Chapter 1
Rules of Evidence Generally
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CHAPTER 1

RULES OF EVIDENCE GENERALLY

I. SCOPE - RULE 101

A. OFFICIAL TEXT:

These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in this rule.

(a) Scope. These rules apply to proceedings in the courts of this State to the extent and with the exceptions stated in this rule.

(b) General Applicability. These rules apply in all proceedings in the courts of the State of Indiana except as otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court. If these rules do not cover a specific evidence issue, common or statutory law shall apply. The word "judge" in these rules includes referees, commissioners and magistrates.

(c) Rules of Privilege. The rules and laws with respect to privileges apply at all stages of all actions, cases, and proceedings.

(d) Rules Inapplicable. The rules, other than those with respect to privileges, do not apply in the following situations:

(1) ***Preliminary questions of fact.*** The determination of a question of fact preliminary to the admission of evidence, where the court determines admissibility under Rule 104(a).

(2) ***Miscellaneous proceedings.*** Proceedings relating to extradition, sentencing, probation, or parole, issuance of criminal summonses or warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims, and grand jury proceedings.

B. THE APPLICATION OF THE EVIDENCE RULES TO VARIOUS PROCEEDINGS

1. Presumption

Rule 101(a) establishes a presumption that the evidence rules apply to all proceedings. Norfolk Southern Ry. Co. v. Estate of Wagers, 833 N.E.2d 93, 101 (Ind. Ct. App. 2005). "A party asserting the contrary bears the burden of convincing the court that an exception applies." Miller, *Courtroom Handbook on Indiana Evidence*, 3 (2015-16 ed.).

However, in the absence of strict evidentiary rules, judges carry a special responsibility in assessing the weight, sufficiency, and reliability of proffered evidence. Carter v. State, 706 N.E. 2d 552, 554 (Ind. 1999); Cox v. State, 706 N.E.2d 547 (Ind. 1999).

Bogner v. Bogner, 29 N.E.3d 733, 739-41 (Ind. 2015) (parties can stipulate to proceeding "in summary fashion" without Evidence Rules).

2. Exceptions - Inapplicability of Rules to certain proceedings- Rule 101(d)

a. Sentencing hearings

(1) In general

The evidence rules, other than those with respect to privilege, do not apply to sentencing hearings. Pickens v. State, 767 N.E.2d 530, 534 (Ind. 2002). The rationale for the relaxation of the evidentiary rules at sentencing is that unlike at trial, the evidence is not confined to the narrow issue of guilt. Kellett v. State, 716 N.E.2d 975, 983 n.5 (Ind. Ct. App. 1999). Instead, the task is to determine the type and extent of punishment. Id. "This individualized sentencing process requires possession of the fullest information possible concerning the defendant's life and characteristics." Thomas v. State, 562 N.E.2d 43, 47 (Ind. Ct. App. 1990).

However, due process requires that sentences be based upon accurate and reliable information and cannot be based on information which has been withheld from the defendant. Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977); Gardner v. State, 270 Ind. 627, 388 N.E.2d 513 (1979).

> United States v. Miele, 989 F.2d 659 (3rd Cir. 1993) (memory-impaired addict-informant's estimate of quantity of drug involved in offense was insufficiently reliable for due process purposes).

(2) Aggravating and mitigating circumstances

The trial court is not limited to admissible evidence in evaluating aggravating and mitigating circumstances. Thacker v. State, 709 N.E.2d 3, 17 (Ind. 1999); Jackson v. State, 697 N.E.2d 53, 55 (Ind. 1998).

(3) Evidence of previous crimes

Previous crimes, regardless of whether the defendant was charged, convicted, or acquitted, are admissible into evidence.

However, a defendant cannot be sentenced based on assumptions concerning his criminal record which are materially untrue. United States v. Harris, 558 F.2d 366, 373 (7th Cir. 1977). To be used to aggravate a sentence, the prior crimes must be proven through conviction, defendant's admission, or other evidence. Powell v. State, 644 N.E.2d 82 (Ind. 1994).

(a) Prior acquittal

A sentencing court's consideration of a defendant's previous charge which resulted in an acquittal does not violate the defendant's federal right to due process if the State proves by preponderance of the evidence that the defendant committed those crimes. United States v. Watts, 519 U.S. 148, 117 S. Ct. 633, 638 (1997).

However, where the court assumes, without considering any evidence, that the defendant committed the crime or that the defendant was convicted of the crime,

the defendant's due process right to be sentenced based on materially true assumptions is violated.

Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252 (1948) (defendant may not be sentenced based on court's belief that defendant had three previous convictions when, in fact, some of charges had been dismissed and defendant had been acquitted on others).

Fugate v. State, 516 N.E.2d 75 (Ind. Ct. App. 1987) (trial court's express reliance on pre-sentence report which contained statement of damage to victim in crime of which defendant was acquitted denied defendant his right to be sentenced on basis of materially true assumptions).

Lewis v. State, 759 N.E.2d 1077 (Ind. Ct. App. 2001) (victim's mother's testimony about crime for which defendant was acquitted was irrelevant to sentence for crimes for which defendant was convicted in same trial). See also Bowles v. State, 737 N.E.2d 1150 (Ind. 2000).

(b) Prior convictions without counsel

Previous convictions of the defendant which were obtained without the assistance of counsel in violation of Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), may not be considered in sentencing the defendant. United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589 (1972).

Brown v. State, 683 N.E.2d 600 (Ind. Ct. App. 1997) (*quoting* Nichols v. United States, 511 U.S. 738, 114 S. Ct. 1921 (1994)) (because uncounseled misdemeanor convictions are valid if no imprisonment is imposed, they may be considered in determining sentence for later conviction; however, they may not be used if defendant proves, by preponderance of evidence, that there was actual lack of representation without waiver of counsel in earlier proceeding).

It is unclear as to whether a court may consider an uncounseled juvenile conviction in determining the defendant's sentence.

PRACTICE POINTER: Counsel may argue that the court cannot rely on a misdemeanor conviction regardless of whether imprisonment was imposed because, unlike the U.S. Constitution, the Indiana Constitution guarantees the right to counsel for all persons charged with a misdemeanor, regardless of whether the charge ultimately results in imprisonment. Ind. Const., art. 1, § 13; Brunson v. State, 182 Ind. App. 146, 394 N.E.2d 229 (1979).

Berry v. State, 561 N.E.2d 832 (Ind. Ct. App. 1990) (juvenile conviction that was allegedly uncounseled could be considered in sentencing where juvenile conviction was used to enhance sentence but not offense and trial court had knowledge of fact that juvenile conviction was uncounseled).

But see:

Angleton v. State, 686 N.E.2d 803, 814, fn 7 (Ind. 1997) (*citing* Rizzo v. United States, 821 F.2d 1271 (7th Cir. 1987) (because it is violation of due process to sentence defendant on basis of "misinformation of constitutional magnitude" such as convictions where defendant was unrepresented in violation of Sixth Amendment, trial court may not consider uncounseled juvenile delinquent adjudication).

(c) Statements of defendant

Hensley v. State, 573 N.E.2d 913 (Ind. Ct. App. 1991) (the rule prohibiting evidence of a plea bargain or statements made during plea bargaining is not just a rule of evidence, but also a rule of substantive law, and thus, applies in sentencing proceedings).

(d) Other evidence

Brooks v. State, 555 N.E.2d 1348 (Ind. Ct. App. 1990) (where at sentencing, judge ignored parole officer's affidavit stating that defendant was discharged from parole on date arrested for instant crime and State failed to present evidence contradicting affidavit, defendant was sentenced on basis of materially untrue record).

Carter v. State, 711 N.E.2d 835 (Ind. 1999) (no abuse of discretion for trial court to consider defendant's uncharged attempted molestation of his sister as an aggravating circumstance in the murder of another girl based on accusation by mother in pre-sentence report). See also Kent v. State, 675 N.E.2d 332, 340-41 (Ind. 1996).

Pickens v. State, 767 N.E.2d 530 (Ind. 2002) (no abuse of discretion to find prior batteries based on testimony of witnesses who were subjected to questioning by defendant).

(4) Hearsay

Hearsay evidence may be admitted in a sentencing hearing only if the hearsay is reliable and the defendant is given the opportunity to rebut the evidence. United States v. Barnes, 117 F.3d 328, 337 (7th Cir. 1997); United States v. Corbin, 998 F.2d 1377, 1385 (7th Cir. 1993). The court is not required to admit all hearsay evidence, nor is it required to admit evidence not relevant to the sentencing decision. See Powell v. State, 644 N.E.2d 82, 83 (Ind. 1994); Rabadi v. State, 541 N.E.2d 271, 277 (Ind. 1989).

Powell v. State, 644 N.E.2d 82 (Ind. 1994) (sworn statement given to police by defendant's friend, relating telephone conversation with defendant in which he told friend she should have reason to be afraid of defendant, was admissible at sentencing hearing because it carried some indicia of reliability and defendant had opportunity to inform court of any inaccuracies in statement).

Thomas v. State, 562 N.E.2d 43 (Ind. Ct. App. 1990) (trial court properly excluded codefendant's hearsay statement at defendant's sentencing due to questionable reliability of codefendant's pretrial statements).

Moore v. State, 479 N.E.2d 1264 (Ind. 1985), *cert. denied* (defendant's Sixth Amendment right to confront witnesses was not violated by incorporation of evidence from guilty plea hearing, including presentence report, into record of sentencing hearing because defendant was given opportunity to rebut any and all of matters contained in report and by pleading guilty, he waived his Sixth Amendment right).

Coleman v. State, 162 N.E.3d 1184, 1188 (Ind. Ct. App. 2021) ("Regarding hearsay, the strict rules of evidence do not apply to sentencing hearings. It is well-settled that hearsay evidence is admissible at a sentencing hearing.").

Davis v. State, 892 N.E.2d 156 (Ind. Ct. App. 2008) (prohibition against testimonial hearsay of an unavailable witness does not apply in sentencing hearings).

(5) Defendant's evidence

The defendant is entitled to subpoena and call witnesses and present evidence in his own behalf at the sentencing hearing. U.S. Const., amend. XIV; Ind. Const., art. §§ 12, 13; Ind. Code 35-38-1-3.

Wilson v. State, 865 N.E.2d 1024 (Ind. Ct. App. 2007) (trial court violated defendant's due process rights by denying him the right to present evidence at his sentencing hearing because of his refusal to cooperate with probation officer assigned to prepare his PSI report).

(6) Exception- sentencing hearings in which standard is beyond a reasonable doubt and capable of being tried to a jury

Where a "sentencing" hearing resembles more of a trial in which the defendant has a right to a jury and the State must prove the allegations beyond a reasonable doubt than a typical sentencing, the Rules of Evidence do apply.

Dumas v. State, 803 N.E.2d 1113 (Ind. 2004) (because 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," this phase is nonetheless in the nature of a trial to which the Indiana Rules of Evidence apply).

Moore v. State, 769 N.E.2d 1141 (Ind. Ct. App. 2002), *cert. denied,* 538 U.S. 1014 (2003) (evidence rules apply to habitual offender proceedings).

PRACTICE POINTER: Being that a jury trial on aggravators held in accordance with Smylie v. State, 823 N.E.2d 679 (Ind. 2005) and Blakely v. Washington, 124 S. Ct. 2531 (2004), requires introduction of evidence with the burden on the State to prove its case beyond a reasonable doubt, the Indiana Rules of Evidence should apply to a Blakely hearing as they do to a guilt phase in a death penalty trial as set forth in Dumas v. State, 803 N.E.2d 1113 (Ind. 2004).

b. Suppression Hearings

The Evidence Rules do not apply to the issuance of criminal summonses, arrest warrants or search warrants. Miller, 12 *Indiana Practice* 17, § 101.406 (4th ed. 2016). However, the rules of evidence have been held to apply in hearings on motions to suppress evidence seized without a warrant." Miller, 12 Indiana Practice 13, § 101.306 (3d. Ed. 2007). Lewis v. State, 904 N.E.2d 290 (Ind. Ct. App. 2009) (officer's testimony that computer showed an active warrant was not hearsay because it was admitted to show the officer's course of action; even if it were hearsay, pursuant to Evidence Rule 104(a), hearsay can be considered when ruling on the admissibility of evidence and Crawford v. Washington, 541 U.S. 36 (2004) does not apply to suppression hearings).

Johnson v. State, 472 N.E.2d 892, 902 (Ind. 1985) (in hearing to suppress and dismiss, statements were not inadmissible hearsay where police officer testified to information supplied to him by fellow officer; held, testimony was to show basis for information in probable cause affidavit, not for showing truth of fellow officer's statements).

Lindsey v. State, 485 N.E.2d 102 (Ind. 1985) (pre-evidence rules, court held that "rules regarding cross-examination of witnesses are more relaxed at suppression hearing because there is no jury present which could be influenced by improper questioning or responses").

c. Juvenile hearings

(1) Fact finding hearing

Although the rules of evidence are not applicable to preliminary juvenile hearings, they are generally applicable to fact-finding hearings. Miller, 12 *Indiana Practice* 17, § 101.407 (4th ed. 2016); Moore v. State, 723 N.E.2d 442 (Ind. Ct. App. 2000). See Ind. Code § 31-32-1-1 (in delinquency proceedings, procedures governing criminal trials apply in all matters unless exempted by juvenile law).

J.R.T. v. State, 783 N.E.2d 300 (Ind. Ct. App. 2003) (the evidentiary prerequisites, including stipulation of both parties, for admission of polygraph results in criminal cases, rather than the lesser prerequisites required in civil cases, applies to a juvenile fact-finding hearing).

(2) Waiver Hearing

Moore v. State, 723 N.E.2d 442, 448 (Ind. Ct. App. 2000) ("[t]he juvenile waiver hearing is dispositional in nature and the hearsay rules do not apply since the

evidence in the waiver hearing is not offered to prove the juvenile guilty of alleged crime beyond a reasonable doubt. . . A waiver hearing is more akin to a probable cause hearing than an actual trial . . .").

(3) Disposition Hearing

Although a disposition hearing is not a "preliminary hearing," the rules of evidence may be inapplicable being that the disposition hearing is the equivalent to an adult sentencing hearing. Miller, 12 *Indiana Practice* 18, § 101.407 (4th ed. 2016).

C.C. v. State, 826 N.E.2d 106 (Ind. Ct. App. 2005) (while hearsay rules apply in juvenile proceedings to determine a child delinquent, excluding hearsay evidence in disposition hearings would in many cases disserve the child by excluding relevant information that might support a less restrictive disposition).

(4) Hearing to determine placement on sex offender registry

Because a hearing to determine whether a juvenile should be placed on a sex offender registry is not a preliminary matter and statutorily requires a "full evidentiary hearing," the evidence rules apply. Z.H. v. State, 850 N.E.2d 933, 941 n.2 (Ind. Ct. App. 2006) (*citing* B.J.B. v. State, 805 N.E.2d 870 (Ind. Ct. App. 2004) and Ind. Evid. Rule 101(d)(2)).

d. Probation revocation, community corrections revocation, deferred sentence revocation or withheld judgment revocation proceedings

Probation and community corrections revocation proceedings are flexible and strict rules of evidence do not apply. Cox v. State, 706 N.E.2d 547, 550-51 (Ind. 1999). In probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability, including hearsay, expert testimony, and scientific evidence. Carter v. State, 706 N.E.2d 552 (Ind. 1999); Cox v. State, 706 N.E.2d 547 (Ind. 1999).

However, judges are not bound to admit all evidence presented to the court. Carter v. State, 706 N.E.2d 552 (Ind. 1999); Cox v. State, 706 N.E.2d 547 (Ind. 1999).

