could be intoxicated without showing signs of intoxication. D thus asked to present testimony that he was not a heavy drinker to refute the expert's implication that D was a tolerant drinker. Once the Tr. Ct. ruled that this would open the door to admission of his 2013 OWI arrest, D chose to forgo this testimony.

The Tr. Ct.'s ruling did not violate D's fundamental right to present a defense. See Barber v. State, 911 N.E.2d 641 (Ind. Ct. App 2009); Roach v. State, 695 N.E.2d 934 (Ind. 1998); Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Even though the right to present witnesses is of the greatest importance, it is not absolute. Barber, 911 N.E.2d at 646; Roach, 695 N.E.2d at 939. Ds often must make difficult evidentiary and strategic decisions. The fact that the Tr. Ct.'s ruling compelled D to make such a choice – in which he chose to forgo one aspect of his defense - did not deny his fundamental right to present a defense. Held, judgment affirmed.

TITLE: Dunagan v. State
INDEX NO.: O.14.a.
CITE: 661 S.E.2d 525 (Ga. 2008)
SUBJECT: Improper exclusion of evidence regarding inherent dangerousness of intersection
HOLDING: Georgia Supreme Court held a driver facing charges for his role in a serious highway collision should have been allowed to present evidence of the inherently dangerous nature of the intersection involved and remedial steps the state department of transportation took following the wreck. D was driving his truck when he tried to beat a traffic light. His vehicle struck and severely injured a motorist making a turn in the intersection, which resulted in his conviction for causing serious injury by vehicle based on reckless driving. The Tr. Ct. refused to allow D, who raised an affirmative defense of accident, to introduce evidence that the intersection malfunctioned due to hazardous design and that subsequent corrective measures demonstrated known design flaws that contributed to the crash. Court noted the evidence proffered by D was both relevant to both criminal negligence and proximate cause and that the Tr. Ct. abused its discretion in barring it. Design defects "would bear directly upon the ultimate issue of Dunagan's guilt of the charged crimes." Criminal negligence is more than the negligence that can render one civilly liable and even a D who violates a traffic law may not be criminally negligent "unless the violation is intentional, willful, or wanton, or though unintentional, is accompanied by recklessness or is under circumstances from which probable death or injury to others might be reasonably anticipated." Court added any absence of criminal negligence was relevant also to the defense of accident, which requires a D to prove that his actions did not show an utter disregard for the safety of others. The evidence of subsequent modification can show known dangers existed and that another party, the DOT, was responsible for the collision.

TITLE: Griffin v. State
INDEX NO.: O.14.a.
CITE: (2-22-02), Ind., 763 N.E.2d 450
SUBJECT: Hearsay cloaked as impeachment - claim of due process violation
HOLDING: On petition for rehearing of decision at 754 N.E.2d 899, Ct. affirmed its conclusion that Tr. Ct. properly excluded hearsay testimony by D's former attorney that another person had confessed to crime. Defense put this person on stand, knowing he would deny having confessed, in order to get attorney's hearsay testimony admitted under guise of impeachment. D argued in his petition for rehearing that Ct. failed to consider Chambers v. Mississippi, 410 U.S. 284 (1973), & did not fully address his claim that Tr. Ct.'s hearsay ruling violated his federal right to due process. In Chambers, D was denied permission to cross-examine an adverse witness based on Mississippi's voucher rule & was also denied opportunity to introduce testimony by three other witnesses that this witness had confessed to them on three separate occasions. U.S. S. Ct. held, under facts & circumstances of case, that exclusion of this critical evidence, coupled with State's refusal to permit D to cross-examine adverse witness, denied him due process.

Here, Indiana S. Ct. rejected D's claim that Chambers stands for proposition that exclusion of hearsay evidence about a single confession, standing alone, violates federal due process. Ct. held that D's case is distinguishable from Chambers because: 1) D was permitted to attack witness's credibility & motivation; 2) Tr. Ct. allowed some testimony alluding to witness's confession; 3) confession was not as reliable as confession in Chambers because it was not made to disinterested acquaintance & because corroborating evidence was insufficient; & 4) confession was made to one person as opposed to multiple people. Held, judgment of Tr. Ct. affirmed; Boehm, J., dissenting, believes that D's former attorney should be viewed as disinterested party & that her testimony was corroborated by enough other evidence that its exclusion deprived D of his Sixth Amendment right to present witness in his defense.

TITLE: Harris v. State
INDEX NO.: O.14.a.
CITE: (7/30/85), Ind., 480 N.E.2d 932
SUBJECT: Defense right to present evidence - motion in limine (MIL) re D's prior convictions
HOLDING: Tr. Ct. did not err in denying D's MIL asking that state be prohibited from introducing evidence of his criminal convictions to impeach him in event he testified. Here, D did not testify & claims he was denied right to present evidence/due process. Denial of MIL is not final action causing prejudice to D. Error, if any, occurs when challenged evidence is improperly admitted & objection is made at trial. Bennett 423 N.E.2d 588. It was D's decision whether to testify; there is no right to special consideration if D chooses to testify. Robinson 446 N.E.2d 1287; Geisleman 410 N.E.2d 1293. Held, no error.

