CHAPTER 4
Relevant Evidence
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CHAPTER 4

RELEVANT EVIDENCE

I. TEST FOR RELEVANT EVIDENCE - RULE 401

A. OFFICIAL TEXT:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

B. DEFINITION OF RELEVANT EVIDENCE

Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Sturgis v. State, 654 N.E.2d 1150 (Ind. Ct. App. 1995); Henson v. State, 535 N.E.2d 1189 (Ind. 1989). In a criminal case, evidence need only have some tendency, however slight, to make the existence of a material fact more or less probable or tend to shed any light upon the guilt or innocence of the accused. Simmons v. State, 717 N.E.2d 635 (Ind. Ct. App. 1999); Christian-Hornaday v. State, 649 N.E.2d 669 (Ind. Ct. App. 1995).

> Carter v. State, 932 N.E.2d 1284 (Ind. Ct. App. 2010) (Wal-Mart's SOP for detaining shoplifters was irrelevant in theft case; whether Wal-Mart employee followed Wal-Mart's policy does not change the illegality of defendant's actions).

Under earlier law, evidence was relevant if it tended to prove or disprove a material fact or fact in issue. Rule 401 extends the concept of relevancy to facts that are not disputed (although such evidence may be excluded under Rule 403 for waste of time). Williams v. State, 681 N.E.2d 195, 199, n.2 (Ind. 1997); Miller, 12 *Indiana Evidence*, 273 § 401.101 (3d ed.). The universe of relevant evidence is not narrowed by a defendant's theory of defense.

> Duncan v. State, 23 N.E.3d 805 (Ind. Ct. App. 2014) (no abuse of discretion in admitting ammunition even though defendant did not dispute that he possessed gun or that he knew that it was loaded; defendant's offer to concede a point or to stipulate generally cannot prevail over the government's choice to offer evidence showing guilt and all the circumstances surrounding the offense).

1. Probative value may not be based on speculation

An inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility. Vasquez v. State, 741 N.E.2d 1214 (Ind. 2001).

Vasquez v. State, 741 N.E.2d 1214 (Ind. 2001) (trial court did not abuse its discretion in admitting evidence that it was possible the defendant could have obtained medication for sexually transmitted disease from another inmate while incarcerated; although supervisor of county jail medical department did testify that inmates without medicine have access to other inmates' medicine if other inmates allow it, he did not speculate as to whether defendant obtained medication in jail).

Smith v. State, 718 N.E.2d 794 (Ind. Ct. App. 1999) (alleged statement by defendant's three-year-old son, upon seeing man on television show enter a room where a baby was crying, "He's gonna hit her because she's crying" was not relevant to prove that defendant had knowledge of her boyfriend's behavior toward daughter, in neglect prosecution).

2. No automatic relevance: *Res gestae* rule no longer used

Res gestae is a term used at common law, denoting facts that are part of the story of a particular crime. "[T]he admissibility of evidence heretofore claimed admissible as part of the *res gestae* should henceforth be analyzed by reference to the Indiana Rules of Evidence. The *res gestae* rule itself has not survived the adoption of those rules." Swanson v. State, 666 N.E.2d 397, 397-98 (Ind. 1996). Facts that are part of the story of the crime are admissible if relevant within the meaning of Rule 401. Thompson v. State, 690 N.E.2d 224, 234, n.10 (Ind. 1997) (*citing* Swanson v. State, 666 N.E.2d 397 (Ind. 1996)).

PRACTICE POINTER: Although the "res gestae" evidence rule has been superseded, the term "res gestae" is not completely obsolete. It refers to acts that are part of an uninterrupted transaction; a crime that is continuous in its purpose and objective is deemed to be a single uninterrupted transaction. Dye v. State, 984 N.E.2d 625, 629 (Ind. 2013) (habitual offender enhancement may not be supported with a conviction arising out of the same res gestae as the conviction used to prove that the defendant was a serious violent felon; impermissible double enhancement).

Brown v. State, 747 N.E.2d 66 (Ind. Ct. App. 2001) (reversible error to admit evidence and testimony relating to shotgun, ski masks, and duct tape found in the vehicle at the time of arrest; these items had no relevancy to issue of the defendant's guilt or innocence on charge of possessing unlicensed handgun, nor did they prove or disprove any material fact in this case). See also Romack v. State, 446 N.E.2d 1346 (Ind. Ct. App. 1983).