(1) Evidence must bear some substantial indicia of reliability

(a) Hearsay

There are certain due process rights that inure to a probationer at a revocation hearing, which include "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Morrissey v. Brewer, 408 U.S. 471, 489 (1972). When determining whether to admit hearsay into a probation revocation hearing, the trial court must weigh the confrontation interest of a parolee/probationer against the interests of the government.

Rather than require that a trial court to make an explicit finding of good cause every time hearsay evidence is admitted during a probation revocation hearing, the trial court may instead evaluate the hearsay's "substantial trustworthiness."

Ideally, the trial court should explain on record why the hearsay is reliable and why that reliability is substantial enough to supply good cause for not producing live witnesses. Reyes v. State, 868 N.E.2d 438 (Ind. 2007).

Mateyko v. State, 901 N.E.2d 554 (Ind. Ct. App. 2009) (trial court did not explain why triple hearsay was reliable or why any reliability was substantial enough to support good cause for not producing a live witness; instead, State relied solely upon testimony of a witness who had no direct involvement with defendant or the events which State alleged constituted a violation of terms of probation).

Carden v. State, 873 N.E.2d 160 (Ind. Ct. App. 2007) (introduction of mapping system without any evidence of name of manufacturer of system, how it works and whether it has been updated, was fundamental error in proving defendant was two blocks of daycare center).

C.S. v. State, 817 N.E.2d 1279 (Ind. Ct. App. 2004) (no violation of juvenile's confrontation rights to cross-examine his accuser where testing results were presented by a probation officer without knowledge of the testing procedures employed). See also Black v. State, 794 N.E.2d 561 (Ind. Ct. App. 2003).

Baxter v. State, 774 N.E.2d 1037 (Ind. Ct. App. 2004) (so-called probable cause affidavit, actually entitled "Law Enforcement Incident Report", did not have a substantial indicia of reliability to be admissible in probation revocation hearing; the report was uncertified, unverified, and, contrary to State's representation at revocation hearing – unsigned by either arresting officer or author of report; further, document was admitted with neither of those individuals present at trial or available for cross examination).

Watters v. State, 22 N.E.3d 617 (Ind. Ct. App. 2014) (due process violation where documents purporting to show new conviction were not reliable, as they were not certified or supported by affidavit or live testimony).

Whatley v. State, 847 N.E.2d 1007 (Ind. Ct. App. 2006) (where probable cause affidavit from another case was prepared and signed under oath by the same officer who was listed as the affiant, the affidavit was admissible in probation revocation although officer did not testify). See also Pitman v. State, 749 N.E.2d 557 (Ind. Ct. App. 2001).

But see:

Robinson v. State, 955 N.E.2d 228 (Ind. Ct. App. 2011) (in probation revocation hearing, trial court abused its discretion in admitting unreliable probable cause affidavit that contained multiple levels of hearsay).

Figures v. State, 920 N.E.2d 267 (Ind. Ct. App. 2010) (court declined to extend Whatley to case where probable cause affidavit was from a dismissed case; moreover, State presented no evidence at revocation hearing to corroborate allegations in affidavit).

(b) Expert and scientific testimony

In probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability, including expert testimony and scientific evidence. Carter v. State, 706 N.E.2d 552 (Ind. 1999).

Black v. State, 794 N.E.2d 561 (Ind. Ct. App. 2003) (trial court erroneously excluded independent urinalysis from evidence in probation revocation hearing; under relaxed procedures of Ind. Evidence Rule 101(d)(2) at probation revocation hearing, State toxicology technician's testimony was a sufficient foundation for admission of independent test results).

J.J.C. v. State, 792 N.E.2d 85 (Ind. Ct. App. 2003) (evidence was insufficient to support probation revocation where State did not adequately establish reliability of home detention monitoring system).

Carter v. State, 706 N.E.2d 552 (Ind. 1999) (although lab technician's testimony that he had been operator of urinalysis equipment for five years, had tested more than ten thousand samples, received all of training necessary to become operator and knew how equipment worked may not have been sufficient to qualify him as expert under *Frye* or Rules of Evidence, it was adequate to find testimony reliable).

Smith v. State, 971 N.E.2d 86 (Ind. 2012) (record supported trial court's finding that lab results are substantially trustworthy).

Mogg v. State, 918 N.E.2d 750 (Ind. Ct. App. 2009) (even assuming Secure Continuous Remote Alcohol Monitor (SCRAM) data has not gained general acceptance in the community, facts supported trial court's finding that the SCRAM data was reliable and sufficient to support the revocation).

Peterson v. State, 909 N.E.2d 494 (Ind. Ct. App. 2009) (witness's comparison of transcript of questions and answers prepared by polygraph examiner to the video of the examination was sufficient to establish the reliability of the transcript for purposes of revocation hearing).

(c) Judicial notice of filings in other cases

Even in a proceeding governed by the Evidence Rules, a trial court 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).

Christie v. State, 939 N.E.2d 691 (Ind. Ct. App. 2011) (in probation hearing, trial court properly took judicial notice of a new conviction entered in a different Indiana court).

Horton v. State, 51 N.E.3d 1154 (Ind. 2016) (trial court, and even the appellate court, by request or *sua sponte*, can take judicial notice of the case files not entered into the record).

Knecht v. State, 85 N.E.3d 829 (Ind. Ct. App. 2017) (a court may use a trial transcript as substantive evidence of a probation violation, assuming the defendant had the opportunity to cross examine any witnesses at the prior trial).

PRACTICE POINTER: Probable cause affidavits, and other documents filed in a case, may be hearsay. Thus, these documents must have substantial indicia of reliability for the court to take judicial notice of them. Baxter v. State, 774 N.E.2d 1037 (Ind. Ct. App. 2004) (so-called probable cause affidavit, actually entitled "Law Enforcement Incident Report," did not have a substantial indicia of reliability to be admissible in probation revocation hearing; the report was uncertified, unverified, and, contrary to State's representation at revocation hearing – unsigned by either arresting officer or author of report; further, document was admitted with neither of those individuals present at trial or available for cross examination).

(2) Evidence cannot violate rule of substantive law

Hensley v. State, 573 N.E.2d 913 (Ind. Ct. App. 1991) (the rule prohibiting evidence of a plea bargaining or statements made during plea bargaining is not just a rule of evidence, but also a rule of substantive law, and thus, applies in sentencing proceedings).

(3) Evidence must afford constitutional protections

Probationers have the right to confront and cross-examine witnesses, an opportunity to be heard in person, and to present witnesses and documentary evidence in a revocation hearing under both the Federal Constitution, Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973), and Indiana statutory law, Ind. Code 35-38-2-3(e). See also Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593 (1972) (establishing minimum due process requirements for parole revocation hearings); Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992); Fields v. State, 676 N.E.2d 27, 31 (Ind. Ct. App. 1997); Dalton v. State, 560 N.E.2d 558, 560 (Ind. Ct. App. 1990). In order for the introduction of hearsay to be constitutional, the trial court must determine that the hearsay is substantially trustworthy. Ideally, the trial court should explain on record why the hearsay is reliable and why that reliability is substantial enough to supply good cause for not producing live witnesses. Reyes v. State, 868 N.E.2d 438 (Ind. 2007).

Marsh v. State, 818 N.E.2d 143 (Ind. Ct. App. 2004) (the Supreme Court's decision in Crawford v. Washington, 124 S. Ct. 1354 (2004), interpreting the Confrontation Clause to require prior opportunity of cross examination before testimonial hearsay statement of unavailable witness can be introduced, does not apply to probation revocation proceedings); see also Monroe v. State, 899 N.E.2d 688 (Ind. Ct. App. 2009) (revocation of community corrections placement hearing).

C.S. v. State, 817 N.E.2d 1279 (Ind. Ct. App. 2004) (rejecting defendant'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 testing procedures employed).

Isaac v. State, 605 N.E.2d 144 (Ind. 1992), *cert. denied,* 508 U.S. 922 (1993) (although prosecutor declined to present evidence and court called and questioned probation officer, due process and statutory requirements were satisfied where probation officer was under oath subject to cross-examination and defendant was given an opportunity to present evidence in his own defense).

Strowmatt v. State, 686 N.E.2d 154 (Ind. Ct. App. 1997) (defendant was not denied procedural rights and prejudiced where court, as matter of judicial economy, heard evidence at trial in child molestation prosecution as evidence in probation revocation and then determined whether defendant violated terms of probation by molesting child; jury was not informed of probation proceedings, and defendant had opportunity to confront and cross-examine witnesses, as well as representation of counsel). See also Fields v. State, 676 N.E.2d 27 (Ind. Ct. App. 1997).

Brewer v. State, 816 N.E.2d 514 (Ind. Ct. App. 2004) (trial court abused its discretion in probation revocation hearing when it denied defendant's due process right to present witnesses).

The same constitutional protections provided to probationers are also provided to defendants in a proceeding to enforce a deferred sentence or withheld judgment. Debro v. State, 821 N.E.2d 367 (Ind. 2005).

C. APPLICATION OF EVIDENTIARY RULES WITH STATUTES OR COMMON LAW-RULE 101(b).

If the evidence rules cover an area, common law rules and statutes are preempted and must be disregarded. Harrison v. State, 644 N.E.2d 1243 n.14 (Ind. 1995).

Harrison v. State, 644 N.E.2d 1243, n.14 (Ind. 1995) (rules of evidence prevail over Ind. Code 35-37-4-13 allowing admission of DNA results without antecedent expert testimony concerning trustworthy and reliable method).

Church v. State, 173 N.E.3d 302 (Ind. Ct. App. 2021) (statute restricting defendants' ability to take child depositions in sex cases conflicts with Indiana Trial Rules and is invalid).

1. Application with statutes

Rule 101(b) provides that statutory law applies if rules of evidence do not cover a specific evidence issue. If a statute's substantive requirements for admissibility conflict with the Indiana Rules of Evidence, the statute is a nullity on that point, because the statute and the rule would both address the admissibility of evidence, thereby creating two different standards. McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998) (*citing* Humbert v. Smith, 664 N.E.2d 356, 357 (Ind. 1996)).

State v. Wilson, 836 N.E.2d 407 (Ind. 2005) (holding IC 34-46-3-2, which declared spouse of accused incompetent, nullity because it conflicts with Evidence Rules).

But see Wray v. State, 751 N.E.2d 679 (Ind. Ct. App. 2001) (without addressing any conflict between rule of evidence 803(8) and Ind. Code 9-30-6-5, court upheld admission of certified copies of certificates of training, even though there was no determination

under Evid. R. 803(8) whether the breath test operator's certificate was trustworthy, but rather the appellate court deferred to administrative rules requiring training in five specified areas in order for breath test operator to reliably administer a test; in effect, administrative rules trumped Rules of Evidence).

a. Is there a conflict?

"To be in conflict, it is not necessary that the rule and the statute be in direct opposition. Rather, the rule and the statute need only be incompatible to the extent that both could not apply in a given situation." In re J.L.V., 667 N.E.2d 186, 189 (Ind. Ct. App. 1996).

McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998) (no conflict between Ind. Code 35-37-4-14, requiring notice of intent to admit previous battery, and rule 404(b) only requiring notice upon defendant's request for notice; 404(b) does not foreclose a statutory requirement of notice to defendant irrespective of any request for notice; but provision of Ind. Code 35-37-4-14, allowing admission of previous battery if being admitted to show motive, intent, identity or common scheme and design conflicts with rule 403 prohibiting previous batteries if their probative value is substantially outweighed by their prejudice; thus, Ind. Code 35-37-4-14 would admit evidence not necessarily admissible under Ind. Rules of Evidence).

b. Can conflicting portion of statute be severed from rest of statute?

When an Evidence Rule and a statute address the same subject matter, the Rule controls to the extent there are any differences. McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998) (*citing* Williams v. State, 681 N.E.2d 195, 200, n.6 (Ind. 1997)). But if the statutory provision conflicting with rule of evidence cannot be severed from the rest of the statute, the whole statute is nullified. McEwen, 695 N.E.2d at 89.

"'Every part and application of every statute is severable' unless 'the remainder [of the statute] is so essentially and inseparably connected with, and so dependent upon, the invalid provision or application that it cannot be presumed that the remainder would have been enacted without the invalid provision or application.'" Id. at 89 (quoting Ind. Code 1-1-1-8(b)).

McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998) (the notice provision of Ind. Code 35-37-4-14 cannot be severed from the rest of the statute that conflicts with the rules of evidence; thus, the whole statute is nullified).

2. Application with common law

Where the rules do not address a particular issue, courts will "look to pre-rule cases for the relevant common law..." Moreland v. State, 701 N.E.2d 288, 292 (Ind. Ct. App. 1998).

Moreland v. State, 701 N.E.2d 288 (Ind. Ct. App. 1998) (use of prior consistent statements to rehabilitate witness held permissible after witness had been impeached with prior inconsistent statements, regardless of whether the consistent statements were made after the motive for fabrication arose; court relied on pre-Rules and Federal cases because Indiana Rule 801(d) addresses admission of prior consistent statements as substantive evidence and not impeachment or rehabilitation evidence).

State v. Walton, 715 N.E.2d 824 (Ind. 1999) (common law exception to Rape Shield Rule permitting introduction of evidence of prior false accusations of rape survived adoption of Ind. Rules of Evidence; Ind. Evid. Rule 412 does not address prior accusations of sexual misconduct, but only prior sexual misconduct).

Gilliam v. State, 650 N.E.2d 45 (Ind. Ct. App. 1995) (in interpreting Indiana Rule of Evidence 410, the court followed common law rule that allows admission of statements made to police officer who had no authority to enter into binding plea agreement).

Swanson v. State, 666 N.E.2d 397 (Ind. 1996) (res gestae exception to prior bad act evidence did not survive adoption of Rules of Evidence but was subsumed by Indiana Rule of Evidence 401).

3. Application with Indiana and U.S. Constitutions

State evidentiary rules are subject to Federal and State constitutional limitations. Dumas v. State, 803 N.E.2d 1113, 1121 (2004); Green v. Georgia, 442 U.S. 95, 97, 99 S. Ct. 2150 (1979).

a. Defendant's right to present a defense

A defendant's right to a meaningful opportunity to present a complete defense is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. Holmes v. South Carolina, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006) (*citing* Washington v. Texas, 388 U.S. 14 (1967), Chambers v. Mississippi, 410 U.S. 284 (1973), Crane v. Kentucky, 476 U.S. 683 (1986), and Rock v. Arkansas, 483 U.S. 44 (1987), as examples of arbitrary rules, i.e., rules that excluded important defense evidence but that did not serve any legitimate interests).

Green v. Georgia, 442 U.S. 95, 97, 99 S. Ct. 2150 (1979) (exclusion of defendant's evidence under state hearsay rules in capital penalty phase violated 14th Amendment).

Joyner v. State, 678 N.E.2d 386 (Ind. 1997) (without considering implication of Rule of Evidence 404(B) or 403, court held that evidence that someone else committed crime is admissible if relevant under Rule of Evidence 401). See also Allen v. State, 813 N.E.2d 349 (Ind. Ct. App. 2004).

b. Defendant's right to cross-examination and confrontation

"[E]videntary constraints must sometimes yield to a defendant's right of cross-examination." State v. Walton, 715 N.E.2d 824, 827 (*quoting* Clinebell v. Commonwealth, 368 S.E.2d 263, 266 (1998)).