RELATED CASES: Luce v. US (1984), U.S., 105 S.Ct. 460, 83 L.Ed.2d 443 (Crim L 1036.2; Cts. may not review Tr. Cts.' in limine ruling that prior conviction fell within category of permissible impeachment evidence Fed. R. Evid. 609(a) where D does not testify).

TITLE: Hill v. State
INDEX NO.: O.14.a.
CITE: (2/25/2016), 51 N.E.3d 446 (Ind. Ct. App. 2016)
SUBJECT: No error granting State's motion in limine
HOLDING: The State did not improperly interfere with D's defense, which included calling his wife to testify that despite her initial statement to the police, D did not, in fact, batter or confine her.

The State declined to call wife to testify, but D included her on his witness list. The State filed a motion in limine, asking the trial court to bar wife from testifying because she would either commit perjury or invoke the Fifth Amendment for most questions, which would render her testimony irrelevant. The State also said the party calling wife might suborn perjury. The trial court let wife testify outside the jury's presence for a while to "see where [wife's testimony] is going." When asked about the alleged incident, wife invoked the Fifth Amendment. D said he wanted to make a record that his rights to cross-examination and a fair trial had been compromised, but said he would defer to the trial court's decision on the State's motion in limine. The trial court granted the motion, preventing wife from testifying. D was convicted of criminal confinement, domestic battery, and interference with the reporting of a crime.

The State did not intimidate wife into invoking the Fifth Amendment by cautioning her about the danger of self-incrimination, and the trial court did not abuse its discretion in granting the State's motion in limine. By saying he would abide by the trial court's ruling on the motion in limine, D invited any error that may have occurred. See Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005). Also, any possible error from not allowing wife to testify was harmless because there was other substantial evidence of D's guilt. See Johnson v. State, 747 N.E.2d 623, 629 (Ind. Ct. App. 2001). Held, judgment affirmed

TITLE: Hubbard v. State
INDEX NO.: O.14.a.
CITE: (1-16-01), Ind., 742 N.E.2d 919
SUBJECT: Exclusion of polygraph evidence upheld - right to present defense
HOLDING: Tr. Ct. did not err in excluding results of polygraph examination administered to person whom D argued committed murders. D offered this evidence to show that person committed crimes & argued that exclusion of polygraph examiner's testimony violated his federal constitutional right to put on defense & contravened Indiana Rule of Evidence 702. D does not enjoy unlimited constitutional right to offer exculpatory evidence. Roach v. State, 695 N.E.2d 934 (Ind. 1998). Exclusion of polygraph results absent stipulation does not violate D's constitutional right to put on defense. Perry v. State, 541 N.E.2d 913 (Ind. 1989). Ct. noted well- documented disagreement among experts regarding reliability of polygraph tests & concluded that government interest in ensuring fair trials outweighs D's limited interests in presenting inherently unreliable evidence. United States v. Scheffer, 523 U.S. 303, 118 S. Ct. 1261, 110 L. Ed.2d 413 (1998). As to D's alleged violation of Indiana Evid. R 702, Ct. reaffirmed its longstanding view that polygraph test results are not sufficiently reliable to warrant admission absent stipulation. Held, judgment affirmed.

RELATED CASES: James, 2018 Ind. App. LEXIS 80 (Ind. Ct. App. 2018) (Tr. Ct. court did not abridge D's right to present defense by barring evidence that person he murdered had threatened to kill D two years earlier; threat was too remote to be relevant).

TITLE: Hyser v. State
INDEX NO.: O.14.a.
CITE: (10/17/2013), 996 N.E.2d 443 (Ind. Ct. App. 2013)
SUBJECT: Erroneous exclusion of relevant evidence - denial of right to present a defense
HOLDING: In child molesting prosecution, Tr. Ct. improperly denied D a meaningful opportunity to present a complete defense. Throughout the trial, D attempted to present a defense that the allegations and testimony against him were fabricated as a retaliatory act in response to a report he made to DCS that he believed complaining witness (C.W.) was being abused by C.W.'s mother's boyfriend (Marner). D wished to elicit testimony from two witnesses who observed Marner strike C.W., and from a detective that the report to DCS was made by D and that it prompted C.W.'s allegations that D had molested him. In addition, D wished to present evidence that Marner was a registered sex offender to show Marner knew how the system worked and that J.M. could be taken away from him if a new charge was filed against him.