Hollen v. State, 740 N.E.2d 149 (Ind. Ct. App. 2000), *aff'd by,* 761 N.E.2d 398 (Ind. 2002) (second battery against same person in different county on the same day was not relevant in trial concerning first battery).

Stringer v. State, 853 N.E.2d 543 (Ind. Ct. App. 2006) (fact that the defendant possessed a handgun at the time of arrest and admitted firing the gun shortly before arrest was irrelevant and highly prejudicial in a possession of controlled substance and resisting by fleeing case).

PRACTICE POINTER: Swanson also holds that acts that occur at the same time or under the same circumstances are not prior bad acts subject to Rule 404(b). "[T]he paradigm of inadmissible evidence under Rule 404(b) is a crime committed on another day in another place, evidence whose only apparent purpose is to prove the defendant is a person who commits crimes." Wages v. State, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007). Some Court of Appeals cases have not only expanded the definition of intrinsic evidence to include uncharged crimes that did not occur even in the same day, let alone under the same circumstances of the crime, but also have allowed the prior acts into evidence to "complete the story." Argue these cases are incorrectly relying on the long-*overruled* res gestae exception. See, e.g., Willingham v. State, 794 N.E.2d 1110 (Ind. Ct. App. 2003) (defendant's admission to selling cocaine the week prior to his arrest for dealing in cocaine was probative of his motive to sell cocaine detectives found in his bedroom, and was inextricably bound up with charged crime); Bocko v. State, 769 N.E.2d 658 (Ind. Ct. App. 2002) (evidence that heroin was found in one of three bags defendant threw to floor as he prepared to go to police office served to complete story of crime and was therefore admissible in prosecution for cocaine possession); Cowan v. State, 783 N.E.2d 1270 (Ind. Ct. App. 2003) (allowing admission of evidence of other acts as well as drug usage because it served as a basis for everything that followed charged incident and was necessary to explain and understand incident).

3. Creating and removing relevancy

A party may open door to otherwise inadmissible evidence by injecting an issue into trial. Caley v. State, 650 N.E.2d 54 (Ind. Ct. App. 1995). On the other hand, stipulations by both parties may limit facts in issue, and consequently, admissibility of evidence relevant to establishing those facts, when approved by court conducting the trial. Butler v. State, 647 N.E.2d 631 (Ind. 1995).

4. Standard of appellate review

a. Abuse of discretion

Reviewing court will not reverse a trial court's decision unless the decision was an abuse of discretion; that is, where the decision was clearly against the logic and effect of the facts and circumstances before it. In determining whether evidence is relevant and admissible, reviewing court must determine whether the evidence tends to prove or disprove a material fact in the case or sheds any light on the guilt or innocence of the accused. Carnahan v. State, 681 N.E.2d 1164, 1166 (Ind. 1997).

Reviewing court will sustain the trial court if it can be done on any legal ground apparent in the record. Angleton v. State, 686 N.E.2d 803 (Ind. 1997), *appeal after remand*, 714 N.E.2d 156 (Ind. 1999).

Even if the offered evidence is only marginally relevant, it is within sound discretion of trial court to determine its admissibility. Blinn v. State, 677 N.E.2d 51 (Ind. Ct. App. 1997).

However, the trial court's discretion to determine relevancy of evidence must be balanced against the defendant's right to present evidence in defense, guaranteed by the Sixth and Fourteenth Amendments. Kucki v. State, 483 N.E.2d 788 (Ind. Ct. App. 1985).

Hyser v. State, 996 N.E.2d 443 (Ind. Ct. App. 2013) (trial court improperly denied defendant a meaningful opportunity to present a complete defense in child molesting trial, i.e., that the allegations and testimony against him were fabricated as a retaliatory act in response to a report made to DCS that he believed complaining witness (CW) was being abused by CW's mother's boyfriend).

Bisard v. State, 26 N.E.3d 1060 (Ind. Ct. App. 2015) (in ruling that if defendant pursued testimony about his drinking habits he would open the door to his unrelated OWI arrest, trial court did not deny defendant's right to present a defense and to present his own witnesses).

b. Harmless error standard

Jury trials: Errors in the admission or exclusion of evidence are harmless unless the probable impact on the jury, in light of all the evidence in the case, affects the substantial rights of the parties. Schwestak v. State, 674 N.E.2d 962, 965 (Ind. 1996); Inman v. State, 4 N.E.3d 190 (Ind. 2013).