State v. Walton, 715 N.E.2d 824 (Ind. 1999) (Evidence Rule 608(b), which would otherwise prohibit evidence of specific acts of untruthfulness to impeach accusing witness's credibility, yields to the defendant's Sixth Amendment right of confrontation and right to present a full defense).

Turney v. State, 759 N.E.2d 671 (Ind. Ct. App. 2001) (Rape Shield Statute concerns must yield to Sixth Amendment right to cross-examination where it is posited that the

Defendant was the perpetrator and where it is apparent there could have been another possible source for acts of molestation). See also Steward v. State, 652 N.E.2d 490 (Ind. Ct. App. 1994), *trans. granted and summarily aff'd*, 652 N.E.2d 490; Davis v. State, 749 N.E.2d 552 (Ind. Ct. App. 2001).

Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006) (Excited utterance exception must yield to the right to confrontation; hearsay is inadmissible if it is testimonial, the declarant is unavailable and the defendant did not have a prior opportunity to cross-examine; testimonial hearsay are statements, such as those made by the witness in Hammon, to police officers after the emergency has dissipate).

Hemphill v. New York, 142 S. Ct. 681 (2022) ("Opening the door" is not an exception to the Confrontation Clause; here, trial court erred in allowing the State to introduce parts of the transcript of a co-defendant's plea allocution as evidence to rebut Defendant's theory that the co-defendant committed the murder (the co-defendant was out of the country and not available to testify); the Court left for another day to decide the validity of the common-law rule of completeness as applied to testimonial hearsay).

II. PURPOSE - RULE 102

A. OFFICIAL TEXT:

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

B. PURPOSE OF EVIDENCE RULES

The purpose of the Rules is to identify the forms of proof that will secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the end that the truth may be ascertained, and proceedings justly determined. UNR Industries, Inc. et al. v. Continental Casualty Co. et al., 942 F.2d 1101, 1107 (7th Cir. 1991), *reh'g en banc den.* (1991) (interpreting Federal Rule 102).

The fundamental basis upon which all rules of evidence must rest - if they are to rest upon reason - is their adaptation to the successful development of the truth. Funk v. United States, 290 U.S. 371, 381, 54 S. Ct. 212 (1933).

C. CONSTRUCTION

1. Court's discretion in admitting or excluding evidence

Admissibility of evidence generally rests within court's discretion. A trial court abuses that discretion when its evidentiary ruling is clearly against the logic, facts and circumstances presented. Hardiman v. State, 726 N.E.2d 1201, 1203 (Ind. 2000); Newman v. State, 751 N.E.2d 265, 170 (Ind. Ct. App. 2001). A reviewing court will only disturb a trial court's ruling upon a showing of abuse of discretion. Ealy v. State, 685 N.E.2d 1047, 1050 (Ind. 1997); Averhart v. State, 470 N.E.2d 666, 686 (Ind. 1984).

However, stricter standards of review may apply.

a. Question of Law - de novo review

Recognizing that the same deference should be given to factual findings necessary to determine admissibility of evidence as given to other factual findings, the Court held that interpretation of the language of the Rules of Evidence is a question of law. Stahl v. State, 686 N.E.2d 89 (Ind. 1997).

Southtown Pros. v. City of Ft. Wayne, 848 N.E.2d 393, 401 n. 9 (Ind. Ct. App 2006) (relying on statement in Stahl, *supra*, that an interpretation of an evidence rule is a question of law, court held a de novo standard should apply on appeal).

But see Saunders v. State, 848 N.E.2d 117 (Ind. Ct. App. 2006) (although recognizing the statement in Stahl, *supra,* and the fact that de novo standard should apply to all questions of law, court refused to apply de novo standard to interpretation of Rules of Evidence). See also Smith v. State, 839 N.E.2d 780, n. 5 (Ind. Ct. App. 2005); and Chandler v. State, 837 N.E.2d 1100 (Ind. Ct. App. 2005).

b. Federal constitutional issues- de novo

Finney v. State, 786 N.E.2d 764 (Ind. Ct. App. 2003) (federal constitutional error is reviewed de novo and must be harmless beyond a reasonable doubt).

c. Special responsibility of trial court

(1) Rule or statute impinges upon ordinary evidentiary regime

Carpenter v. State, 786 N.E.2d 696, 703 (Ind. 2003) (where a rule or statute, such as the protected person statute, impinges upon the ordinary evidentiary regime, a trial court's responsibilities thereunder carry with them "a special level of judicial responsibility").

(2) Rules of Evidence do not apply

Carter v. State, 706 N.E.2d 552, 554 (Ind. 1999) (in the absence of strict evidentiary rules, judges carry a special responsibility in assessing the weight, sufficiency, and reliability of proffered evidence). See also Cox v. State, 706 N.E.2d 547 (Ind. 1999).

2. Rule interpretations in conformance with other jurisdictions favored

In the absence of unique Indiana policy, constitutional or statutory consideration, courts in this state should normally construe Indiana evidence rules consistently with the prevailing body of decisions from other jurisdictions interpreting the same rule. Yamobi v. State, 672 N.E.2d 1344, 1347, n.4 (Ind. 1996); Sams v. State, 688 N.E.2d 1323, 1325 (Ind. Ct. App. 1997); Truax v. State, 856 N.E.2d 116, 125 (Ind. Ct. App. 2006).

Gibson v. State, 709 N.E.2d 11, 15 (Ind. Ct. App. 1999) ("[i]n other cases we have looked to the Seventh Circuit for guidance when the text of the state rule of evidence is identical to its federal counterpart").

III. RULINGS ON EVIDENCE - RULE 103

A. OFFICIAL TEXT:

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground unless it was apparent from the context.

(2) If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record at trial a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Fundamental Error. A court may take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved.

(f) Preponderance of Evidence. When deciding whether to admit evidence, the court must decide any question of fact by a preponderance of the evidence.

B. REQUIREMENTS FOR REVERSIBLE ERROR

1. Must show a substantial right was affected

Indiana Rule of Evidence 103(a) sets forth the "harmless error" doctrine by requiring an evidentiary error to affect a substantial right of a party. Miller, 12 *Indiana Practice* 27, § 103.103 (4th ed. 2016). In other words, in order to constitute reversible error, defendant must show that his substantial rights were affected by the error. Rondon v. State, 711 N.E.2d 506, 517 (Ind. 1999) (*citing* Rule 103(a)(2) and Ogle v. State, 698 N.E.2d 1146, 1151 (Ind. 1998)).

> Bowman v. State, 577 N.E.2d 569 (Ind. 1991) (to find an error in the admission of evidence harmless, there must be "no substantial likelihood that the evidence contributed to the verdict").
>
> Ogle v. State, 698 N.E.2d 1146, 1151 (Ind. 1998) (*citing* Rule 103(a), court held that the defendant did not show how he was harmed by the redaction of the sentencing and commitment order from the record of a witness's previous conviction, and thus, defendant's substantial rights were not adversely affected).

Indiana Trial Rule 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

a. Bench trial – "judicial-temperance presumption"

"Where evidence is inadmissible simply because it will inflame the prejudices of the jury, it is appropriate to presume the judge will not likewise be affected. However, where evidence is admitted expressly for a prohibited purpose, we cannot presume the judge did not consider it for the impermissible purpose." Shanks v. State, 640 N.E.2d 734, 736-37 (Ind. Ct. App. 1994).

Shanks v. State, 640 N.E.2d 734 (Ind. Ct. App. 1994) (where evidence was introduced into bench trial to prove action in conformity therewith pursuant to the depraved sexual instinct exception, there was reversible error).

Konopasek v. State, 946 N.E.2d 23 (Ind. 2011) (long-standing "judicial-temperance presumption" generally presumes that in a proceeding tried to the bench, a court renders its decisions solely on the basis of relevant and probative evidence; one way a defendant can overcome the presumption is by showing the trial court admitted the evidence over a specific objection, thereby triggering a full harmless error analysis); see also Hinesley v. State, 999 N.E.2d 975 (Ind. Ct. App. 2013) (applying judicial-temperance presumption in affirming denial of PCR).

Moran v. State, 604 N.E.2d 1258, 1263 (Ind. Ct. App. 1992) (where judge stated that he relied on testimony of complaining witness "along with the other evidence in this cause" in order to support finding of guilt, fact that much of the other evidence was inadmissible hearsay and irrelevant requires reversal).

Marchal v. Craig, 681 N.E.2d 1160,1163 (Ind. Ct. App. 1997) (where trial court issued findings illustrating that court relied on evidence other than inadmissible evidence, error was harmless; appeals court will reverse only when the court's judgment has apparently or obviously been infected by erroneously admitted evidence).

b. Creating harmless error by challenging inadmissible evidence

As long as a party does not exceed the scope of the improperly admitted evidence, "a party does not 'waive' his earlier proper objection to his opponent's evidence by responding to it with rebuttal evidence." Miller, 12 *Indiana Practice* 39-40 § 103.104 (4th ed. 2016).

Camm v. State, 908 N.E.2d 215, 223 (Ind. 2009) ("If anything, the defendant's trial tactics were merely an attempt to defend himself against this allegation, and 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 defendant.'…If this rule is to have any force, a defendant must be able vigorously to challenge erroneously admitted evidence without conceding the issue on appeal.").

Thomas v. Thomas, 577 N.E.2d 216, 219 (Ind. 1991) ("We believe that it is more reasonable to allow a party aggrieved by the erroneous admission of evidence, whose timely and proper objection has been *overruled*, to respond to such improper evidence without sacrificing the right to appellate recourse. . . On the other hand, if the objecting party offers evidence on the same subject matter which goes beyond merely meeting and responding to evidence that was admitted over his proper objection, such action may render harmless the trial court's error in overruling the earlier objection.").

Santonelli v. State, 743 N.E.2d 1281 (Ind. Ct. App. 2001) (defense counsel went beyond merely meeting and responding to erroneously admitted fact that defendant had prior conviction, thus any error arising from admission of prior conviction was harmless).

2. Must either object or make an offer of proof

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. Trial Rule 46.

Campbell v. State, 622 N.E.2d 495, 498 (Ind. 1993) (discussing prior law, and noting that defendant's insistence that trial court admit alibi testimony, coupled with offer to prove, were sufficient to preserve issue for appeal in light of Ind. Trial Rule 46), *overruled on other grounds,* Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

a. Objection

Objection must: (1) be timely made; and (2) state accurately and specifically the basis for claimed inadmissibility. Nasser v. State, 646 N.E.2d 673, n.4 (Ind. Ct. App. 1995). An objection must be sufficiently specific to alert the trial judge fully of the legal issue. Moore v. State, 669 N.E.2d 733, 742 (Ind. 1996). The overriding purpose of the requirement for a specific and timely objection is to alert trial court 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 time and resources.

Camm v. State, 908 N.E.2d 215 (Ind. 2009) (although not a clear case of preservation, defendant preserved issue of inadmissible motive evidence for appeal).

U.S. v. Garcia, 291 F.3d 127, 140 (2d Cir. 2002) (an objection of a co-defendant is presumed to be an objection for all defendants).

Sullivan v. State, 748 N.E.2d 861, 864-65 (Ind. Ct. App. 2001) (holding defendant preserved claim of error by objecting via a motion to suppress, incorporating his objections raised in the motion to suppress during trial, and entering a continuing objection at trial).

(1) Objection must be specific, full, and comprehensive

Objection to evidence must state the specific grounds for the exclusion of evidence. Coates v. State, 650 N.E.2d 58, 61 (Ind. Ct. App. 1995). The objection must be full and comprehensive in pointing out the particular reason for the objection. Id. (*citing* Rule 103(a)(2)). The contemporaneous objection need not be a detailed doctrinal argument and will be sufficient if it allows the trial judge to make an informed decision and prevents the party from switching theories on appeal. Ward v. State, 50 N.E.3d 752 (Ind. 2016).

(a) Examples of inadequate objections

"Immaterial": Objection fails to preserve error for appeal. Lucas v. State, 274 Ind. 635, 413 N.E.2d 578, 583 (1980).

"Lack of relevancy" or "relevancy": Objection too general to present any question for appellate review. Foster v. State, 484 N.E.2d 965 (Ind. 1985); Gambill v. State, 479 N.E.2d 523 (Ind. 1985).

"Incompetent, immaterial, and irrelevant": Disfavored catchwords, without more, they preserve nothing for appeal. Nasser v. State, 646 N.E.2d 673, 676, n.4 (Ind. Ct. App. 1995).

"I do not believe an adequate foundation has been laid." The objecting party needs to state why the foundation was inadequate. Nasser v. State, 646 N.E.2d 673 (Ind. Ct. App. 1995).

"Repetitive" or "prejudicial": Objection fails to preserve error. Hyde v. State, 451 N.E.2d 648, 649 (Ind. 1983).

PRACTICE POINTER: An objection should include citation to the implicated evidence rule followed by an explanation of why the evidence is inadmissible referencing the individual facts of the case.

(b) Specific grounds apparent from record

An appellate court may consider an issue if the grounds for objection are apparent from the context. Willsey v. State, 698 N.E.2d 784, 789 (Ind. 1998).

> Perry v. State, 638 N.E.2d 1236, 1240 (Ind. 1994) (referring to pretrial motion is sufficiently specific to preserve grounds of objection; "counsel should not be faulted for failing to elaborate further on issues that were substantially argued during a [pretrial motion]").
>
> Willsey v. State, 698 N.E.2d 784, 789 (Ind. 1998) (seeking to suppress statement, defendant testified that she had asserted her right to counsel and that the police had ignored her requests before the statement was given; although defendant did not frame the objection in terms of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981) (defendant's testimony at the hearing clearly presented a claim under Edwards and reviewing court could consider the issue).

Camm v. State, 908 N.E.2d 215 (Ind. 2009) (defendant did not object to medical examiner's testimony regarding daughter's injuries and her opinion that injuries could be caused by molestation or straddle fall; however, defendant did object to pediatricians' speculative opinions that injuries were most likely due to molest and State's closing argument that molest was the motive for murder; trial court was well aware of issues and defendant adequately preserved objections for appeal).

Farris v. State, 818 N.E.2d 63 (Ind. Ct. App. 2004) (where defendant approached bench prior to State presenting evidence challenged in pretrial hearing, fact that conference and objection were inaudible did not waive issue for appeal).

Johnson v. State, 829 N.E.2d 44 (Ind. Ct. App. 2005) (although defendant did not specifically raise waiver of rights in motion, fact he testified at hearing that first time he had seen waiver form was when the police began taping him was sufficient to preserve issue).

But see Gayden v. State, 863 N.E.2d 1193 (Ind. Ct. App. 2007) (where portions of 911 call were admissible but other portions inadmissible, objection to the whole tape being introduced into evidence did not preserve the Sixth Amendment objection for only a portion of the tape).

(c) Different grounds on appeal and trial

A defendant is limited to the grounds advanced at trial and may not raise a new ground for an objection for the first time on appeal. King v. State, 799 N.E.2d 42 (Ind. Ct. App. 2003); Meriwether v. State, 984 N.E.2d 1259 (Ind. Ct. App. 2013). Arguments on appeal against the admission of evidence on different grounds than those stated at trial are waived. Harrison v. State, 699 N.E.2d 645, 649 (Ind. 1998) (*citing* Rule 103); Gill v. State, 730 N.E.2d 709 (Ind. 2000).

King v. State, 799 N.E.2d 42 (Ind. Ct. App. 2003) (an objection on relevance and prejudice does not preserve a 404(b) issue for appeal). See also Lashbrook v. State, 762 N.E.2d 756 (Ind. 2002).