Court concluded that this evidence was relevant under Ind. Evidence Rule 401 as it had, at a minimum, the tendency to show that the molestation allegations against D were untrue and were made, or caused to be made by C.W. through the influence of Marner, in retaliation or in response to D making a child abuse report regarding Marner. Evidence regarding report to DCS was not inadmissible hearsay because D did not wish to present it to prove truth of matter asserted, but instead to demonstrate he had made the report against Marner a few days prior to time he was first accused of the molestations, and report provided a motive for Marner to fabricate the molestation allegations and influence C.W. to testify against D. Dyson v. State, 692 N.E.2d 1374 (Ind. Ct. App 1998). Probative value of the evidence was not outweighed by danger of unfair prejudice, and exclusion of the evidence is inconsistent with substantial justice and therefore not harmless. The evidence D wished to elicit and present was exculpatory, unique, and critical to his defense. D had a right, as a fundamental element of due process of law, to present his own witnesses to establish a defense and to present his version of the facts. See Kubsch v. State, 784 N.E.2d 905 (Ind. 2003); Allen v. State, 813 N.E.2d 349 (Ind. Ct. App 2004). Held, convictions reversed and remanded for new trial.

RELATED CASES: Bisard, 26 N.E.3d 1060 (Ind. Ct. App 2015) (in ruling that if D pursued testimony about his drinking habits he would open door to his unrelated OWI arrest, Tr. Ct. did not deny D's right to present a defense and present his own witnesses; see full review, this section).

TITLE: Jordan v. State
INDEX NO.: O.14.a.
CITE: (4th Dist., 2-11-98), Ind. App., 691 N.E.2d 487
SUBJECT: Defense right to present evidence - prosecutor not required to testify
HOLDING: Tr. Ct. did not abuse its discretion when it refused to compel testimony of prosecuting attorneys. Prosecuting attorney cannot be called as witness unless testimony sought is required by compelling & legitimate need. Matheny, 583 N.E.2d 1202. Here, D's theory of defense was that prosecution was part of political conspiracy against him because prosecutor filed charges even though State Police considered investigation to be incomplete. There was no compelling & legitimate need for prosecuting attorney's testimony to prove conspiracy because D elicited testimony from police officer about alleged conspiracy. Thus, jury heard evidence that prosecution was politically motivated. Held, conviction affirmed.

RELATED CASES: Paschall, App., 717 N.E.2d 1273 (D failed to show that prosecutor's testimony would have been both material & favorable to his defense).

TITLE: Joyner v. State
INDEX NO.: O.14.a.
CITE: (3-31-97), Ind., 678 N.E.2d 386
SUBJECT: Erroneous exclusion of relevant evidence
HOLDING: Tr. Ct. committed reversible error when it prevented D from presenting evidence supporting his theory that another person committed murder. In his offer to prove, D sought to present evidence that: Bowens, who worked at same place as victim & D, was having affair with victim; Bowens had sex with victim on night before murder; Bowens had lied to his wife about where he was that evening & later told his wife that he had argument with victim on last day she was seen alive; & Bowens came in late to work on morning after murder & lied about his tardiness on his time card. Some evidence admitted at trial, including expert testimony regarding hair analysis, was consistent with D's theory that crime was committed by Bowens.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind.Evidence Rule 401. Evidence which tends to show that someone else committed crime logically makes it less probable that D committed crime, & thus meets definition of relevance in Rule 401. In this case, it was error to prevent D from offering proposed evidence. Some of proffered testimony could have established motive (argument) & opportunity (unexplained absence/cover-up). Erroneous exclusion of evidence was inconsistent with substantial justice & could not be deemed harmless error. Ind.Trial Rule 61. Held, reversed & remanded for new trial.

RELATED CASES: Tibbs, 59 N.E.3d 1005 (Ind. Ct. App. 2016) (no error in excluding evidence that a third person was previously indicted for victim's murder, gave inconsistent statements regarding his whereabouts the night victim disappeared, and threatened to kill victm 4 years earlier if she disclosed that he sexually molested her); Bryant, App., 802 N.E.2d 486 (evidence offered in attempt to establish that D's father was person who killed victim was properly excluded); Smith, 754 N.E.2d 502 (D only sought to present (mostly hearsay) evidence of various threats made by victim himself; there was absolutely no effort to present any evidence of any behavior by any other person suggesting existence of another suspect; thus, evidence D sought to present falls well short of test for admissibility enunciated by Joyner); Roop, 730 N.E.2d 1267 (no error in excluding evidence that D's father-in-law may have molested D's wife when she was child).