Bench trials: Appellate courts presume that in proceedings tried to the bench, a court renders its decisions solely on the basis of relevant and probative evidence. Coleman v. State, 558 N.E.2d 1059, 1062 (Ind. 1990). This has been termed the "judicial temperance presumption." Konopasek v. State, 946 N.E.2d 23, 28 (Ind. 2011). The judicial temperance presumption may be overcome where the judge in a court trial has erroneously admitted evidence over a specific defense objection. Id.; Fletcher v. State, 264 Ind. 132, 340 N.E.2d 771 (1976). The presumption also may be overcome where the judge expressly states a prohibited purpose for admitting the evidence, or where the evidence is admissible at the time of trial but becomes inadmissible while an appeal is pending due to a change in the law. Konopasek, 946 N.E.2d at 29.

c. Must object to irrelevant evidence or waive issue

Angleton v. State, 686 N.E.2d 803, 808-11, n.4 (Ind. 1997), *appeal after remand*, 714 N.E.2d 156 (Ind. 1999) (an objection solely on grounds of relevance does not preserve the issue of whether the prejudicial impact of the evidence outweighs its probative value; objection to evidence as "irrelevant hearsay" preserved issue for relevance and hearsay analysis but was insufficient to preserve issue of whether prejudicial impact outweighed probative value).

But see Jackson v. State, 712 N.E.2d 986 (Ind. 1999) ("In view of Evidence Rule 401, a 'relevancy' objection at trial now preserves an appellate claim of relevancy under Rule 401 and the appropriate balancing for undue prejudice under 403").

PRACTICE POINTER: In light of conflicting case law, do not rely solely upon a relevance objection under Rules 401 and 402. Whenever evidence is objectionable on relevance grounds, it will usually also be objectionable on the grounds that its prejudicial impact outweighs its probative value and should be excluded under Rule 403. Before the adoption of the Indiana Rules of Evidence, cases held that the objection "irrelevant" was general and did not preserve any issue for appellate review. Foster v. State, 484 N.E.2d 965, 967 (Ind. 1985). Counsel was required to specify what harm would result from the irrelevant evidence in order to preserve the issue. See Young v. State, 620 N.E.2d 21, 25 (Ind. Ct. App. 1993).

5. Conditional relevancy

See Chapter 1, for a more detailed discussion of Rule 104(b) and conditional relevancy.

a. Rule 104(b) test

Under Rule 104(b) when relevancy 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.

b. When relevance depends on a speculative fact

"If the fact upon which the evidence depends is too speculative, then the evidence will not be admitted under Rule 104(b). Once evidence passes the 104(b) hurdle, the court then separately determines admissibility under the other rules of evidence. The speculative component of evidence conditioned on the existence of a fact may then become part of the trial court's relevance inquiry. The trial court must determine whether the evidence is of no probative value or whether its probative value is substantially decreased by its speculative component and inadmissible under Rule 402 (relevance) or Rule 403 (balancing). This is a highly fact sensitive inquiry and accordingly is reviewed for abuse of discretion." Cox v. State, 696 N.E.2d 853 (Ind. 1998) (*citing* Thompson v. State, 690 N.E.2d 224, 233 (Ind. 1997)).

> Wells v. State, 441 N.E.2d 458, 463 (Ind. 1982) (expert testimony that bullets fired into the plant where defendant worked were from the same weapon as the bullet taken from the victim was inadmissible because an unreliable tip did not link the defendant to the shooting with sufficient certainty).

II. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE - RULE 402

A. OFFICIAL TEXT:

Relevant evidence is admissible unless any of the following provides otherwise:

(a) the United States Constitution;
(b) the Indiana Constitution;
(c) a statute not in conflict with these rules;
(d) these rules; or
(e) other rules applicable in the courts of this state.

Irrelevant evidence is not admissible.

"There are two components to relevant evidence: materiality and probative value." Evidence is material if it is "of consequence to the determination of the action," and "evidence that affects the probability that a fact is as a party claims it too has probative force." 1 *McCormick on Evidence*, § 185, 994-95 (7th ed. 2013). "Evidence has 'probative value' if it tends to prove an issue." BLACK'S LAW DICTIONARY 836 (6th Ed.).

Under the Rules of Evidence, relevant evidence is presumptively admissible. Rule 402.