Griffin v. State, 16 N.E.3d 997 (Ind. Ct. App. 2014) (though defendant objected to autopsy photos at trial under same Indiana Evidence Rule that he raised on appeal, he waived issue because appellate argument was substantially different than the one, he presented to trial court).

However, if the trial court bases its challenged evidentiary ruling on a wrong reason, the ruling will be upheld as long as any reason exists to justify the ruling. Feliciano v. State, 477 N.E.2d 86 (Ind. 1985); Moritz v. State, 465 N.E.2d 748, 755 (Ind. Ct. App. 1984).

PRACTICE POINTER: Because an objection on one ground does not preserve the issue on another ground, constitutionalize, under both constitutions, your objections, when possible, in order to preserve the constitutional issues.

(2) Objection must be timely

Failure to make a contemporaneous objection as to provide the trial court an opportunity to make a final ruling in the context in which the evidence is introduced results in waiver of the error on appeal. Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). Where a question asked of witness fully discloses character of evidence expected to be given in the answer, objection should be made before answer is given. Gambill v. State, 479 N.E.2d 523 (Ind. 1985); Coates v. State, 650 N.E.2d 58, 61 (Ind. Ct. App. 1995) (*citing* Rule 103).

Fleener v. State, 656 N.E.2d 1140 (Ind. 1995) (where an objection is made after only a small portion of a witness' long narrative answer, the objection is timely).

K.G. v. State, 81 N.E.3d 1078, 1080 (Ind. Ct. App. 2017) (noting that defendant preserved his claim of evidentiary error by renewing his pre-trial objection at the time the evidence was admitted, giving the trial court the opportunity to definitively rule on the record per Evidence Rule 103(b)).

Dilts v. State, 49 N.E.3d 617 (Ind. Ct. App. 2015) (Court *sua sponte* found waiver because defendant failed to object when evidence was offered, even though parties had extensively addressed admissibility of the evidence before the sponsoring witnesses were called).

Bullock v. State, 903 N.E.2d 156 (Ind. Ct. App. 2009) (instantaneous reaction is not necessarily required; counsel only need by nimble to the extent that his objection be in time to allow the alleged error to be corrected).

Hutcherson v. State, 966 N.E.2d 766 (Ind. Ct. App. 2012) (defendant's single objection during State's questioning of witness did not preserve error for appeal).

Evans v. State, 30 N.E.3d 769 (Ind. Ct. App. 2015) (defendant waived issue of admission of cash beyond buy money found on him at his arrest; he 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 v. State, 983 N.E.2d 226 (Ind. Ct. App. 2013) (even though counsel initially told court he did not object to admission of defendant's statement, he did not waive argument that statement should have been suppressed, because moments later, defendant did object and stated grounds for objection).

A pre-trial motion, without a contemporaneous objection at trial, will not preserve the issue for appeal. Culver v. State, 727 N.E.2d 1062 (Ind. 2000); Pinkston v. State, 821 N.E.2d 830, 839 (Ind. Ct. App. 2004); McCarthy v. State, 749 N.E.2d 528, 537 (Ind. 2001); and Moore v. State, 669 N.E.2d 733, 741 (Ind. 1996).

Hopkins v. State, 668 N.E.2d 686 (Ind. Ct. App. 1996) (the fact that the court granted defendant's motion *in limine* and then admitted evidence contrary to the motion *in limine* does not, by itself, constitute reversible error).

PRACTICE POINTER: If an argument on motion was on the record: (1) object at trial when the evidence is offered; and (2) incorporate the grounds for objection asserted in the specific pretrial motion. Martin v. State, 622 N.E.2d 185, 187 (Ind. 1993).

(a) Court's discretion

Trial court has discretion to eliminate the requirement of contemporaneous objection.

Vehorn v. State, 717 N.E.2d 869 (Ind. 1999) (where the trial court, in its pretrial ruling, states that a contemporaneous objection at trial is not necessary to preserve the issue for appeal, the pretrial ruling is sufficient). See also Swanson v. State, 730 N.E.2d 205 (Ind. Ct. App. 2000).

Wilkes v. State, 917 N.E.2d 675 (Ind. 2009) (no objection is required if the evidence is presented immediately after a mid-trial hearing in which the motion *in limine* was heard and decided).

Neeley v. State, 70 N.E.3d 886 (Ind. Ct. App. 2017) (defendant did not waive objection by failing to make contemporaneous objections to police officers' testimony, because he had requested a continuing objection, which trial court granted, and specifically told defense attorney not to jump up and down making objections to the officers' testimony).

(b) Foundational evidence

A defendant properly preserves an issue for appeal by objecting at the time the contested evidence is admitted as long as the testimony preceding the admission of the evidence is foundational. Segar v. State, 937 N.E.2d 917 (Ind. Ct. App. 2010).

Segar v. State, 937 N.E.2d 917 (Ind. Ct. App. 2010) (objection based on the Fourth Amendment at the time the illegally seized marijuana was introduced preserved the issue for appeal, although the defendant did not object to the police officer's earlier testimony regarding how he discovered the "alleged marijuana" and the green, leafy substance); Cf. Evans v. State, 30 N.E.3d 769 (Ind. Ct. App. 2015).

Lundquist v. State, 834 N.E.2d 1061 (Ind. Ct. App. 2005) (defendant's objection at the time drugs were introduced into evidence was untimely where chemist had already testified that the substance found on the defendant was drugs).

(c) No longer any need to renew objection or request to show a continuing objection

Once specific objection is made, argued, and *overruled*, it need not be repeated to evidence of similar type. Fleener v. State, 656 N.E.2d 1140 (Ind. 1995). Effective January 1, 2014, "[o]nce the court rules definitely on the record at trial,

a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Ind. Evid. R. 103(b).

Once counsel lodges a sufficiently specific objection to a particular class of evidence and the trial court sustains the objection, the proper procedure is to remain silent during the subsequent admission of the class of evidence. Despite the request for a continuing objection, a defendant waives an appellate challenge to the admission of evidence by his or her subsequent affirmative statements that they had no objection to the evidence. Hostetler v. State, 184 N.E.3d 1240 (Ind. Ct. App. 2022).

Hayworth v. State, 904 N.E.2d 684 (Ind. Ct. App. 2009) (defendant waived her objection to evidence seized during search warrant for which she affirmatively stated "no objection" after she lodged a continuing objection; however, court found admission of evidence amounted to fundamental error).

Hoglund v. State, 962 N.E.2d 1230 (Ind. 2012) (continuing objection to a question does not preserve error as to questions that seek different opinions)

Nowling v. State, 961 N.E.2d 34 (Ind. Ct. App. 2012) (defendant's 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).

(d) No opportunity to object - Motion to strike

If there is no opportunity to object before inadmissible evidence is presented, the proper remedy is to strike the evidence. Johnson v. State, 278 N.E.2d 577, 580 (Ind. 1972). Motion to strike must designate with certainty the part of the evidence sought to be stricken. Kempa v. State, 58 N.E.2d 934, 935 (Ind. 1945) (motion to strike all of a witness's testimony relating to a certain fact is too general and indefinite).

(i) Unanticipated answer

Wagner v. State, 474 N.E.2d 476, 491-92 (Ind. 1985) (when the objectionable answer could not have been anticipated from the question, counsel must object and move to strike the objectionable part of the answer to preserve error; here, defendant could have foreseen the witness' hearsay response).

(ii) Non-responsive answer

Only the examining party may object and move to strike an unresponsive or volunteered answer solely on grounds the answer is not responsive to the question. The non-questioning party can object to an answer if there is a basis for the objection other than unresponsiveness. White v. State, 547 N.E.2d 831, 834 (Ind. 1989). However, a defendant's Sixth Amendment right to confront witnesses against him entitles him to object to unresponsive answers elicited inadvertently by counsel for codefendant. Testimony by

state's witnesses bears equally against defendant and codefendant, no matter which defense counsel elicited unresponsive answer. Id. at 834.

(iii) Conditionally admitted evidence

Failure to move the court to: (1) withdraw exhibits or strike evidence objected to, and (2) admonish jury to disregard evidence objected to, when the court has admitted the evidence on condition that a predicate foundation be established by subsequent evidence, and the foundation is not later established, waives the issue of admissibility. Wade v. State, 490 N.E.2d 1097, 1104 (Ind. 1986); see also, Rule 104(b).

(iv) Failure to move to strike

If the court sustains the objection to the testimony after the answer has been given, the objector must move to strike the answer to preserve the issue for appeal. Kalady v. State, 462 N.E.2d 1299, 1308 (Ind. 1984).

It is unclear whether a motion to strike is required when an untimely objection is *overruled*. Whereas the commentary to the Rule of Evidence 103 does not distinguish between a sustained untimely objection and an *overruled* untimely objection, a motion to strike serves no purposes when the untimely objection is *overruled*.

Commentary to Indiana Rule of Evidence 103 ("[w]here an improper or unresponsive answer is given, a timely motion to strike is required to preserve error. This practice is unaltered by Rule 103(a)(1).").

Cf. Sundling v. State, 679 N.E.2d 988, 992 n. 3 (Ind. Ct. App. 1997) (an *overruled* objection need not be accompanied by a motion to strike in order to preserve an error; an adequate objection is sufficient to provide the appellate court with the necessary record).

(3) Objection must be ruled upon

Failure to: (1) request a ruling, and (2) make sure the court rules on the admissibility of objected to evidence results in objecting party waiving the objection. Roche v. State, 596 N.E.2d 896 (Ind. 1992) (*citing* Turczi v. State, 301 N.E.2d 752, 754 (Ind. 1973)), *vacated, in part, on other grounds*, Roche v. Davis, 291 F.3d 473 (7th Cir. 2002)

(4) Effect of inadequate or no objection

Failure to object waives any error for review. Miller v. State, 753 N.E.2d 1284, 1287 (Ind. 2001).

(a) Weight of inadmissible evidence

"It is a well-settled rule of law in Indiana that where incompetent evidence, hearsay or otherwise, is admitted without objection, its probative value is for the trier of fact to determine, notwithstanding the fact that such evidence might have

been excluded if proper and timely objection had been made." Dayton Walther Corp. v. Caldwell, 402 N.E.2d 1252, 1257 (Ind. 1980).

However, "[h]earsay evidence, standing alone, and not clothed with indicia of reliability associated with the exceptions which may render it admissible, is not sufficient evidence of probative value to sustain a conviction." Jackson v. State, 485 N.E.2d 144, 147 (Ind. Ct. App. 1985); see also Vest v. State, 621 N.E.2d 1094 (Ind. 1993).

(b) Subsequent objections may be harmless error

Failure to object to evidence when first offered may result in similarly objectionable evidence later being considered "cumulative," so that its admission over objection is either not error, or harmless error. See, e.g., Warrick v. State, 538 N.E.2d 952, 956 (Ind. Ct. App. 1989).

Swan v. State, 375 N.E.2d 198, 201 (Ind. 1978) (by not objecting to original mention of polygraph test, defendant waived the right to have later mention of test excluded).

(5) Exception-denial of opportunity to object

Failure to object does not waive an issue on appeal if the trial court does not afford the aggrieved party an opportunity to object. Long v. State, 448 N.E.2d 1103, 1104-05 (Ind. Ct. App. 1983); Indiana Trial Rule 46.

Long v. State, 448 N.E.2d 1103, 1104 -05 (Ind. Ct. App. 1983) (where trial court, *sua sponte*, gave supplemental instruction, failed to give parties written copy of instruction, and did not provide opportunity for objection to instruction outside of presence of jury, the defendant did not have opportunity to object; it is understandable that an attorney would be reluctant to object to a judge's instruction in front of the jury).

b. Offer of proof - Rule 103(a)(2)

An offer to prove is an 'offer' from counsel regarding what a witness would say if he was allowed to testify. Roach v. State, 695 N.E.2d 934, 939 (Ind. 1998) (*citing* Bradford v. State, 675 N.E.2d 296, 301 (Ind. 1996)). Reviewing court must answer two preliminary questions to determine whether a defendant has preserved an issue for appeal. (1) Whether defendant made an offer to prove at trial. (2) Whether the offer to prove made at trial covers the same grounds that defendant argues on appeal. Roach v. State, 695 N.E.2d 934, 939-940 (Ind. 1998), *reh'g granted on other grounds,* 711 N.E.2d 1237 (1999).

(1) When required

(a) Exclusion of witness or direct testimony

If an alleged error is based on trial court's exclusion of a witness, then an offer of proof is required for appellate review. Roach v. State, 695 N.E.2d 934, 939 (Ind. 1998), *reh'g granted on other grounds,* 711 N.E.2d 1237 (1999); Flinn v. State,

563 N.E.2d 536, 543 (Ind. 1990); White v. State, 978 N.E.2d 475 (Ind. Ct. App. 2012).

West v. State, 755 N.E.2d 173 (Ind. 2001) (where defendant failed to make an offer to prove evidence of murder victim's domestic abuse by her husband, the issue was waived for appeal).

Although a defendant does not have the right to make an offer of proof when the defendant believes a witness is incorrectly asserting her Fifth Amendment privilege, the court may require that the privilege be asserted on a question-by-question basis outside the presence of the jury. Duso v. State, 866 N.E.2d 321 (Ind. Ct. App. 2007).

(b) Curtailment of cross examination

It is appropriate and necessary for counsel to make an offer of proof on cross-examination if she believes the trial court has improperly limited a line of questioning or has erroneously sustained an objection by opposing counsel. The offer may be made immediately upon the judge's sustaining of opposing counsel's objection, or before the judge rules on the objection. Arhelger v. State, 714 N.E.2d 659 (Ind. Ct. App. 1999); Hightower v. State, 735 N.E.2d 1209 (Ind. Ct. App. 2000); see also Miller, 12 *Indiana Evidence* 83 §103.114 (4th ed. 2016).

(2) Contents of offer of proof

The offeror must: (1) make "the substance of the evidence", (2) the grounds for admission, and (3) the relevance of the evidence, known to the trial court in the offer to prove. Roach v. State, 695 N.E.2d 934, 939 (Ind. 1998) (*citing* Hilton v. State, 648 N.E.2d 361, 362 (Ind. 1995)); Nelson v. State, 792 N.E.2d 588, 594-95 (Ind. Ct. App. 2003); Arhelger v. State, 714 N.E.2d 659, 666 (Ind. Ct. App. 1999), *reh'g granted on other grounds,* 711 N.E.2d 1237 (1999).

(a) Immaterial details unnecessary

Details that are immaterial to the ultimate facts are not necessary. State v. Wilson, 836 N.E.2d 407 (Ind. 2005) (disapproving of language in Hilton v. State, 648 N.E.2d 361 (Ind. 1995), that would require time and place and other details; Hilton overstates the requirement for an adequate offer of proof).

Baker v. State, 750 N.E.2d 781 (Ind. 2001) (because the primary purposes of an offer to prove were satisfied through the defendant's filing of an offer of evidence under Rule 412 asking court to affirm or deny previous order on motion *in limine* and offer was discussed in a sidebar immediately before the defendant was to testify, the defendant's failure to make an offer to prove did not waive issue for appellate review).

(b) Vouching for witness unnecessary

The attorney making an offer of proof must have a good faith and reasonable belief that witness will testify as the attorney states, but attorney is not a warrantor of the witness's reliability and should not vouch for the witness. State

v. Wilson, 836 N.E.2d 407 (Ind. 2005) (disapproving of language from Hilton, *supra*, suggesting that an offer of proof must vouch for anticipated testimony).