TITLE: Kubsch v. Neal,Superintendent, Indiana State Prison
INDEX NO.: O.14.a.
CITE: (9/23/2016), 838 F.3d 845 (7th Cir. 2016)
SUBJECT: Due process requires admission of reliable hearsay evidence critical to D's theory of defense
HOLDING: The Seventh Circuit granted habeas corpus relief because the Indiana Supreme Court's conclusion that the Due Process Clause did not require the admission of critical evidence into Kubsch's trial was either contrary to, or an unreasonable application of, the Chambers line of Supreme Court precedent. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court held that the "hearsay rule may not be applied mechanistically to defeat the ends of justice" and that exclusion of critical evidence under the hearsay rule may violate a D's right to present a defense. Id. at 302. The holding in Chambers has been reiterated in Green v. Georgia, 442 U.S. 95 (1979), Crane v. Kentucky, 476 U.S. 683 (1986), Rock v. Arkansas, 483 U.S. 44 (1987) and Holmes v. South Carolina, 547 U.S. 319 (2006). The Seventh Circuit interpreted the Chambers line of cases to hold that when hearsay is otherwise reliable and critical to the theory of the defense and the case involves a murder prosecution, due process requires its admission.

Here, Kubsch was charged with the murder of his wife, her ex-husband and his eleven-year-old step-son, Aaron. Aaron's best friend, Mandy, lived across the street from Aaron, who lived primarily with his father and not Kubsch. A few days after the murders, the police interviewed Mandy and her mother. Both said that they saw Aaron after they returned home around 3:45 p.m. on Friday. In order for Kubsch to have been the killer, the murders would have had to have occurred before 3:00 p.m. In a subsequent interview, Mandy's mother said she was mistaken and they saw Aaron on Thursday, not Friday. Mandy never explained whether she was mistaken. At the second trial, Mandy could not remember seeing Aaron or even making her statement to the police. As such, the Tr. Ct. denied Kubsch the ability to introduce the prior statement. The Indiana Supreme Court held that the statement was not admissible under Indiana Rule of Evidence 803(5) as a recorded recollection because Mandy did not vouch for the accuracy of the statement. The Court also held that the statement was not admissible under Chambers because of the mother's testimony regarding the confusion of the days. The Seventh Circuit explained that the circumstances of Mandy's statement made the statement reliable and, if believed, the statement exonerates Kubsch as it supports his actual innocence defense. Because the facts of Kubsch's case parallel so closely to the facts of Chambers, Green, Crane, and Holmes, a failure to apply those cases here amounted to an unreasonable application of law clearly established by the Supreme Court. Held, judgment of the district court reversed and remanded for issuance of the writ of habeas corpus, unless the State within 120 days takes steps to give Kubsch a new trial; Hamilton, J., joined by Easterbrook and Sykes, JJ., dissenting on basis that there was no error in the exclusion of Mandy's statement, let alone a violation of constitutional law clearly established by Supreme Court decisions.

TITLE: Martin v. State

INDEX NO.: O.14.a.

CITE: (12/30/2021), Ind. Ct. App., 179 N.E.3d 1060

SUBJECT: A witness who is expected to invoke his 5th Amendment privilege is not categorically barred from being called as a witness but there is no right to force a witness to take the stand solely to invoke a 5th Amendment right.

HOLDING: Defendant was convicted of murder and arson for the death of his former girlfriend's father-in-law. At trial he sought to implicate his accomplice by forcing him to appear before the jury and either testify or invoke his 5th Amendment right against self-incrimination. Defendant argued his right to present a defense as guaranteed by the 6th Amendment of the U.S. Constitution and Article One section 13 of the Indiana Constitution was violated when he was prevented from calling the accomplice to the witness stand. Although trial counsel failed to preserve the issue in the trial court the Court of Appeals addressed the issue *citing* Stephenson v. State, 864 N.E.2d 1022 (Ind. 2007) (appellate counsel should have raised the issue of the failure to allow the defense to force a witness to invoke the 5th Amendment right as reversible error.) Here, the Court of Appeals held that a witness who is expected to invoke his 5th Amendment privilege is not categorically barred from being called as a witness but there is no right to force a witness to take the stand solely to invoke a 5th Amendment right. It is an abuse of discretion standard that is fact sensitive, and the trial court should consider whether any trier of fact might possibly and reasonably believe that the proposed witness might have committed the crime instead of the defendant. Here the trial court did not abuse its discretion. The Court of Appeals reversed Defendants two convictions for felony murder finding that a defendant cannot be convicted of a knowing and intentional murder and felony murder for the killing of the same person. Defendant was sentenced to 65 years for count I murder enhanced by 15 years due to the firearm enhancement. He was sentenced to 12 years for arson ordered consecutive to count I for an aggregate sentence of ninety-two years. The Court of Appeals found the evidence sufficient to support his convictions and his sentence was not inappropriate.