1. Exceptions

Evidence rendered inadmissible by:

(1) Constitution (federal or state).
(2) Statute not in conflict with Evidence Rules.
(3) Another Evidence Rule.
(4) Another rule applicable in Indiana courts.

See Rule 402.

2. Examples

(1) Rule 404 (excludes evidence of conduct conforming to character)
(2) Rule 407 (excludes evidence of subsequent remedial measures)
(3) Rule 408 (excludes evidence of compromise and offers to compromise)
(4) Rule 409 (excludes evidence of payment for medical and similar expense)
(5) Rule 411 (excludes evidence of liability insurance)
(6) Rule 501 (privileged evidence)
(7) Discovery violation (Braswell v. State, 550 N.E.2d 1280, 1283 (Ind. 1990) (exclusion of evidence required where State blatantly and deliberately refused to comply with discovery order).

B. IRRELEVANT EVIDENCE GENERALLY INADMISSIBLE

1. Objection necessary

Party challenging evidence must object and clarify harm that would result from admission of irrelevant evidence. See Rule 103(a); Young v. State, 620 N.E.2d 21, 25 (Ind. Ct. App. 1993).

2. Opening the door

A defendant may open the door to otherwise inadmissible evidence by injecting an issue into the trial himself. Caley v. State, 650 N.E.2d 54, 56 (Ind. Ct. App. 1995). A party's successful offer of irrelevant evidence opens the door to admission of responsive evidence by the other party. Party who opened the door cannot complain on relevancy grounds when answering evidence is received. Storey v. State, 552 N.E.2d 477, 482 n.2 (Ind. 1990).

Boyd v. State, 650 N.E.2d 745 (Ind. Ct. App. 1995) (although possession of knife had no relevance or connection to crime charged, evidence was admissible to contradict the defendant's statement that he had never owned a knife). See also Marshall v. State, 893 N.E.2d 1170 (Ind. Ct. App. 2008).

But see Petit v. State, 135 Ind. 393, 34 N.E. 1118 (1893) (party cannot passively allow admission of irrelevant evidence and then claim a right to present his own irrelevant matter).

Responding evidence must somehow relate to the evidence said to have opened the door. Kelley v. State, 555 N.E.2d 1341, 1346 (Ind. Ct. App. 1990).

Wiggins v. State, 727 N.E.2d 1 (Ind. Ct. App. 2001) (because it is unclear how knowing the defendant's income from 1985, much less 1975, would aid jury in evaluating the defendant's claim that he could not work very much in 1992 and 1993 because of depression associated with divorce, this evidence was irrelevant and should not have been admitted).

Warner v. State, 579 N.E.2d 1307 (Ind. 1991) (defendant's testimony that he was forced to make confession due to promises of leniency and withholding of medical treatment did not open door to entire fifty-one-page confession in which the defendant confessed to an additional seventeen crimes unrelated to the charge).

C. ADMISSIBILITY OF DIFFERENT TYPES OF EVIDENCE

1. Witness's ability to state facts accurately

Evidence relating to witness's ability and willingness to state facts accurately is relevant. Morgan v. State, 425 N.E.2d 625, 627 (Ind. 1981).

2. Extent of injuries

McMurry v. State, 467 N.E.2d 1202 (Ind. 1984) (victim's testimony re current condition and two surgeries (removal of bullet from head and replacement of bone removed in first surgery) were properly admitted; the character and severity of the wounds were relevant to the defendant's intent to commit murder). See also Haggenjos v. State, 441 N.E.2d 430 (Ind. 1982).

3. Evidence that connects defendant to confederate in crime

Griffin v. State, 275 Ind. 107, 415 N.E.2d 60, 63-64 (1981) (evidence is relevant if tends to connect defendant to confederate in the crime).

Haak v. State, 695 N.E.2d 944 (Ind. 1998) (co-conspirator's motives for seeking another's assistance in arranging murder for hire were irrelevant in conspiracy and murder prosecution of defendant who allegedly carried out the killing).

4. Evidence that connects defendant to scene of crime

Evidence is relevant if it tends to connect accused to charged crime. For physical evidence to be admissible, witness who observed it must be able to state at least that it is like the instrumentality used in the crime, and there must be a showing that the item is connected to the defendant and the commission of the crime. Rafferty v. State, 610 N.E.2d 880, 883 (Ind. Ct. App. 1993).

Stwalley v. State, 534 N.E.2d 229, 233 (Ind. 1989) (evidence that victim's neighbor saw the defendant "prowling around her home" the night prior to the attack on the victim was relevant), *overruled, in part, on other grounds by* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).