(c) Excluded testimony must only be apparent from record

Ind.R. Evid. 103(a) (2) may be interpreted to relax somewhat the rigid specificity requirement of an offer to prove because it states merely that 'the substance of the evidence' be made known to the trial court or 'apparent from the context within which the questions were asked.' Nasser v. State, 646 N.E.2d 673, 681 n. 15 (Ind. Ct. App. 1995).

Baker v. State, 750 N.E.2d 781 (Ind. 2001) (where the primary reasons for requiring an offer to prove are satisfied, rigid enforcement of format of offer serves no purpose; sidebar colloquy illustrated that trial court was aware of nature of excluded evidence, and thus, was sufficient to preserve issue for appeal).

Beedree v. Bedree, 747 N.E.2d 1192 (Ind. Ct. App. 2001) (where the substance of the evidence the witness would be giving was apparent from the context of the case, an offer of proof was not strictly necessary).

State v. Wilson, 836 N.E.2d 407 (Ind. 2005) (where it was clear from context of record the substance of the expected testimony, the offer of proof that included only the questions the prosecutor wanted to ask the witness was sufficient to preserve error for appeal); see also Britt v. State, 937 N.E.2d 914 (Ind. Ct. App. 2010).

(3) Timing

A party may make an offer of proof either before or immediately after the court rules on the objection. Indiana Criminal Rule 6; Arhelger v. State, 714 N.E.2d 659, 666 (Ind. Ct. App. 1999). An offer of proof made for purposes of a pretrial motion does not preserve the issue for appeal. Another offer of proof must be made at trial. Miller v. State, 716 N.E.2d 367, 370 (Ind. 1999).

Miller v. State, 716 N.E.2d 367 (Ind. 1999) (where the defendant failed to offer evidence that the trial court excluded in a pretrial motion as inadmissible under rape shield law, the defendant did not preserve the error).

Aslinger v. State, 2 N.E.3d 84 (Ind. Ct. App. 2013) (defendant 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).

State v. 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).

Talinger Farm v. Uhl, 815 N.E.2d 1015 (Ind. Ct. App. 2004) (an offer of poof made after State rested and motion to dismiss was made was untimely; an offer of proof should be made during direct examination or cross examination).

(4) Methods

Although Rule 103(a)(2) does not specify the method of making an offer of proof, Indiana recognizes three principal methods of making an offer to prove. Arhelger v. State, 714 N.E.2d 659, 665 (Ind. Ct. App. 1999). Methods of making an offer of proof:

(a) Question-and-offer format. The offeror may use questions, but not answers after an objection to a specific question to a witness is sustained, examining counsel states what testimony would be if the witness would be allowed to answer. Duso v. State, 866 N.E.2d 321 (Ind. Ct. App. 2007) (*citing* Arhelger, 714 N.E.2d at 665); and State v. Wilson, 836 N.E.2d 407 (Ind. 2005)).

(b) Question-and-answer format. The court may direct that the offer to prove be in question-and-answer form in any proceeding, or if questioner reports lack of knowledge of what witness's answer would be. Id.; Rule 103(c) and Miller, 12 *Indiana Evidence* 81 § 103.113 (4th ed. 2016).

(c) No question formats. The offer to prove may be made without questions if the court indicates that no further testimony of the witness will be allowed with respect to the offered proof, or if neither the court nor opposing counsel require the use of question. Id. Offers may be made in writing. Tyson v. State, 619 N.E.2d 276 (Ind. Ct App. 1993), *cert. den.* 510 U.S. 1176, 114 S. Ct. 1216, 127 L.Ed.2d 562 (1994) (judge refused to let defense call three witnesses who came forward after trial started; the issue was preserved because counsel filed a detailed offer of proof).

(5) Denial of opportunity to make an offer of proof

A party has a right to make an offer of proof. If a trial court can arbitrarily deny counsel the right to make an offer of proof, it can prevent appellate review of its own decisions. "[I]t is reversible error for a trial court to deny a party the opportunity to explain the substance, relevance, and admissibility of excluded evidence with an offer of proof." Nelson v. State, 792 N.E.2d 588, 595 (Ind. Ct. App. 2003) (finding harmless reversible error) (*citing* Bextermueller v. Busken, 376 S.W.2d 621, 630 (Mo. Ct. App. 1964)).

Littler v. State, 871 N.E.2d 276 (Ind. 2007) (trial courts should very rarely completely deny a party's request to make an offer of proof, and then only upon clear abuse by requesting party).

Harmon v. State, 4 N.E.3d 209 (Ind. Ct. App. 2013) (where trial court provided counsel the opportunity at a sidebar to explain the substance, relevance and grounds for the excluded evidence, defendant was not denied his right to make an offer of proof).

C. ROLE OF JUDGE

A judge may make *sua sponte* objections. Anderson v. State, 653 N.E.2d 1048 (Ind. Ct. App. 1995) (trial court judge must remain impartial and refrain from unnecessary intervention, but also has a duty to conduct the trial properly).

White v. State, 547 N.E.2d 831 (Ind. 1989) (judge's extensive questioning of witness, outside of presence of jury, in order to be more able to rule on the pending motion to exclude witness' testimony, was proper and did not condition the witness for her testimony in front of the jury).

D. HEARING OF JURY- RULE 103(d)

1. Purpose

The purpose of (Federal) Rule 103(d) is to prevent evidence which should be excluded from coming to the jury's attention. Removing the jury from the courtroom is one way to effectuate the commands of Rule 103(c). United States v. Adames et al, 56 F.3d 737, 744 (7th Cir. 1995), *cert. den.,* 517 U.S. 1250, 135 L.Ed.2d 201, 116 S. Ct. 2512 (1996) (*citing* Fed. R. Evid. 103(d) advisory committee's note). Although much of the responsibility for shielding the jury from inadmissible evidence falls to the judge, counsel must act in good faith when offering to prove and should exercise discretion prior to launching into an offer that may be inadmissible. Arhelger v. State, 714 N.E.2d 659, 665 n. 9 (Ind. Ct. App. 1999).

2. Considerations against removal of jury

Removal is improper whenever: (1) the number of interruptions reach a level where it prejudices a defendant, or (2) removal impairs the defendant's ability to effectively confront the witnesses. United States v. Adames et al., 56 F.3d 737,744 (7th Cir. 1995), *cert. den.,* 517 U.S. 1250, 116 S. Ct. 2512, 135 L.Ed.2d 201 (1996) (construing Federal Rule 103(d)).

3. Motions *in limine*

"The purpose of a motion *in limine* is to prevent the display of potentially prejudicial material to the jury until the trial court has the opportunity to rule on its admissibility . . . Motions *in limine* are granted for the purpose of ensuring a defendant a fair determination of his guilt or innocence and is incumbent upon the parties to alert their witnesses to the court's order." Lehman v. State, 777 N.E.2d 69, 71-72 (Ind. Ct. App. 2002) (reversing denial of mistrial due to violation of motion *in limine*).

Vehorn v. State, 717 N.E.2d 869, 872 n. 4 (Ind. 1999) (motion *in limine* may be made orally).

E. FUNDAMENTAL ERROR - RULE 103(e)

A party may not fail to object to a court's action and then raise the court's action as error on appeal unless the error is fundamental. Sturma v. State, 683 N.E.2d 606, 610 (Ind. Ct App. 1997). An appellate court may address the merits of an issue not properly preserved at trial if the error is fundamental. Roach v. State, 695 N.E.2d 934, 942 (Ind. 1998) (*citing* Ben-Yisrayl v. State, 690 N.E.2d 1141, 1150 (Ind. 1997), *cert. den.* 119 S. Ct. 877 (1999)).

1. Definition of fundamental error

Fundamental error is an error that is a blatant violation of basic principles, that creates harm or potential for harm that is substantial and denies the defendant fundamental due process. Brown v. State, 799 N.E.2d 1064, 1067 (Ind. 2003).

Delarosa v. State, 938 N.E.2d 690, 694-95 (Ind. 2010) (the error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process; this exception is available only in egregious circumstances).

2. Test for fundamental error

The error must be such that if not rectified it would deny the defendant fundamental due process. Whether an error is fundamental and affects the defendant's substantial rights is determined by assessing the probable impact the evidence had on the jury. Sturma v. State, 683 N.E.2d 606, 610 (Ind. Ct. App. 1997) (*citing* Craig v. State, 630 N.E.2d 207, 211 (Ind. 1994) and Bolin v. State, 634 N.E. 2d 546, 550 (Ind. Ct. App. 1994)). This is a greater standard of prejudice than ordinary reversible error. Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005).

Culver v. State, 727 N.E.2d 1062 (Ind. 2000) (establishing fundamental error requires at least as much a showing of prejudice as a claim of ineffective assistance of counsel).

3. Invited error cannot generally be fundamental error

Although the Indiana Supreme Court has suggested that invited errors cannot be subject to appellate review, our Courts, including the Indiana Supreme Court, "have chosen to determine whether errors unavailable for review by virtue of their invitation were nevertheless fundamental error." Oldham v. State, 779 N.E.2d 1162, 1172 (Ind. Ct. App. 2002) (*citing* Roach v. State, 695 N.E.2d 934, 942 (Ind. 1998) and Cuto v. State, 709 N.E.2d 356, 361 (Ind. Ct. App. 1991)).

Oldham v. State, 779 N.E.2d 1162 (Ind. Ct. App. 2002) (despite the defendant's attorney's expressed agreement to the admission of the evidence, it was fundamental error to admit into evidence a business card bearing the name "Goddie" and the phrases "Tre Block" and "Dope City", and a novelty photograph of the defendant with another youth with superimposed printed text bearing the words "America's Most Wanted" and "Wanted for: robbery, assault, arson, jaywalking" and "Considered armed and dangerous" and "Approach with extreme caution").

Cuto v. State, 709 N.E.2d 356 (Ind. Ct. App. 1991) (retrial was barred by double jeopardy even though defendant actually requested the retrial; "despite the procedural posture of this case which implicates both law of the case and invited error, it appears that a double jeopardy violation would require the doctrine to yield to the constitution").

Correll v. State, 639 N.E.2d 677 (Ind. Ct. App. 1994) (although the defendant invited the error by tendering the erroneous instruction, it is fundamental error to allow the defendant to be convicted for offense including an element not listed in the charge, and therefore the Defendant's conviction constituted reversible error). See also Anderson v. State, 674 N.E.2d 184 (Ind. Ct. App. 1996).

Baugh v. State, 933 N.E.2d 1277 (Ind. 2010) (where defense counsel asked trial court to review only the charging information and mental health professionals' written reports to decide if defendant was a sexually violent predator, stating "I think the Court has to make that determination based upon the charge that he's been convicted and the doctors' reports, and I would leave that up to the Court," the error of not requiring in-court testimony from the experts was invited and thus waived).

4. Examples of automatic fundamental error

The following are examples of errors that almost always rise to the level of fundamental error. The following list is not meant to be exhaustive.

a. Overstepping judges

The fundamental error doctrine is applicable to review of claims of improper judicial intervention in criminal trials. Anderson v. State, 653 N.E.2d 1048 (Ind. Ct. App. 1995) (*citing* Kennedy v. State, 280 N.E.2d 611 (Ind. 1972)). "An attorney would be reluctant to object to the judge's questioning as it then would appear to the jury that the defense and the court were in direct conflict with doing further damage to defendant's case." Long v. State, 448 N.E.2d 1103, 1104 (Ind. Ct. App. 1982) (*citing* Kennedy*, supra*).

PRACTICE POINTER: Although case law states that fundamental error doctrine is applicable, the courts have dealt with the issue of inappropriate judicial involvement by eliminating the need to object.

b. Failure to instruct on element of crime

Lacy v. State*,* 438 N.E.2d 968 (Ind. 1982) (total failure to give an instruction detailing the elements of the offense constitutes reversible error even absent contemporaneous objection).

c. Conviction on non-existent crime

Multiple Indiana courts have reversed convictions for offenses that were not charged or were not lesser included offenses of those charged due to fundamental error. Brooks v. State, 526 N.E.2d 1171 (Ind. 1988); Yarbourgh v. State, 497 N.E.2d 206 (Ind. 1986); Sandford v. State*,* 255 Ind. 542, 265 N.E.2d 701 (1971); Rouse v. State*,* 525 N.E.2d 1278 (Ind. Ct. App. 1988); Peek v. State, 454 N.E.2d 450 (Ind. Ct. App. 1983); Lechner v. State*,* 439 N.E.2d 1203 (Ind. Ct. App. 1982); Stevens v. State, 422 N.E.2d 1297 (Ind. Ct. App. 1981); and Gutowski v. State, 354 N.E.2d 293 (Ind. Ct. App. 1976).

Garcia v. State*,* 433 N.E.2d 1207 (Ind. Ct. App. 1982) (the Court *sua sponte* found fundamental error where the defendant was convicted of an offense that was not charge nor was a lesser included of the charged offense).

Vandeventer v. State, 459 N.E.2d 1221 (Ind. Ct. App, 1984) (conviction for non-existent crime is fundamental error).

d. Violation of right to jury trial

The right to a jury trial is one of the most fundamental elements of due process and a basic principle of our criminal justice system, and denial of that right is fundamental error. See, e.g., Vukadinavich v. State, 529 N.E.2d 837 (Ind. Ct. App. 1988). "The right to jury trial in criminal cases is one of the sacred cows long nurtured in the pastureland of our legal system." Smith v. State, 451 N.E.2d 57, 60 (Ind. Ct. App. 1983).

Doughty v. State, 470 N.E.2d 69, 70 (Ind. 1984) (question of effective waiver of jury trial reviewed even though no objection was made at trial).

Cunningham v. State, 433 N.E.2d 405 (Ind. Ct. App. 1982), *reh'g denied* (conviction reversed for lack of proper waiver of jury trial even though no objection was entered by defendant or attorney).

e. Violation of right to be present – trial *in absentia*

Excluding defendant from trial in the absence of disruptive, contumacious conduct or interference with trial court proceedings violates the right to be present under the Sixth Amendment and Article one section 13 of the Indiana constitution.

Wells v. State, 176 N.E.3d 977 (Ind. Ct. App. 2021) (excluding Defendant from trial and trying him in absentia for testing positive for THC resulted in fundamental error).

f. Violation of due process right to proof beyond reasonable doubt

"The standard of proof is not the defendant's to waive; it is a burden placed on the government, without which a conviction cannot be obtained." In the Matter of Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S. Ct. 1068 (1970)). Put in another way, the deprivation of the due process right to be tried beyond a reasonable doubt is fundamental error. Thomas v. State, 442 N.E.2d 700 (Ind. Ct. App. 1982).

g. Sentencing

Error in sentencing is fundamental and can be raised for first time on appeal. Huff v. State, 443 N.E.2d 1234 (Ind. Ct. App. 1983).

But see Carmon v. State, 473 N.E.2d 618 (Ind. 1985) (limiting fundamental sentencing error to errors in which the sentencing court exceeded its statutory authority).

h. Certain situations in which defendant is *pro se*

Trial judge "has an obligation to justice" which requires the judge to direct the course of the trial and where the defendant represents self, judge should not permit prosecutor "'to secure convictions of accused by use of tactics which prevent achievement of a fair and just decision.'" Grubbs v. State, 265 N.E.2d 40 (Ind. 1970).

Dack v. State, 479 N.E.2d 96 (Ind. Ct. App. 1984) (although prosecutor's comment on the defendant's failure to testify could be deemed harmless, such ruling "would be at odds" with Indiana law; held, reversed, and remanded).