TITLE: McKim v. State
INDEX NO.: O.14.a.
CITE: (4/19/85), Ind., 476 N.E.2d 503
SUBJECT: Defense right to present evidence of recantment
HOLDING: Tr. Ct. did not err in refusing to permit witness to testify re lack of sexual relations with victim. Here, purpose of testimony was to show victim's propensity to falsely accuse others of having sex with her. Little, App., 413 N.E.2d 639 & Hall, App., 374 N.E.2d 62 (sexual assault victims later recanted accusations). D testified daughter told him she & witness had sex. Ct. finds D's version of episode self-serving & finds no evidence of recantment. There was some indication that victim & witness "played around," but such evidence was properly excluded pursuant to rape shield law since it touched on victim's promiscuous background. Held, no error.

TITLE: McKinley v. State
INDEX NO.: O.14.a.
CITE: (4th Dist. 6/25/84), Ind. App., 465 N.E.2d 742
SUBJECT: Defense right to present evidence
HOLDING: Tr. Ct. erred in restricting D's cross-examination of state's key witness (Officer Rarey) & in preventing D from presenting evidence of incidents surrounding his arrest (severe beating by officer) & later charge of attempted battery on police officer. Here, D & officer gave conflicting accounts of incident (who forced who off road). Officer (dressed in blue jeans & sport shirt) approached D's car; D contends officer jumped out of pickup truck & charged toward him with an angry look on his face. D picked up tire iron to protect himself/wife but dropped it when officer pulled gun & shouted he was an officer. Officer then beat D severely (broken rib, broken jaw). Officer arrested D for DWI. D, bleeding profusely, was taken to station & given breathalyzer. Officer cursed D & spit on him at station. Another officer told Rarey he should file charge against D to protect himself. DWI charge was dropped; present charge was filed. D's first trial ended in hung jury. State offered to dismiss charge if D dropped civil law suit against officer/municipality. Ct. finds evidence re beating was admissible under 4 theories: (1) res gestae; (2) insight into motives/intentions of parties; (3) buttressed D's self-defense testimony; (4) motive for bias & prejudice of officer (who faced civil suit & departmental discipline if beating was proven). Evidence re officer's behavior at station should have been admitted to impeach officer's credibility. Higginbotham, App., 427 N.E.2d 896. Held, reversed.

TITLE: Rock v. Arkansas
INDEX NO.: O.14.a.
CITE: 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)
SUBJECT: Right of D to testify in own behalf - hypnosis
HOLDING: D's right to testify in own defense is guaranteed by Due Process Clause, Compulsory Process Clause, & 5th Amend.'s guarantee against compelled testimony. Here, D was hypnotized at suggestion of her attorney to facilitate increased memory of shooting incident. State rule made hypnotically enhanced testimony inadmissible per se. Tr. Ct. limited D's testimony to matters remembered & stated to examiner prior to hypnosis. Court reviews prior cases dealing with constitutional challenges to state rules designed to ensure trustworthy evidence that interfered with ability of D to offer evidence. Statute which prevents persons charged as principals, accomplices, or accessories in same crime from testifying for each other violates 6th Amend. Washington v. TX (1967), 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019. Nor may state apply rule of evidence that permits witness to take stand, but arbitrarily excludes material portions of his/her testimony. Chambers v. MS (1973), 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297. Right to present relevant testimony is not without limitation. However, restrictions of D's right to testify may not be arbitrary/disproportionate to interests they are designed to serve. State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in individual case. Here, results of test conducted on gun corroborated details D remembered about shooting. Held, per se rule excluding D's post-hypnosis testimony impermissibly infringes upon D's right to testify in own behalf. Rehnquist, joined by White, O'Connor, & Scalia, DISSENTS.

RELATED CASES: Parker, 965 N.E.2d 50 (Ind. Ct. App 2012) (prohibiting D from testifying that the alleged victims of the robbery were selling him marijuana rather than an X-Box gaming system did not violate D's right to present a defense; D did not disclose defense until day of trial, reference to marijuana would make the victims appear to be drug dealers and D was still able to testify that a different "transaction" took place without referring to drugs).

TITLE: Saintignon v. State
INDEX NO.: O.14.a.
CITE: (1/17/2019), 118 N.E.3d 778 (Ind. Ct. App. 2019)
SUBJECT: Exclusion of witnesses did not violate D's right to present a defense
HOLDING: In murder, conspiracy and robbery prosecution, Tr. Ct. did not deprive D of a defense when it excluded certain witnesses, including his late-disclosed alibi witnesses. Evidence that a prior suspect had once held knives to another woman's throat and threatened to decapitate her is was irrelevant to the charged crime and inadmissible as character evidence under Ind. Evidence Rule 404(b). Exclusion of two witnesses' testimony that the same prior suspect confessed to killing victim did not violate due process because D "utterly failed" to show that the testimony would have borne persuasive assurances of trustworthiness such as those at issue in Chambers v. Mississippi, 410 U.S. 284 (1973). Their statements were made at least three years after the crime, and D was allowed to present evidence of suspect's threats to kill victim days before she was murdered. Finally, information concerning the belated alibi witness came from D's self-serving explanation just days before trial that he was using drugs at time of murder which prevented him from remembering. None of D's witnesses excluded from testifying led to the deprivation of a defense in derogation of his constitutional rights.