Kilpatrick v. State, 746 N.E.2d 52 (Ind. 2001) (defendant's check-cashing card and photo identification, retrieved by police from home in which fight began, were irrelevant because items were not discovered until approximately five months after murder, during which time homeowner testified defendant visited her home several times; there was no evidence that last time defendant was present at home was on night of murder).

Rasnick v. State, 2 N.E.3d 17 (Ind. Ct. App. 2013) (probative value of GPS evidence tracking defendant's movements during crime period exceed prejudicial impact, which was minimized by parties' pretrial stipulation that jury would not be advised that defendant was on parole).

Forrest v. State, 655 N.E.2d 584 (Ind. Ct. App. 1995) (evidence of bloody shirt in possession of defendant's sister was irrelevant to murder where defendant did not present any evidence that the blood on the shirt belonged to the victim, murderer, or was linked to crime).

In fact, evidence connecting the scene of the crime with criminal activity may be relevant, even in absence of a connection with the defendant. Martinez v. State, 549 N.E.2d 1026, 1029 (Ind. 1990).

5. Pornography and sexual devices

Rafferty v. State, 610 N.E.2d 880 (Ind. Ct. App. 1993) (in trial for child molesting, it was reversible error to admit various exhibits and testimony relating to sexually explicit paraphernalia because materials were not shown to have been used in the crime and therefore were irrelevant).

Biberstine v. State, 632 N.E.2d 377 (Ind. Ct. App. 1994) (sexually explicit magazines and related testimony of victim was irrelevant in child molestation trial, absent link between magazines and crime). See also Buchanan v. State, 767 N.E.2d 967 (Ind. 2002); and Cutshall v. State, 166 N.E.3d 373 (Ind. Ct. App. 2021) (defendant's browsing history and evidence he accessed adult pornography on night of incident was irrelevant in child molesting prosecution).

McGrew v. State, 673 N.E.2d 787 (Ind. Ct. App. 1996), *aff'd, in part and vacated in part on other grounds*, 682 N.E.2d 1289 (Ind. 1997) (dildo found at home of defendant charged with criminal deviate conduct was probative even though not used in incident, as it corroborated victim's account of the incident).

6. Conversations or song lyrics about criminal activity

Shane v. State, 716 N.E.2d 391 (Ind. 1999) (trial court erred in permitting witness to testify as to conversation she overheard between the defendant and co-defendant concerning the commission of "perfect murder;" the murder at issue was not committed as described in "perfect murder" scenario).

Harris v. State, 644 N.E.2d 552 (Ind. 1994) (testimony that witness overheard defendant state in a joking manner that "he wanted to see how it felt to kill somebody" was relevant because accomplice testified that defendant made a similar comment upon returning to his car immediately after robbery/murder).

Houser v. State, 823 N.E.2d 693 (Ind. 2005) (lyrics to popular heavy metal band's song which defendant frequently listed to, describing an individual who sleeps during the day and prowls at night, were irrelevant in murder case).

Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App. 2004) (rap lyrics, referring to placing a body in the trunk of a car, were admissible to show defendant's intent to murder as they showed he had a hostile and violent attitude toward victim and to rebut defendant's claim that victim's husband killed her).

Ward v. State, 138 N.E.3d 268 (Ind. Ct. App. 2019) (song posted to defendant's social media account properly admitted at trial because it was highly probative of defendant's participation in the crimes given its proximity and accurate description of murder scene; evidence was not unfairly prejudicial because it was accompanied by a jury instruction that mitigated any risk that the jurors would consider the song based on racial prejudices).

7. Weapons

a. Means of obtaining a weapon

Thompson v. State, 690 N.E.2d 224, 234 (Ind. 1997) (defendant's access to gun was an important piece of circumstantial proof increasing the likelihood that he was the killer).

b. Weapons similar to that used in crime

The fact that a person possesses the same instrumentality as that used in a crime has only the slightest tendency to support an inference that the person committed the crime, especially where the possession is remote in time from the date the crime occurred. Pope v. State, 737 N.E.2d 374 (Ind. 2000).

Wilson v. State, 770 N.E.2d 799 (Ind. 2002) (photo of defendant brandishing firearms and flashing what appeared to be gang signs was irrelevant where there was no comparison between shell casings at scene and weapon in photo).