IV. PRELIMINARY QUESTIONS - RULE 104

A. OFFICIAL TEXT:

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury is not present and cannot hear if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

B. QUESTIONS OF ADMISSIBILITY - RULE 104(a)

1. Role of rules of evidence in deciding preliminary questions

Certain preliminary questions, including whether a person is qualified to be a witness, whether a privilege exists, and whether a given piece of evidence is admissible are questions for the trial court. Rule 104(a). In making these preliminary determinations, the trial court is not bound by the rules of evidence, except for the rules regarding privileges. Rule 104(a). See, e.g., Lewis v. State, 904 N.E.2d 290, 293 (Ind. Ct. App. 2009) (court may consider hearsay testimony).

The following is a non-exhaustive list of examples of preliminary questions for the court. The burden of proof for admissibility can change with the different types of evidence being offered into evidence.

a. Unavailability of witness

The determination of preliminary questions such as the unavailability of a witness is normally determined by the judge in the exercise of his or her discretion. United States v. Koller, 956 F.2d 1408, 1413 (7th Cir. 1992) (*citing* Federal Rule 104).

Jackson v. State, 735 N.E.2d 1146 (Ind. 2000) (State failed to demonstrate that witness was unavailable for live testimony being the State made no effort to obtain

officer's attendance, good faith or otherwise; accordingly, officer was not unavailable, and admitting his deposition testimony into evidence was error because it ran afoul of the defendant's Sixth Amendment right of confrontation).

PRACTICE POINTER: Although it has been generally accepted that the party offering hearsay has the burden of showing that the hearsay declarant is unavailable if unavailability is required for admission, the Indiana Supreme Court in Fowler v. State, 829 N.E.2d 459 (Ind. 2005), switched this burden to the party objecting to the hearsay. The Court held that the defendant failed to show the admission of testimonial hearsay violated his confrontational rights because the defendant failed to exhaust all means of obtaining the state's witness for trial. But Melendez-Diaz v. Massachusetts,129 S. Ct. 2527 (2009), makes clear that the Indiana Supreme Court's burden-switching to the Defendant to prove a state's witness is unavailable in order to support a Sixth Amendment objection is erroneous. The Melendez-Diaz Court held that "[c]onverting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shift the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses." Thus, Fowler is incorrectly decided and conflicts with years of precedent that the Government must show unavailability of the declarant when presenting hearsay. See Miller, 12 *Indiana Practice* 804.104 (4th ed. 2016) (*citing* multiple cases discussing the government's responsibilities). But to be on the safe side, subpoena all of the State's witnesses to trial, and always be sure to ask the Court to hold a state's witness who is refusing to answer a question in contempt in order to show that the defendant did all he could do to make the witness available.

b. Conspiracy

Indiana case law developed before adoption of rules of evidence treated such statements in furtherance of a conspiracy as admissible, but required that State provide other evidence, either circumstantial or direct, that conspiracy existed as a precondition to admitting hearsay. Lott v. State, 690 N.E.2d 204 (Ind. 1997). This "independent evidence" requirement has been viewed as useful safeguard against abusive use of co-conspirator hearsay, and the Court will continue to apply it to evidence proposed for admission under Rule 801 (d)(2)(E). Id.

Cockrell v. State, 743 N.E.2d 799 (Ind. Ct. App. 2001) (without evidence that the defendant agreed with alleged co-conspirator, no conspiracy was established, and the trial court abused its discretion when it allowed co-conspirator's statements into evidence under Ind. Evidence Rule 801(d)(2)(E); relationship and association with co-conspirator, standing alone, is insufficient to establish conspiracy).

c. Confession

(1) Corpus Delicti

Evidence of an extrajudicial confession to a crime is not admissible without some independent proof of the crime. Shinnock v. State, 76 N.E.3d 841, 843 (Ind. 2017); see also Miller, 12 *Indiana Evidence* 131 § 104.301 (4th ed. 2016) (*citing* Owens v. State, 732 N.E.2d 161, 163-64 (Ind. 2001)). The *corpus delicti* evidence need not be strong and need not exclude other hypotheses with support in the evidence. Fowler v. State, 900 N.E.2d 770, 775-76 (Ind. Ct. App. 2009).

Although it is desirable to first establish corpus delicti before showing a confession or statement against interest by the defendant, such is not necessary. The order of proof is within the sound discretion of the trial judge. Sluss v. State, 436 N.E.2d 907 (Ind. Ct. App. 1982).

PRACTICE POINTER: Under the U.S. Constitution, the State need only prove that the confession was voluntary by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 626-27 (1972). If a confession is only challenged under the U.S. Constitution, the lower standard of preponderance will be used rather than proof beyond a reasonable doubt. White v. State, 699 N.E.2d 630 (Ind. 1998). Thus, be sure to always challenge the admissibility of confessions under both Indiana and U.S. Constitutions.

(2) Voluntariness

Before a confession is admissible under the Indiana Constitution, the State must prove beyond a reasonable doubt that it was voluntary. Coates v. State, 534 N.E.2d 1087 (Ind. 1989); Fields v. State, 679 N.E.2d 1315, 1320 (Ind. 1997); Henry v. State, 738 N.E.2d 663, 664 n. 1 (Ind. 2000). The State must also prove beyond a reasonable doubt that the Defendant's waiver of his rights was voluntary. Scallissi v. State, 759 N.E.2d 618 (Ind. 2001); Turner v. State, 738 N.E.2d 660 (Ind. 2000); and Berry v. State, 703 N.E.2d 154 (Ind. 1998).

C. RELEVANCE THAT DEPENDS ON A FACT - RULE 104(b)

The court may admit the evidence only after it makes a preliminary determination that there is sufficient evidence to support a finding that the conditional fact exists. These issues are, for the most part, simple factual questions to be decided based on common sense, and the Rules [of Evidence] assume that the jury is as competent to decide them as the judge. Cox v. State, 696 N.E.2d 853, 861 (Ind. 1998) (quoting 1 *Weinstein's Federal Evidence,* § 104.30[1], at 104-63 (2d ed. 1998)).

1. Test

The judge must determine only that a reasonable jury could make the requisite factual determination based on the evidence before it. Cox v. State, 696 N.E.2d 853, 861 (Ind. 1998) (*citing* 1 *Weinstein's Federal Evidence,* § 104.30[1], at 104-05, n.3 (2d ed. 1998)). Issues of conditional relevance are governed by Ind. Evidence 104(b), which provides that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." Whether Rule 104(b) should result in the exclusion of evidence depends upon whether 'the fact upon which the evidence depends is too speculative' at the time a party seeks introduction of the evidence." Duvall v. State, 978 N.E.2d 417, 427 (Ind. Ct. App. 2012) (cleaned up).

> Cox v. State, 696 N.E.2d 853 (Ind. 1998) (the jury could have inferred that defendant had learned what transpired in a hearing from his mother who was present at the hearing in order to make evidence of the hearing admissible).

Once evidence passes the Rule 104(b) hurdle, the court then separately determines whether the speculative component decreases the evidence's probative value, and thus, makes the

evidence inadmissible under the relevance test of Rule 402 or the balancing test of Rule 403. Cox v. State, 696 N.E.2d 853, 861-62 (Ind. 1998).

2. Conditional relevancy and Rule 404(b)

"'Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. (Citation omitted). In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred, and that the defendant was the actor." Huddleston v. U.S., 485 U.S. 681, 690, 108 S. Ct. 1496, 99 L.Ed.2d 771 (1988)). The "[g] overnment may [not] parade past the jury a litany of potentially prejudicial [prior bad acts] that have been established or connected to the defendant only by unsubstantiated innuendo." Hicks v. State, 690 N.E.2d 215, 221 (Ind. 1997) (*quoting* Huddleston v. U.S., 485 U.S. 681, 108 S. Ct. 1496 (1988)); Shane v. State, 716 N.E.2d 391, 397-98 (Ind. 1999). See Chapter 4, Section discussing Indiana Rule of Evidence 404(b).

3. No instruction

When evidence is admitted pursuant to Rule 104(b), the jury should not be instructed of the conditional nature of the court's ruling on admissibility. Miller, 12 *Indiana Evidence* 127-28 § 104.204 (4th ed. 2016).

4. Timing of proof of conditional fact: "Connecting up"

The trial judge may admit evidence subject to being "connected up" by the later introduction of proof of the fact upon which relevancy depends. Miller, 12 *Indiana Evidence* 128 § 104.205 (4th ed.) (*citing* Kindred v. State, 524 N.E.2d 279, 293 (Ind. 1988)).

> Granger v. State, 946 N.E.2d 1209, 1217 (Ind. Ct. App. 2011) ("Because of the apparent lack of relevance of all the exhibits to the charged offenses at the time of admission while some of these exhibits were made relevant later, then, the trial court should have required the State to explain how these items would be connected up with the charged offenses later in the trial, thereby granting conditional admission under Rule 104(b).").

PRACTICE POINTER: When an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases it is customary to permit him to introduce the evidence and 'connect it up' later. Rule 104(b) continues this practice, specifically authorizing the judge to admit the evidence 'subject to' proof of the preliminary fact. It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition. Granger v. State, 946 N.E.2d 1209, 1217, n.7 (Ind. Ct. App. 2011); Franciose v. Jones, 907 N.E.2d 139, 145 (Ind. Ct. App. 2009), *aff'd on reh'g*, 910 N.E.2d 862 (Ind. Ct. App. 2009); Huddleston v. United States, 485 U.S. 681, 690, n.7, 108 S. Ct. 1496, 1502 (1988) (quoting 21 C. Wright & K. Graham, Federal Practice and Procedure, § 5054, pp. 269-70 (1977)). If conditional relevance evidence is not subsequently introduced, move to strike the irrelevant evidence from the record. Eaton v. State, 186 Ind. 167, 115 N.E. 329 (1917).

D. CONDUCTING A HEARING SO THAT THE JURY CANNOT HEAR IT - RULE 104(c)

1. Hearing on admissibility of confession must be held outside jury's presence

The admissibility of a confession is a question for the court, not the jury. But the jury evaluates the credibility of a confession once it is admitted and how much weight to give it. Battles v. State, 688 N.E.2d 1230, 1233 (Ind. 1997); Livermore v. State, 777 N.E.2d 1154, 1160 (Ind. Ct. App. 2002). Hearings on the admissibility of confessions must be held outside the jury's presence and hearing, regardless of the grounds for the challenge to the confession's admissibility. See, e.g., Grimm v. State, 556 N.E.2d 1327 (Ind. 1990).

> Grimm v. State, 556 N.E.2d 1327 (Ind.1990) (holding hearing outside of presence of jury to determine whether, beyond a reasonable doubt, the defendant voluntarily waived his right to counsel).

PRACTICE POINTER: Even if the statement is admitted into evidence, the defendant still must be permitted to challenge the credibility of the statement at trial. Miller v. State, 825 N.E.2d 884 (Ind. Ct. App. 2005). In fact, it can be error to exclude a defense expert on coerced confessions. Both sides must be permitted to present evidence of the defendant's mental capacity. Miller v. State, 770 N.E.2d 763 (Ind. 2002); Carew v. State, 817 N.E.2d 281 (Ind. Ct. App. 2004).

2. Hearing on admissibility of evidence other than confession evidence

A hearing on the admissibility of evidence other than confession evidence need not be conducted outside the presence of the jury unless the interests of justice require or the accused in a criminal case is a witness and so requests. Ind. R. Evid. 104(c). Absent a request to excuse the jury by a defendant who is a witness, whether the interests of justice require proceeding outside the jury's presence is within the trial court's discretion. Miller, 12 *Indiana Evidence* 97 § 104.303 (4th ed. 2016). But that discretion might be abused if, for example, the proceedings disclose the existence of prior crimes or convictions. Id.

E. CROSS-EXAMINING A DEFENDANT IN A CRIMINAL CASE - RULE 104(d)

1. Limited cross-examination

The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case. Ind. R. Evid. 104(d).

2. Use of testimony at trial

A defendant's pretrial statements cannot be used against him when to do so would place the defendant in an untenable position of choosing between constitutional rights. Thomas v. State, 734 N.E.2d 572 (Ind. 2000) (*citing* Johnston v. State, 517 N.E.2d 397, 401 (Ind. 1998)).

> Thomas v. State, 734 N.E.2d 572 (Ind. 2000) (using at trial a defendant's pre-trial statement made during a hearing on defendant's motion to dismiss was improper; defendant had a statutory right to file a motion to dismiss).

> Johnston v. State, 517 N.E.2d 397, 401 (Ind. 1998) (when a hearing involves personal or constitutional rights, such as suppression of confessions or evidence, double jeopardy,

change of venue or bond, a defendant's testimony during the hearing cannot be used against him as substantive evidence at trial; however, if defendant testified at hearing on competency of witness, the testimony could be used against him).

Simmons v. United States, 390 U.S. 377, 394, 88 S. Ct. 967, 976 (1968) (when an accused testifies in support of a motion to suppress evidence on federal constitutional grounds, the testimony may not be admitted over objection as substantive evidence against the accused at trial; the defendant should not be placed in the untenable position of choosing between his Fourth Amendment right to be free from unreasonable searches and his Fifth Amendment right to remain silent); See also Livingston v. State, 542 N.E.2d 192 (Ind. 1989).

State v. Samuels, 965 S.W.2d 913 (Mo. Ct. App. 1998) (self-incriminating statements made during post-conviction (PCR) hearing in support of ineffective assistance of counsel claim cannot be used against him at retrial; a defendant should not be made to choose between his Sixth Amendment right to effective counsel and Fifth Amendment right to remain silent).

However, this evidence may be admissible to impeach a defendant who testifies at trial. Miller, 12 *Indiana Evidence* 136 § 104.401 (4th ed. 2016).

F. EVIDENCE RELEVANT TO WEIGHT AND CREDIBILITY - RULE 104(e)

When the same preliminary facts are relevant to the weight or credibility of evidence, the parties can present evidence about those facts to the jury after the exhibit or testimony has been admitted. Miller, 12 *Indiana Evidence* 137 § 104.501 (4th ed. 2016). For instance, the remoteness and lack of similarity of a prior act that was considered by the judge in determining whether the prior act was admissible can also be argued to the jury to show the prior act has little probative weight. Similarly, the same factors the judge used to determine whether a confession was voluntary to be admissible can be presented to impeach the credibility of the confession.

V. LIMITING EVIDENCE THAT IS NOT ADMISSIBLE AGAINST OTHER PARTIES OR FOR OTHER PURPOSES - RULE 105

A. OFFICIAL TEXT:

If the court admits evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

B. PARTY MUST REQUEST LIMITING INSTRUCTION

The trial court has no affirmative duty to give a limiting instruction *sua sponte*. Small v. State, 736 N.E.2d 742 (Ind. 2000). Where potentially damaging evidence is admissible for one purpose but not for another, counsel may choose not to request a limiting instruction for strategic reasons. For example, counsel may feel that a limiting instruction will do more harm than good by focusing the jury's attention on the limited evidence. The defendant should request a cautionary instruction and afford the judge an opportunity to give it. Humphrey v. State, 680 N.E.2d 836, 839-40 (Ind. 1997).

PRACTICE POINTER: Requesting a limiting instruction may not be in your client's best interest. Limiting instruction may be more harmful than helpful. Humphrey v. State, 680 N.E.2d 836 (Ind. 1997). Despite the skepticism concerning limiting instructions, a limiting instruction is presumed to cure any error regarding the admission of evidence. Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004). Thus, by requesting a limiting instruction, one may be not only drawing attention to prejudicial evidence, but also may be worsening the client's chances of success on appeal. No case has held that a defendant must request a limiting instruction to preserve an underlying error other than prosecutorial misconduct.