Court also found no error in admitting a photograph into evidence depicting what he contends were his Aryan Brotherhood tattoos. The pictures were relevant to show D had a bruise on his bicep two days after the murder, and the State did not present any testimony identifying or explaining the significance of the tattoos. State presented sufficient evidence to support D's convictions. Held, judgment affirmed

TITLE: Singh v. State

INDEX NO.: O.14.a.

CITE: (2/20/23), Ind. Ct. App., 203 N.E.3d 1316

SUBJECT: Erroneous exclusion of relevant evidence of distracted driving at time of fatal accident in reckless homicide trial

HOLDING: After his semi-tractor truck overshot the roadway at an intersection, Defendant stopped the truck, activated his hazard lights, so they were flashing, and began reversing very slowly. Moments later, an SUV slammed into his truck, and the SUV's only occupant, a 24-year-old woman, died upon impact. Defendant was charged and convicted of reckless homicide, resulting in a 6-year sentence. On direct appeal, Defendant argued the trial court committed reversible error when it excluded relevant evidence tending to show that the deceased was using Snapchat to send and receive messages on her phone and thus was distracted around the time her SUV collided with his truck. The Court of Appeals agreed and found that, in this instance, the evidence that the deceased was using social media at the time of the accident was relevant, and the trial court erred in excluding this "highly probative" evidence of Snapchat usage and distracted driving. "[W]ithout the introduction of the Snapchat evidence or the evidence about distracted driving, the jury did not have the full picture of this tragic situation." The Court reversed the conviction and remanded for new trial, encouraging the careful drafting of instructions depending on the evidence admitted at trial.

TITLE: Smith v. State
INDEX NO.: O.14.a.
CITE: (4/16/87), Ind., 506 N.E.2d 31
SUBJECT: D's expert witness - exclusion of testimony
HOLDING: Tr. Ct. did not err in refusing to let D question his own expert witness re certain ballistics tests expert had performed. Here, D contends denial prevented him from putting on defense to refute state's theory of case. During state's case in chief, doctor who performed autopsy on victim testified re wounds victim suffered, specifically concerning assumptions as to how one bullet entered victim's body. First assumption supported D's contention that he shot victim as victim leaned over to take gun out of boot. Second assumption supported state's contention that D stood over victim & shot him in the back. Tr. Ct. sustained state's objection to expert's testimony re powder residue tests he performed on .357 magnum handgun which was not murder weapon. Tr. Ct. relied upon Miller 236 N.E.2d 585 concerning admission of such evidence. Despite fact D's expert apparently complied with requirements of such testing, because expert's offered testimony would not have added anything of substance nor detracted from testimony of doctor who performed autopsy, exclusion of testimony was not erroneous. Held, no abuse of discretion. Dickson CONCURS IN RESULT without opinion.

TITLE: State v. Murtagh
INDEX NO.: O.14.a.
CITE: 169 P.3d 602 (Alaska 2007)
SUBJECT: Statute allowing victims to not speak with defense found unlawful
HOLDING: Alaska Supreme Court held that provisions of the Alaska Victims' Rights Act that require advising victims and some witnesses that they need not talk to defense investigators, that allow victims and witnesses of sex crimes to refuse contact with defense investigators, and that preclude defense investigators from covertly recording interviews unjustifiably interfere with defense investigations in violation of the state constitution's procedural due process guarantee. Court decided that the provisions create too great a risk of suppressing sources of evidence that otherwise would be available to Ds.

TITLE: State v. St. George
INDEX NO.: O.14.a.
CITE: 252 Wis.2d 499, 643 N.W.2d 777 (Wis. 2002)
SUBJECT: Right to Present Defense -- Child Interview Expert
HOLDING: Exclusion of expert on techniques for interviewing children in sex abuse cases violated D's 6th Amend. right to present a defense at his trial for child sexual assault. Court sets out two-part test for determining when D has established right to present expert testimony. In first part, D must demonstrate: (1) the testimony of the expert satisfies evidentiary rule governing admission of expert testimony; (2) expert's testimony is clearly relevant to material issue; (3) expert's testimony is necessary to D's case; and (4) probative value of expert testimony outweighs prejudicial impact. After D satisfies part one of test, Tr. Ct. must determine whether state has compelling interest in exclusion that outweighs D's need for testimony. Here, D satisfies first prong of test, and state has no compelling interest in excluding expert's testimony.