Tynes v. State, 650 N.E.2d 685 (Ind. 1995) (assault rifle and pistol found in the truck the defendant had been driving at the time of arrest was irrelevant in murder arising when victim was fatally shot with shotgun; weapons were not used in charged crime). See also Hubbell v. State, 754 N.E.2d 884 (Ind. 2001); Jervis v. State, 679 N.E.2d 875 (Ind. 1997); and Heavrin v. State, 675 N.E.2d 1075 (Ind. 1996).

Stringer v. State, 853 N.E.2d 543 (Ind. Ct. App. 2006) (fact that the defendant possessed a handgun at the time of arrest and admitted firing the gun shortly before arrest was irrelevant and highly prejudicial in a possession of controlled substance and resisting by fleeing case).

Messel v. State, 80 N.E.3d 230 (Ind. Ct. App. 2017) (trial court admitted evidence that defendant once possessed a mag flashlight, which the State posited may have been murder weapon; assuming admission of this speculative evidence was erroneous, Court found it harmless due to overwhelming independent evidence of guilt).

Maffett v. State, 113 N.E.3d 278 (Ind. Ct. App. 2018) (although defendant's vague statements may create inference of he was engaged in activities for which a gun was required for protection, a "mere inference" of bad acts does not implicate Rule 404(b)).

Malone v. State, 700 N.E.2d 780 (Ind. 1998) (six .38 caliber bullets found in murder defendant's girlfriend's home were relevant because they tended to connect him to the crime by way of reasonable inferences; victim was killed with a .38 caliber bullet and defendant stayed at girlfriend's home at the time of the murder and girlfriend did not own a gun or know from where the bullets came).

However, the defendant's possession of weapons not used in the crime may be relevant to rebut the defendant's defense of accident, Simmons v. State, 717 N.E.2d 635 (Ind. Ct. App. 1999), or self-defense, Lycan v. State, 671 N.E.2d 447 (Ind. Ct. App. 1996).

8. Details of admissible prior acts

If the fact of conviction for a prior murder is presumptively prejudicial, the gruesome details of that offense may be even more damaging. The rules of evidence require courts to guard against exploitation of those details. Accordingly, even where the defendant's involvement in a prior murder is relevant in part, the circumstances of the killing should not be presented unless they too are relevant. Thompson v. State, 690 N.E.2d 224, 235-36 (Ind. 1997).

9. Evidence of innocence

Evidence is admissible if it makes the defendant's guilt less probable. Due process requires the admission of critical evidence, even reliable hearsay evidence critical to the defendant's theory of defense.

Kubsch v. Neal, 838 F.3d 845 (7th Cir. 2016) (habeas relief granted because Indiana Supreme Court's conclusion that due process clause did not require admission of critical evidence into Kubsch's trial was either contrary to, or an unreasonable application of, Supreme Court precedent).

Shelton v. State, 679 N.E.2d 499 (Ind. Ct. App. 1997) (evidence that defendants had permission to hunt on private land was irrelevant in prosecution from hunting from the public road).

Lush v. State, 783 N.E.2d 1191 (Ind. Ct. App. 2003) (testimony that witness did not approve of mother's parenting skills and that witness had problems with mother's care of two-year-old daughter victim before defendant stepfather became member of household was irrelevant to neglect and battery charges).

a. Misidentification or possible misidentification

Evidence that witness has mistakenly identified another individual as the defendant is relevant, particularly given suspect nature of identification testimony. Kiner v. State, 643 N.E.2d 950 (Ind. Ct. App. 1994). However, the earlier misidentification may not render the subsequent identification inadmissible. Wrencher v. State, 635 N.E.2d 1095 (Ind. 1994).

Kucki v. State, 483 N.E.2d 788 (Ind. Ct. App. 1985) (newspaper article with picture of person being sought in burglaries and who resembled the defendant was relevant to show mistaken identification).

b. A third party committed the act

Evidence may be excluded if its probative value is outweighed by the danger or unfair prejudice, confusion of the issues, or potential to mislead the jury, but a defendant's evidence that a third party committed the crime may not be excluded purely on the strength of the prosecution's case. Holmes v. South Carolina, 547 U.S. 319, 324 (2006).

State and federal rule makers have broad latitude to establish rules excluding evidence from criminal trials, but this latitude has limits. Holmes v. South Carolina, 547 U.S. 319, 324 (2006). The federal Constitution guarantees criminal defendants a meaningful opportunity to make a complete defense. Id. at 325 (due process, compulsory process, Confrontation clause). Evidence rules may not be 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' Id.