1. Request must be timely and specific

Rule 105 is triggered only when a party makes a timely and specific request with respect to evidence to which the rule applies. Humphrey v. State, 680 N.E.2d 836, 839 (Ind. 1997); Brooks v. State, 934 N.E.2d 1234, 1244 (Ind. Ct. App. 2010); Cole v. State, 28 N.E.3d 1126, 1134 (Ind. Ct. App. 2015).

2. Failure of Court to give requested limiting instruction

It is error to refuse a tendered limiting instruction if there is evidence in the record to support the instructions. Spires v. State, 670 N.E.2d 1313, 1316 (Ind. Ct. App. 1996). However, not every error is reversible. Id.

If refusal to give limiting instruction leaves the jury with an incorrect impression of the law, the court's refusal may be reversible error.

> Caldwell v. State, 722 N.E.2d 814 (Ind. 2000) (because prosecutor created erroneous impression of what would happen to the defendant if he was found not responsible by reason of insanity, the trial court's failure to either admonish jury or give tendered instructions concerning the consequence of guilty but mentally ill and insanity verdicts was reversible error). But see Georgopolus v. State, 735 N.E.2d 113 (Ind. 2000).

However, if there is overwhelming evidence of guilt or the final instructions address the substance of a requested limiting instruction, the trial court's failure to give the requested limiting instruction may be harmless.

Wilhelmus v. State, 824 N.E.2d 405 (Ind. Ct. App. 2005) (under unique circumstances of this case, the final instructions cured the error of failing to admonish the jury when originally requested; the better practice for limiting use of 404(b) evidence is for the trial court to immediately instruct the jury as well as give a final instruction on the matter).

Spires v. State, 670 N.E.2d 1313 (Ind. Ct. App. 1996) (where there was no substantial likelihood that the refusal to give limiting instruction on 404(b) evidence affected the verdict, there was no reversible error).

3. Failure to request limiting instruction

a. Does not waive objection to inadmissible evidence

A party need not request an instruction when the trial court overrules an objection as to the admissibility of evidence. There is no instruction that would cure the admission of inadmissible evidence. Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004).

The one exception is when asking for a mistrial based on prosecutorial misconduct. See Dumas v. State, 803 N.E.2d 1113, 1117 (Ind. 2004); Brown v. State, 799 N.E.2d 1064, 1066 (Ind. 2003); Brewer v. State, 605 N.E.2d 181 (Ind. 1993). This required instruction is different than a limiting instruction in Indiana Rule of Evidence 105 in that the judge is not instructing on limited admissibility but rather instructing to disregard the improper argument entirely. Although these cases require a request for an instruction or a mistrial even after an objection is *overruled* in order to preserve error, argue, if necessary, that this requirement serves no purpose and should be *overruled*. The purpose of an objection is to allow a trial court the opportunity to rule on an issue and provide a record for an appellate court. A judge, who has already determined there is no error by overruling an objection, has implicitly ruled that there is no need to admonish the jury.

Williams v. State, 29 N.E.3d 144 (Ind. Ct. App. 2015), *sum. aff'd*, 43 N.E.3d 578 (Ind., 2015) (noting that "[i]t makes absolutely no sense" to require a defendant to "request an admonishment or a mistrial after having been told by the trial court that no misconduct occurred").

b. May waive objection to misuse of admissible evidence

There are a few cases holding that an *overruled* objection based on a party's concern that evidence, such as hearsay or impeachment evidence, will be used improperly by the jury must be followed with a request for an instruction explaining to the jury the limited use of the evidence. See, e.g., Martin v. State, 736 N.E.2d 1213, 1218 (Ind. 2000).

However, the concept that an instruction could cure the jury's potential misuse of the evidence is inconsistent with the recognition that an instruction may exacerbate rather than cure the problem. Humphrey v. State, 680 N.E.2d 836, 839-40 (Ind. 1997). There can be strategical reasons why an attorney would not want a limiting objection to

evidence believed to be inadmissible. Id; see also Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000).

PRACTICE POINTER: In order to avoid waiver, object on Rule 403 grounds arguing that the danger of misuse substantially outweighs the probative value of the evidence. Thus, any instruction would not cure the problem. Moreover, specifically note on the record that the decision not to ask for an instruction is strategic. The Court of Appeals has noted that "we think it particularly prudent to address the merits of a defendant's claim in cases where trial counsel has rejected an offer to admonish the jury and specifically commented on the unsavory position of choosing between emphasizing inappropriate testimony to the jury and waiving appellate review of the trial court denial of a motion for mistrial." Smith v. State, 872 N.E.2d 169 (Ind. Ct. App. 2007).

c. Waives argument that court should have given instruction

By failing to request a limiting instruction, a party waives any error based on the absence of an admonition. The court has no duty to give one, *sua sponte*. Humphrey v. State, 680 N.E.2d 836, 840 (Ind. 1997); Warren v. State, 725 N.E.2d 828, 835 n.1 (Ind. 2000).

PRACTICE POINTER: To be sure of preserving error when the trial court refuses to give a limiting instruction, request, and tender an appropriate instruction as part of final instructions.

d. May not constitute ineffective assistance of counsel

Johnson v. State, 719 N.E.2d 812 (Ind. 1999) (counsel was not ineffective in failing to ask the trial court for immediate limiting instruction when alleged accomplice called by State refused to testify; whether to ask for instruction is decision for defense to make).

Grund v. State, 671 N.E.2d 411 (Ind. 1996) (although defendant would have been entitled to limiting instruction concerning hearsay evidence had defense counsel requested it, defendant was not prejudiced by failure to request instruction being the other evidence at trial).

C. COURT MAY GIVE LIMITING INSTRUCTION ON ITS OWN MOTION

Rule 105 does not preclude trial courts from giving a limiting instruction *sua sponte* as a matter of discretion but imposes no affirmative duty to do so. Small v. State, 736 N.E.2d 742, 746 (Ind. 2000); Humphrey v. State, 680 N.E.2d 836, 839 (Ind. 1997) (*citing* Miller, 12 *Indiana Evidence*, 106-108 § 105.103 (2d. ed.) & David P. Leonard, *The New Wigmore: A Treatise on Evidence,* § 1.11.1 at 1:78-79 (1996) (discussing other jurisdictions' versions of Rule 105)).

Merritt v. State, 99 N.E.3d 706 (Ind. Ct. App. 2018) (trial court did not commit fundamental error by failing to *sua sponte* admonish jury to not speculate about the reasons for the unavailability of two witnesses who testified at the first trial; trial court might well have determined that defense counsel thought an admonishment with respect to the unavailability of both witnesses was not worth the risk of drawing unnecessary attention to their absences).

D. LIMITING INSTRUCTION

1. Timing of instruction

A party in Indiana may request a limiting instruction at the time the evidence is offered, rather than waiting until final jury instructions. See Humphrey v. State, 680 N.E.2d 836, 839, n.7 (Ind.1997) (*citing* Miller, 12 *Indiana Practice* 109-10 § 105.104 (3d. ed.)). A party may seek a limiting instruction or admonishment either prior to trial or at the time evidence is admitted. See State v. Velasquez, 944 N.E.2d 34, 39 (Ind. Ct. App. 2011).

> Wilhelmus v. State, 824 N.E.2d 405 (Ind. Ct. App. 2005) (trial court erred by not admonishing jury prior to admission of disputed evidence; the better practice is to immediately admonish jury as well as give a final instruction on the matter).

2. Instruction need not be in writing

Because Trial Rule 51 and Criminal Rule 8 do not apply to in-trial instructions, the court's instruction is an "admonition" and need not be presented to counsel in writing. Miller, 12 *Indiana Evidence* 149 § 105.105 (4th ed.) (*citing* Hunter v. State, 360 N.E.2d 588, 601-602 (Ind. Ct. App. 1977)).

3. Effect of limiting instruction

The law presumes that juries can and do follow the limiting instructions issued to them. United States v. Linwood, 142 F.3d 418, 426 (7th Cir. 1998), *cert. den.* 119 S. Ct. 224, 142 L.Ed.2d 184 (1998). The presumption is only overcome if there is an 'overwhelming probability' that the jury was unable to follow the instruction as given. Id. "Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." Bruton v. United States, 391 U.S. 123, 135, 88 S. Ct. 1620, 1627 (1968) (*quoting* Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294 (1957)).

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).

There are two types of instructions: (1) limiting instructions, described in Rule 105, when evidence is admissible for one purpose and not another; and (2) admonishments to disregard improper evidence or argument which is not referred to in Rule 105.

a. Limiting instruction

A timely and accurate instruction is presumed to cure any error in the admission of evidence. Camm v. State, 812 N.E.2d 1127, 1135 (Ind. Ct. App. 2004) (*citing* Kirby v. State, 744 N.E.2d 523, 555 (Ind. Ct. App. 2002)). However, if the instruction instructed the jury to consider the evidence as to one admissible purpose and the Court of Appeals find that the evidence should not have been admitted for that purpose, the instruction is inaccurate and does not cure any error. Camm, 812 N.E.2d at 1135.

Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (an admonishment instructing the jury that they could consider evidence of defendant's past affairs on the issue of motive and credibility did not cure error because the evidence of past affairs should not have been considered on either the issue of motive or credibility).

United States v. King, 897 F.2d 911, 915 (7th Cir. 1990) (a limiting instruction should have been submitted that was not confusing to the jury; however, because the prosecution never suggested that the jury should use the evidence for an improper purpose, and because (1) the possibility that the jury would become confused on that issue was the only justification for a limiting instruction and the prosecution never made this improper suggestion to the jury, and (2) the other evidence of defendant's guilt was substantial, the failure to give a limiting instruction was harmless error).

Even if an instruction is accurate, it still may not cure the error. There are various social science studies and articles that seriously question the efficacy of jury instructions. "There materials are interesting and suggest at a minimum that a court construct and deliver jury admonishments with care and precision." Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000). "Empirical studies unanimously show that a limiting instruction does not prevent spill-over prejudice." Commentary, Ind. R. Evid. 105 (*citing* ABA Section of Litigation, *Study of Emerging Problems Under the federal Rules of Evidence* (David A. Schlueter, 2d ed. 1991).

Humphrey v. State, 680 N.E.2d 836 (Ind. 1997), *post-conviction relief granted*, 73 N.E.3d 677 (Ind. 2017) (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).

b. Instruction to disregard evidence

Unless there is some compelling reason to think otherwise, a trial court's instruction is presumed to have dispelled a prejudice. Norcutt v. State, 633 N.E.2d 270, 273 (Ind. Ct. App. 1994).

Whitehair v. State, 654 N.E.2d 296 (Ind. Ct. App. 1995) (trial court's admonishment to jury limited danger of unfair prejudice caused by 404(b) evidence).

Jarrett v. State, 465 N.E.2d 1097 (Ind. 1984) (admonishment, with instruction, dispelled any prejudice from officer's references to the defendant having homosexual experiences with his own nephew in a child molest case). See also Roland v. State, 501 N.E.2d 1034 (Ind. 1986).

Boner v. State, 796 N.E.2d 1249 (Ind. Ct. App. 2003) (the trial court did not err in denying the defendant's motion for mistrial after arresting officer testified that driver said drugs found in car belonged to the defendant; judge's timely, specific and accurate admonishment to jury re: inadmissible and potentially prejudicial hearsay testimony was sufficient and recommended for future cases).

However, a simple fact that instruction 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. Bonner v. State, 650 N.E.2d 1139 (Ind. 1995).

Bonner v. State, 650 N.E.2d 1139 (Ind. 1995) (although an admonishment was given and there was other evidence of the defendant's guilt, nature, scope, and repetition of erroneously admitted testimony that defendant was involved in drug trafficking before date of charged offense was likely to have had prejudicial impact upon jury).

Scifres-Martin v. State, 635 N.E.2d 218 (Ind. Ct. App. 1994) (evidence inferring family cover-up of crime was so prejudicial that neither admonishment from the court nor curative instruction could remove prejudice).

Pavey v. State, 764 N.E.2d 692 (Ind. Ct. App. 2002) (no abuse of discretion in granting State's motion for mistrial following the defendant's opening statement; admonishment was insufficient to cure error).

Baker v. State, 506 N.E.2d 817(Ind. 1987) (although admonishment was given to jury, prosecutor's question to police officer whether defendant ever was offered a polygraph required reversal being defendant's credibility was at issue).

Glenn v. State, 796 N.E.2d 322 (Ind. Ct. App. 2003) (although court found prejudice mitigated in this case due to limiting instruction, court noted studies showing admonishments are not very effective and suggested the following more specific admonishment: "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").

E. CONFESSIONS AND STATEMENTS

1. Codefendant's confession implicating defendant: The Bruton rule

A limiting instruction is not an adequate substitute for the defendant's constitutional right of confrontation and cross-examination when a non-testifying codefendant's confession is admitted into evidence in a joint criminal trial and would be inadmissible against the other defendant or defendants. Bruton v. United States, 391 U.S. 123, 88 S.Ct.1620, 20 L.Ed.2d 476 (1968); but see Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987) (sufficiently redacted confession admissible against the codefendant who made it); Taggart v. State, 595 N.E.2d 256 (Ind. 1992).

a. Prosecution's statutory options

Ind. Code 35-34-1-11 provides three options to a prosecutor seeking admission of a non-testifying codefendant's confession: (1) joint trial with entire statement excluded; (2) separate trials; (3) joint trial with confession redacted.

b. Sufficiency of redaction

Redaction is insufficient if the redacted confession leaves little doubt as to the fact and identity of the confessor's confederate. Miller, *Courtroom Handbook on Indiana*

Evidence, 25 (2018-19 ed.) (*citing* Gray v. Maryland, 523 U.S. 185, 118 S.Ct.1151, 1155, (1988)).

2. Statements of Interrogating Officer

It is error for a trial court admit an interrogating police officer's statements to the defendant without a limiting instruction or admonishment. Smith v. State, 721 N.E.2d 213, 216 (Ind. 1999); Lampkins v. State, 778 N.E.2d 1248 (Ind. 2002). However, the defendant has no duty to request an instruction. Smith, 721 N.E.2d at 216.

Smith v. State, 721 N.E.2d 213 (Ind. 1999) (where officer's statements to defendant during interrogation were assertions of fact by the detective and not mere questions, and there was no admonishment to jury, their admission constituted reversible error).

VI. REMAINDER OF OR RELATED WRITING OR RECORDED STATEMENTS - RULE 106

A. OFFICIAL TEXT:

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part - or any other writing or recorded statement—that in fairness ought to be considered at the same time.

B. DOCTRINE OR RULE OF COMPLETENESS

When one party introduces part of a conversation or document, the opposing party is generally entitled to have the entire conversation or entire instrument placed into evidence. This rule is often referred to as the doctrine of completeness. Sweeney v. State, 704 N.E.2d 86, 110 (Ind. 1998) (*citing* McElroy v. State, 553 N.E.2d 835, 839 (Ind. 1990)); Evans v. State, 643 N.E.2d 877, 881 (Ind. 1994) (*citing* McElroy).

1. Application of common law

The doctrine of completeness has been incorporated into Indiana Rule of Evidence 106. Norton v. State, 772 N.E.2d 1028, 1033 (Ind. Ct. App. 2002). Indiana Rule of Evidence 106 has not changed the common law doctrine of completeness. Norton v. State, 772 N.E.2d 1028, 1033 (Ind. Ct. App. 2002).

2. Application of federal law

Although Indiana Courts are not bound by interpretation of the Federal Rules of Evidence, Indiana courts do not hesitate to look to federal cases interpreting similarly worded rules, such as the evidence rules relating to the doctrine of completeness, when faced with a similar issue. Lewis v. State, 754 N.E.2d 603, 607 (Ind. Ct. App. 2001).