TITLE: State v. Tiernan
INDEX NO.: O.14.a.
CITE: 941 A.2d 129 (R.I. 2008)
SUBJECT: Limiting cross about pending civil suit improper under Sixth Amendment
HOLDING: Rhode Island Supreme Court held that an assault D who sought to attack the complainant's credibility at trial by cross-examining him closely about the extent of injuries he claimed to have suffered and about his plans to file a civil lawsuit should not have been limited to a single question as to whether the complainant planned to seek monetary damages from D. Court stated the trial judge gave defense counsel essentially no latitude to explore possible bias relating to the planned lawsuit, noting that it was clearly in the complainant's interest to maximize his harm and D's fault. Defense counsel should have had a chance to explore that by asking questions not only about the complainant's retention of counsel and the extent of his injuries but also as to whether the victim believed a conviction of D might help his civil action. Limiting defense counsel to a single general question about a lawsuit amounted to a "virtually total" preclusion of the cross-examination guaranteed by the Sixth Amendment and its state counterpart.

TITLE: United States v. Tsarnaev

INDEX NO.: O.14.a.

CITE: (03/04/2022), 142 S. Ct. 1024 (US Supreme Court)

SUBJECT: In capital sentencing, no error in excluding evidence of third parties' alleged role in unsolved murders

HOLDING: In capital case, District Court did not abuse its discretion in excluding from the sentencing proceedings evidence that Defendant's accomplice brother was allegedly involved in a triple murder two years before the bombing. Defendant offered this evidence to support his mitigation defense that his brother was the ringleader of the bombing. Although the Federal Death Penalty Act provides that, at the sentencing phase of a capital trial, "information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor," (18 U. S. C. §3593(c)), the district court may exclude information "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." Such evidentiary decisions are reviewed for abuse of discretion. The proffered evidence here did not allow the jury to confirm or assess Defendant's brother's alleged role in the unsolved murders. Thus, the District Court did not abuse its discretion when it reasonably excluded the evidence for its lack of probative value and potential to confuse the jury. Held, First Circuit Court of Appeals' opinion vacated, judgment affirmed. Breyer, J., joined in part by Sotomayor and Kagan, JJ., dissenting, agreed with 1st Circuit that district court should have allowed Defendant to introduce evidence about his brother's role in 2011 triple murders which was "critically important" to his defense, noting that one of the main issues at sentencing was whether Defendant's brother was more responsible for the bombings than Defendant.

TITLE: Winkelman v. State
INDEX NO.: O.14.a.
CITE: (4th Dist. 10/8/86), Ind. App., 498 N.E.2d 99
SUBJECT: Defense right to present evidence - waiver
HOLDING: Tr. Ct. denied pro se Ds their right to fair trial where evidence shows they did not knowingly/intelligently waive their right to present evidence on their own behalf. Here, Ds were charged with neglect of a dependent for failing to provide medical care (relying upon prayer/religious beliefs for treatment of 3-week old son stricken with pneumonia). Ct. finds Tr. judge did not explain right to be heard. Ind. Const. Art. 1, Section 13. Tr. judge "merely engaged in disjointed & interpretive colloquy with [Ds]." Record shows Ds did not understand that they could testify on their own behalf. Constitutional right to be heard was not satisfied by merely allowing Ds to present final argument. Held, reversed & remanded for new trial.

RELATED CASES: Phillips, 673 N.E.2d 1200 (Ind. 2006) (interpreting Winkelman to hold that Tr. Ct. has an affirmative duty to insure a pro se D knowingly and intelligently waived right to testify at trial and contrasting this with lack of such affirmative duty where D is represented by counsel); Fonner, 955 N.E.2d 24 (Ind. Ct. App. 2011) (error in failing to explain to D that he had right to offer his own testimony at trial was harmless because D did not indicate what testimony he would have offered at trial had he received the proper advisement or what evidence was not rendered admissible because he did not know he could testify).

O. EVIDENCE

O.15. Miscellaneous evidentiary principles

TITLE: Doe v. Tobias
INDEX NO.: O.15.
CITE: (8-31-99), Ind., 715 N.E.2d 829
SUBJECT: Use of offensive collateral estoppel to criminal convictions
HOLDING: Tr. Ct. should apply offensive collateral estoppel against convicted criminal D on issues that were defended vigorously in criminal case in absence of showing that it is unfair to D to give conclusive effect to conviction. Ind. Code 34-3-18-1 provides for admission of criminal conviction, & although evidence of conviction is not necessarily conclusive proof in civil case, it may potentially provide basis for offensive use of collateral estoppel. Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994). "Offensive" collateral estoppel would bar criminal D from relitigating issue D has previously litigated unsuccessfully in criminal action. Tr. Ct. does not have unfettered discretion to deny offensive collateral estoppel where, as here, first litigated case involved criminal proceeding & D was proven guilty beyond reasonable doubt. Generally, following considerations are appropriate in evaluating offensive use of criminal conviction: 1) whether party in prior action had full & fair opportunity to litigate issue & 2) whether it is otherwise unfair to apply collateral estoppel given facts of particular case. Convicted D bears burden of showing that application of offensive collateral estoppel is unfair. It is appropriate to permit D to raise issues similar to those presented by claims of ineffective assistance of counsel insofar as they bear on fairness of holding D to results of criminal trial. Held, transfer granted, Ct. App.' decision at 700 N.E.2d 796 vacated; Tr. Ct. judgment reversed & remanded with instructions to enter partial summary judgment on issue of liability in favor of plaintiff, Doe.