Evidence which tends to show that someone else committed the crime logically makes it less probable that the defendant committed the crime, and thus meets the definition of relevance in Rule 401. Joyner v. State, 678 N.E.2d 386, 389 (Ind. 1997); Cook v. State, 734 N.E.2d 563 (Ind. 2000); Roop v. State, 730 N.E.2d 1267 (Ind. 2000).

Joyner v. State, 678 N.E.2d 386, 389 (Ind. 1997) (eliminating the old rule under Burdine, 515 N.E.2d 1085 (Ind. 1987), that such evidence must do more than cast suspicion or raise a conjectural inference that a third party committed the crime and must directly connect the third party to the crime charged). The U.S. Supreme Court later rejected a similar rule in Holmes v. South Carolina, 547 U.S. 319, 324 (2006).

Allen v. State, 813 N.E.2d 349 (Ind. Ct. App. 2004) (trial court erroneously excluded a defense witness's statement he had given outside presence of jury indicating that a named third party made incriminating statements implicating him and some other individuals in the murders).

Campbell v. State, 622 N.E.2d 495 (Ind. 1993) (in burglary trial, trial court erred by excluding evidence of subsequent burglary at the same address, committed while the defendant was in jail to show someone else committed the instant offense; although evidence had little probative value, it was minimally prejudicial to the State, and should have been admitted).

Dickens v. State, 754 N.E.2d 1 (Ind. 2001) (considering the confusion at the time of the shooting, the fact that police initially considered another person a suspect although they did not have any actual evidence on the other person did not make it less probable that defendant committed the crime).

Johnson v. State, 734 N.E.2d 530 (Ind. 2000) (statements by third party that he felt no emotion over victim's death and that victim got what he deserved, were irrelevant; aside from the statements, there was nothing to suggest that the individual may have been the killer).

Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App. 2004) (evidence, including the defendant's father's prior battery of victim, offered in attempt to establish that the defendant's father was the killer was properly excluded).

Cook v. State, 734 N.E.2d 563 (Ind. 2000) (mere fact that victim was a police informant was not evidence tending to show that someone other than the defendant committed the charged crime).

10. Evidence of 'consciousness of guilt'

The manufacture, destruction, or suppression of evidence may properly be considered as an admission of the defendant's guilt or his guilty knowledge. Larry v. State, 716 N.E.2d 79 (Ind. Ct. App. 1999).

Evidence of a defendant's flight may be admissible as probative of guilt, Miller v. State, 544 N.E.2d 141, 143 (Ind. 1989), but the Indiana Supreme Court has disapproved the use of a jury instruction to that effect because it unduly emphasizes certain evidence. Dill v. State, 741 N.E.2d 1230 (Ind. 2001).

Serano v. State, 555 N.E.2d 487, 494 (Ind. Ct. App. 1990) (evidence of concealing one's identity is relevant).

McKinstry v. State, 660 N.E.2d 1052 (Ind. Ct. App. 1996) (depending upon circumstances of utterance, the defendant's false alibi statements may be found relevant; adoption of the rules of evidence did not abrogate common-law rule that defendant's false alibi statements are admissible as part of state's case to show consciousness of guilt).

Gregory v. State, 540 N.E.2d 585, 591-92 (Ind. 1989) (evidence of escape from custody admissible as probative of defendant's guilt).

Hughes v. State, 546 N.E.2d 1203, 1208 (Ind. 1989) (evidence of offering false story was admissible).

Neal v. State, 659 N.E.2d 122, 124 (Ind. 1995) (evidence of threatening witnesses was admissible). See also Dean v. State, 901 N.E.2d 648 (Ind. Ct. App. 2009); Bassett v. State, 895 N.E.2d 1201 (Ind. 2008); Larry v. State, 716 N.E.2d 79 (Ind. Ct. App. 1999); Williams v. State, 480 N.E.2d 953, 955 (Ind. 1985); Mayes v. State, 467 N.E.2d 1189, 1194 (Ind. 1984).

Bowman v. State, 51 N.E.3d 1174 (Ind. 2016) (letters which defendant had written to two people from prison whom he believed were in apartment at time of one of his drug sales to informant were admissible to show his attempt to unduly influence witnesses into providing false testimony).