3. Applies to all evidence regardless of whether it was recorded

Indiana Rule 106 only mentions writings and recorded statements. However, the common law rule of completeness, which applied to conversations whether recorded or not, was not superseded by the Indiana Rules of Evidence. Sweeney v. State, 704 N.E.2d 86, 110 (Ind. 1998), *cert. den.,* 119 S. Ct. 2393, 144 L.Ed.2d 793 (1999); Strange v. State, 674 N.E.2d 214, 216 (Ind. Ct. App. 1996); but see Lewis v. State, 754 N.E.2d 603 (Ind. Ct. App. 2001).

> Lewis v. State, 754 N.E.2d 603 (Ind. Ct. App. 2001) (although tape of defendant's statement is inadmissible under Indiana Rule of Evidence 106 to complete the story of officer's testimony explaining defendant's statement where State did not admit tape, common law doctrine of completeness permits impeaching the officer with entire conversation).

All modes of conveying information, including videotapes and other media which are not listed as 'writings and recordings' in Rule 1001(a), are 'writings and recordings' for purposes of Rule 106. "[T]he doctrine is wholly independent of the peculiarities of the technology by

which any particular medium transmits information, and applies to any mode of conveying information, including those identified for purposes of Article X as 'photographs.'" DesJardins v. State, 759 N.E.2d 1036 (Ind. 2001).

DesJardins v. State, 759 N.E.2d 1036 (Ind. 2001) (although doctrine of completeness applies to videotapes, defendant failed to demonstrate the relevance of the absent portions of which he complained on appeal).

Johnston v. State, 517 N.E.2d 397, 401 (Ind. 1988) (Trial Rule 32(A) permits the admission of relevant parts of a deposition when any other part is offered).

4. Applies to different writings or recorded statements

Indiana Rule of Evidence 106 expressly allows admission of "any other writing or recorded statement which in fairness ought to be considered contemporaneously with [the admitted writing or recorded statement or part thereof]." However, the other writing or recording must be relevant to the admitted writing or recording. "[O]bviously, the admission of one recorded statement could not require the admission of every other such statement in the party's possession." United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986).

United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986) (tape recording contained more than one conversation; defendant could not properly invoke the rule of completeness as foundation for admission of the subsequent conversation that was irrelevant to the first).

5. Purpose of rule: provide context; prevent misleading finder of fact

This rule prevents one party from misleading the jury by presenting statements out of context. The rule's purpose is to provide context for otherwise isolated comments when fairness requires it. Evans v. State, 643 N.E.2d 877, 881-82 (Ind. 1994).

6. Test for admission

The omitted portions of a statement are admissible to: (1) explain the admitted portion; (2) place the admitted portion in context; (3) avoid misleading the trier of fact; and (4) insure a fair and impartial understanding of the admitted portion. Lieberenz v. State, 717 N.E.2d 1242, 1248 (Ind. Ct. App. 1999); Strunk v. State, 44 N.E.3d 1, 7 (Ind. Ct. App. 2015).

Sanders v. State, 840 N.E.2d 319 (Ind. 2006) (trial court did not improperly redact references in letter from defendant to judge in which defendant states he has learned that the child had previously been molested and wanted to accept plea so not to cause child and her family any more harm; 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 defendant, and thus "doctrine of completeness" was not violated).

7. Trial court's discretion

The trial court must determine whether the need for contemporaneous admission of the additional evidence to avoid misleading the jury will outweigh the impact on the adversary's presentation. See Miller, 12 *Indiana Evidence* § 106.103 (4th ed.). Whether to admit

evidence under Rule 106 is within the court's discretion. Id.; Hawkins v. State, 884 N.E.2d 939, 948 (Ind. Ct. App. 2008).

The trial court's exercise of discretion under Rule 106 involves weighing the adequacy of the repair work necessary to correct any potentially misleading impression caused by an incomplete presentation against the waste of time and attention and the unfairness involved in blunting the proponent's presentation of his case when everything is required to be read at one time. United States v. Lewis, 954 F.2d 1386 (7th Cir. 1992) (*citing* United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981)); see also *Weinstein's Federal Evidence,* at 106-07 (2d ed. 1998).

Lewis v. State, 754 N.E.2d 603 (Ind. Ct. App. 2001) (although admitting the entire videotape, per defendant's request, of defendant's statement would have alleviated any possibility that the jury did not understand the statement, trial courts have discretion to weigh the competing interest of fairness to a defendant and the elimination of unjustifiable expense and delay; no abuse of discretion).

Hawkins v. State, 884 N.E.2d 939 (Ind. Ct. App. 2008) (separate conversations recorded by jail properly excluded; Evidence Rule 106 is limited by fairness, which in this case did not require that trial court allow admission of otherwise inadmissible self-serving hearsay).

8. Timing

A party may immediately introduce the remainder of a document under Rule 106. The party may also choose to wait and introduce the remainder of the document during cross-examination or as part of his case in chief. Brown v. State, 728 N.E.2d 876, 879 (Ind. 2000).

Unlike the common law doctrine of completeness that required a party to wait for cross examination or the party's own case in chief or rebuttal to offer completing evidence, Rule 106 affects the order of proof by permitting a party to require "immediate completeness," when necessary to avoid prejudice. Miller, 12 *Indiana Evidence* §§ 106.102. 106.105 (4th ed.). The trial court has authority under Rule 611(a) to control the order of proof to make the presentation of evidence effective for the ascertainment of truth. Id.

C. RULE OF COMPLETENESS SUBJECT TO OTHER EVIDENCE RULES AND REDACTION

1. Other evidence rules

The remainder of the statement or document is subject to the general rules of admissibility, and any portions found immaterial, irrelevant, or prejudicial must be redacted. Sweeney v. State, 704 N.E.2d 86, 110 (Ind. 1998), *cert. den.* (*citing* Evans v. State, 643 N.E.2d 877, 881 (Ind. 1994)).

a. Relevance

When one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant. Beech Aircraft Corporation v. Rainey,

488 U.S. 153, 172, n.14, 109 S. Ct. 439, 450-451 (1988) (*citing* 1 *Weinstein's Federal Evidence,* 106[02], at 106-20 (2d ed. 1998)).

Desjardines v. State, 759 N.E.2d 1036 (Ind. 2001) (although Rule 106 was applicable to videotapes, the defendant failed to demonstrate relevance of excluded portions).

Hart v. State, 30 N.E.3d 1283 (Ind. Ct. App. 2015) (no error in allowing State to redact from defendant's statements to police details of a peace treaty he brokered between rival rap groups five months before shooting; details of treaty were irrelevant and unnecessarily add details that are likely to confuse issues).

b. Unfair prejudice

Evidence highly prejudicial to the defendant, offered by the State may not be admitted under Rule 106. Norton v. State, 772 N.E.2d 1028, 1034 (Ind. Ct. App. 2002) (*citing* Stanage v. State, 674 N.E.2d 214 (Ind. Ct. App. 1996)). However, there is a split in authority whether evidence offered by the defendant can be excluded on the basis of its prejudice to the defendant.

Norton v. State, 772 N.E.2d 1028, 1034 (Ind. Ct. App. 2002) ("a statement may be constructed of parts which are both inculpatory and exculpatory; it does not serve the interests of justice for the State to be permitted to admit portions of the statement which are inculpatory against an individual, but prevent the same individual from entering the remaining portions of the statement which are relevant while being both inculpatory and exculpatory under the guise that the judicial system is protecting the individual from prejudicial information being brought before the jury").

But see Stanage v. State, 674 N.E.2d 214 (Ind. Ct. App. 1996) (trial court's refusal to allow completing portions of videotape made by defendant, on grounds that the completing material was inadmissible evidence of prior acts, was not error, although the defendant was the party requesting admission of the portions with the prior acts).

c. Prior Bad Acts

Indiana Rules of Evidence require that prior bad acts must be redacted from statements admitted into evidence. Stanage v. State, 674 N.E.2d 214, 216 (Ind. Ct. App. 1996).

Stanage v. State, 674 N.E.2d 214 (Ind. Ct. App. 1996) (trial court's refusal to allow evidence completing portions of videotape made by defendant, on grounds that the completing material was inadmissible evidence of prior acts, was not error).

Atwell v. State, 738 N.E.2d 332 (Ind. Ct. App. 2000) (testimony that the defendant battered a woman several days before shooting the victim was admissible under the doctrine of completeness in order to explain the shooting victim's testimony on cross by the defendant that victim told police he was going to knock defendant's brains out the night of the shooting; victim never got into a physical altercation with the defendant and threatened him because he had beaten the woman; thus, evidence was not offered for the purpose of showing conformity therewith).

d. Evidence Concerning Possible Penalties

Generally, comments on sentencing are not admissible to the jury.

Saperito v. State, 490 N.E.2d 274, 277 (Ind. 1986) (defendant's statement concerning length of possible sentence in letter written to witness was not admissible under completeness doctrine).

2. Exception: Rule 106 requires admission of otherwise inadmissible evidence

a. Court cannot use rules meant to protect defendant's rights in order to exclude recordings, writings, or remainder thereof that defendant wants into evidence to show full story

(1) Waiver of rules of evidence

"A statement may be constructed of parts which are both inculpatory and exculpatory. It does not serve the interests of justice for the State to be permitted to admit portions of the statement which are inculpatory against an individual but prevent the same individual from entering the remaining portions of the statement which are relevant while being both inculpatory and exculpatory under the guise that the judicial system is protecting the individual from prejudicial information being brought before the jury." Norton v. State, 772 N.E.2d 1028, 1034 (Ind. Ct. App. 2002).

(2) Waiver of constitutional rights

A defendant may waive the protections set forth in Bruton v. U.S., 88 S.Ct. 1620 (1968), by agreeing that an entire statement of the co-defendant should be placed into evidence if the statement, as redacted, is misleading. Norton v. State, 772 N.E.2d 1028, 1032-33 (Ind. Ct. App. 2002). Further, it is error for the trial court to exclude evidence offered by the defendant under Rule 106 on the grounds that it violates the defendant's right to confrontation; "it is a well-settled principle of law that a defendant may waive his right to confront and cross-examine witnesses." Id. at 1031.

b. Rule 106 May Trump Hearsay Rules

Hearsay is admissible under Indiana Rule of Evidence 106 when the hearsay statements, in fairness ought to be considered contemporaneously with other portions of same statement or conversation in which the hearsay is included. Sweeney v. State, 704 N.E.2d 86, 110-111, n. 42 (Ind. 1998), *cert. den.*, 119 S. Ct. 2393, 144 L.Ed.2d 793 (1999).

(1) Defendant's Self-serving Hearsay Statements

The doctrine of completeness may even permit the introduction of self-serving hearsay statements. In balancing the potential harm resulting from the introduction of self-serving hearsay against that resulting from the exclusion of relevant portions of prior statements otherwise admitted, the policy is expressed in Trial Rule 43(A) is persuasive: In any case, the statute or rule which favors the reception of evidence

governs. Sweeney v. State, 704 N.E.2d 86, 110-11 (Ind. 1998), *cert. den.* (*citing* McElroy v. State, 553 N.E.2d 835, 839-40 (Ind. 1990)).

McElroy v. State, 553 N.E.2d 835 (Ind. 1990) (trial court erred in refusing to allow defendant to cross a police officer as to what defendant had said to him as to the manner in which the victim was killed when the police officer testified on direct as to incriminating statements made by the defendant during the same interview).

Sweeney v. State, 704 N.E.2d 86 (Ind. 1998) (trial court did not abuse its discretion in refusing to allow defendant to put into evidence self-serving hearsay statements he made in interview with federal authorities, although State introduced other statements made by defendant in the interview; the self-serving hearsay statements were not relevant to the defendant's statements introduced by the State).

Farmer v. State, 908 N.E.2d 1192 (Ind. Ct. App. 2009) (trial court committed harmless error by refusing to allow defendant to cross-examine a police officer on his self-serving statements made during his interview; because doctrine of completeness applies not only to writings but also oral conversations, it will always be proper to cross-examine and to impeach an officer testifying about a conversation with a defendant).

Ryans v. State, 518 N.E.2d 494 (Ind. Ct. App. 1988) (under common law rule, defendant's statement to the police officer that he did not know checks were written on closed account should have been admissible even though it was hearsay when officer, on direct, testified that defendant admitted cashing the checks at five bank branches on one day, withdrawing the balance shortly thereafter).

(a) Implication of Fifth Amendment right not to testify

In criminal cases where the defendant elects not to testify, more is at stake than the order of proof. If the prosecution is not required to submit all relevant portions of prior testimony which further explain selected parts which the prosecution has offered, the excluded portions may never be admitted. Thus, there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case. A defendant should not be forced to take the stand to introduce the omitted exculpatory portions of (a) confession (which) is a denial of his right against self-incrimination. The prosecution's incomplete presentation may paint a distorted picture of a defendant's prior testimony which he was powerless to remedy without taking the stand. United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981); United States v. Sutton, 801 F.2d 1346, 1369-70 (D.C. Cir. 1986).

(b) Limitation

The defendant cannot admit a transcript of his pretrial hearsay statements denying a crime simply because an officer testifies about the interview on direct. However, the defendant may elicit through cross examination the fact that the defendant denied the crime. The Fifth Amendment privilege should not be used

as a sword rather than a shield. In other words, the defendant cannot refuse to testify, but admit into evidence his denial of the crime in pretrial statements when the state offers only testimony from officers concerning the pretrial statements. Brown v. State, 525 N.E.2d 294 (Ind. 1988).

(2) Prior Consistent Statements to Rehabilitate

The jury must be permitted to determine for itself the extent of inconsistencies in context. Once a party attacks the credibility of a witness on the grounds of prior inconsistent statements, the door is open for the opposing party to introduce the prior statements in order that the jury might weigh the accusation of inconsistency and the degree thereof. This is especially true where the alleged inconsistencies go to details, and most of the statements are otherwise substantially similar. Evans v. State, 643 N.E.2d 877, 882 (Ind. 1994) (*citing* Mayhew v. State, 537 N.E.2d 1188, 1191 (Ind. 1989) and United States v. Harris, 761 F.2d 394 (7th Cir. 1985) (applying Federal Rule 106)).

Evans v. State, 643 N.E.2d 877, 882 (Ind. 1994) (suggesting that Ind. R. Evid. 106 is a distinct doctrine with a purpose distinct from the rules concerning hearsay, and thus, prior consistent statements that do not fall under 801(d) may be admissible under the doctrine of completeness; however, holding that the State could introduce the remainder of the witness' statement to the police with prior consistent statements because statements met requirements of both the doctrine of completeness and Indiana Rule of Evidence 801(d)(1)(B)).

Birdsong v. State, 685 N.E.2d 42 (Ind. 1997) (without any analysis under Indiana Rule of Evidence 801(d)(1)(B), the court held that because the defendant used grand jury testimony several times in attempt to impeach a state witness's testimony, the State was entitled to rehabilitate the witness on redirect examination by introducing other pertinent portions of statement).

3. Limitation on admission of inadmissible evidence

Rule 106 was not intended to override every privilege and other exclusionary rules of evidence. In some cases where an excerpt is misleading the only cure is to exclude it rather than to put in other excerpts. United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986).

D. LAYING FOUNDATION FOR ADMISSION OF EVIDENCE UNDER RULE 106

In order to lay a sufficient foundation [for Rule 106 evidence] the offeror need only specify the portions of the testimony that are relevant to the issue at trial, and which qualify or explain portions already admitted. This is a minimal burden that can be met without unreasonable specificity. United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981).