TITLE: Ferguson v. State
INDEX NO.: O.15.
CITE: (8/4/2015), 40 N.E.3d 954 (Ind. Ct. App 2015)
SUBJECT: Judge did not testify
HOLDING: Trial judge did not impermissibly testify when she, while admonishing jury to disregard police officers' statements about the A.W.'s veracity, characterized the officers' views as "heartfelt." See Ind. Evidence Rule 605.

A.W.'s father testified that he and A.W.'s mother took A.W. to Child Protective Services, where officers interviewed A.W. in a separate room. When the interview ended, the officers said they believed A.W. In directing the jury to disregard the officers' opinion about A.W.'s veracity, the judge said the officers' opinion, "though heartfelt," was not to be considered. Evidence Rule 605 bars a judge from testifying because doing so is inconsistent with a judge's duty to remain impartial. Where a judge does not formally testify but may do so in a "less overt" way, the proper question is whether the judge's statement was merely a "fair comment" that summarized the evidence or whether it added to the evidence. See Quercia v. United States, 289 U.S. 466, 472, 53 S. Ct. 698, 77 L. Ed. 1321 (1933) (judicial commentary about how D's wiping of his hands while testifying was behavior classically indicative of lying found to be reversible error); see also United States v. Paiva, 892 F.2d 148, 159 (1st Cir. 1989) (trial judge's commentary explaining to jury difference between field testing and lab analysis while ruling on objection was error but harmless).

Here, the Tr. Ct.'s use of "though heartfelt" was not testimony and was not improper comment on whether A.W.'s testimony was credible. Also, the Tr. Ct. properly instructed the jury to not consider the opinions of others as to credibility of witnesses. "Though heartfelt" emphasized the instruction by saying it was not relevant how "heartfelt" the opinions may have been. Held, judgment affirmed.

TITLE: Hawkins v. Auto-Owners Ins.Co.

INDEX NO.: O.15.

CITE: (02-11-93), Ind., 608 N.E.2d 1358, *overruled on other grounds*, 655 N.E.2d 499 (Ind. 1995)

SUBJECT: Admissibility of criminal conviction in civil case

HOLDING: Ind. S. Ct. granted transfer of Ct. App. decision at 579 N.E.2d 1181 & changed its previous rule that criminal conviction was not admissible in civil case. Ct. App. had noted that despite Ind. Code 34-3-18-1, allowing for admissibility of criminal conviction as evidence in civil case, Indiana case law precluded such admission, & when statute is in conflict with rules of procedure established by Ind. S. Ct., rules prevail & statute is nullity. Ct. App. therefore held that criminal conviction was not admissible in civil case. While recognizing that Ct. App. decision was well written & correctly interpreted law, S. Ct. found that majority of other jurisdictions & Federal Rules of Evidence allowed for such admissibility. Ct. therefore found allowing criminal conviction to be admissible was more reasonable approach & determined that Ind. Code 34-1-18-1 would now be adopted as correct position on admissibility. Dickson & DeBruler, JJ., dissenting as to entry of summary judgment by Tr. Ct.

TITLE: Kimberlin v. Delong
INDEX NO.: O.15.
CITE: (06-13-94), Ind., 637 N.E.2d 121
SUBJECT: Admissibility of criminal conviction in civil proceeding
HOLDING: In opinion on transfer of Ct. App. decision at 613 N.E.2d 46, Ind. S.Ct. limited its implicit holding in Hawkins v. Auto-Owners Ins. Co., 608 N.E.2d 1358, where it held that Ind. Code 34-3-18-1, allowing for admission of criminal judgment as evidence in civil cases was proper rule. Here, Ct. held that while criminal felony judgment may be admitted in civil trial, conviction is not necessarily conclusive proof of factual issues determined by criminal judgment, & criminal transcript is not necessarily admissible. Ct. then looked to facts of case & found that while fact of criminal conviction is not conclusive, it could provide basis for use of offensive collateral estoppel if D had previously had full & fair opportunity to litigate facts determinative of civil liability. Ct. determined that here D's criminal trial provided such opportunity. Held, judgment of Tr. Ct. affirmed, Givan, J., dissenting on this issue.