West v. State, 755 N.E.2d 173 (Ind. 2001) (evidence that defendant said he would kill another person 'too' was admissible).

Stone v. State, 555 N.E.2d 475, 477 (Ind. 1990) (attempts to conceal evidence was admissible).

Robinson v. State, 720 N.E.2d 1269 (Ind. Ct. App. 1999) (defendant's attempts to intimidate officer with his purported status in community could reasonably be interpreted by jury as evidence of his consciousness of guilt, and thus were relevant).

Schumm v. State, 866 N.E.2d 781 (Ind. Ct. App. 2007) (driver's statement to deputy prosecutor asking, "how do I make this go away?" was irrelevant in his trial on an infraction, operating his vehicle with improper taillights).

Stephenson v. State, 29 N.E.3d 111 (Ind. 2015) (evidence of defendant's suicide note was not inadmissible character evidence, but relevant and admissible because it explained a possible motive for defendant to kill victim, his dire financial circumstances and consciousness of guilt).

While manufacture, destruction, or suppression of evidence by a third party can be considered as an admission of the defendant's guilt or guilty knowledge, there must first be foundation laid showing such knowledge or authorization. Scifres-Martin v. State, 635 N.E.2d 218 (Ind. Ct. App. 1994).

Scifres-Martin v. State, 635 N.E.2d 218 (Ind. Ct. App. 1994) (improperly admitted evidence of a family cover-up of which the defendant had no knowledge was so prejudicial that the admonishment did not cure the prejudice).

Vandivier v. State, 822 N.E.2d 1047 (Ind. Ct. App. 2005) (fabricated exculpatory evidence by defendant's friend was admissible).

11. Photographs

Photographs are relevant if the witness would be permitted to describe their subject matter verbally. Timberlake v. State, 679 N.E.2d 1337 (Ind. Ct. App. 1997); Lacey v. State, 670 N.E.2d 1299 (Ind. Ct. App. 1996); Hawkins v. State, 37 N.E.2d 79 (Ind. 1941); and Bates v. State, 366 N.E.2d 659 (Ind. 1977).

a. Injuries

Photographs depicting the victim's injuries or demonstrating a witness's testimony are generally relevant. Harrison v. State, 699 N.E.2d 645 (Ind. 1998). Photographs can be used to aid the pathologist's testimony or prove the seriousness of an injury. See, e.g., Wallace v. State, 725 N.E.2d 837 (Ind. 2000); Malone v. State, 700 N.E.2d 780 (Ind. 1998); and Kellett v. State, 716 N.E.2d 975 (Ind. Ct. App. 1999).

Photographic evidence is subject to Rule 403. It is error to admit photographs if their probative value is substantially outweighed by other considerations, such as the danger of unfair prejudice. See Powell v. State, 714 N.E.2d 624 (Ind. 1999).

b. Victim and child

State introduced photograph of victim and child, purportedly to prove that victim was alive before date and time of alleged killing. Picture of victim taken during life is marginally relevant. These smacks of victim impact evidence and is to be discouraged due to its possible emotional impact on the jury. Humphrey v. State, 680 N.E.2d 836, 842 (Ind. 1997); but see Sauerheber v. State, 698 N.E.2d 796 (Ind. 1998).

Pittman v. State, 885 N.E.2d 1246, 1255 (Ind. 2008) (family photograph helped prove victim was alive before alleged killing but when photo was introduced, jury had already seen gruesome photographs of victim's injuries; juxtaposing those photos with a picture of victims healthy and celebrating created a prejudicial emotional impact that outweighed the picture's probative value; its admission was therefore error).

c. Defendant at time of crime

Photographs of the defendant near the time of the offense are relevant to show the defendant changed his appearance as part of his efforts to evade capture, or to otherwise foil identification before or during trial. Price v. State, 765 N.E.2d 1245 (Ind. 2002). However, a defendant does not open door to otherwise inadmissible character evidence merely by dressing and grooming in a manner appropriate for court. Id.

Price v. State, 765 N.E.2d 1245 (Ind. 2002) (harmless error to admit two photographs which showed the defendant at a club gesturing in a manner that could be interpreted as a gang sign).

12. Demonstrative Evidence

In deciding whether to permit a demonstration, a court should consider such factors as the ability to make a faithful record of the demonstration for appeal purposes, the degree of accuracy in the recreation of the actual prior conditions the complexity and duration of the procedures, other available means for proving the same facts, and the risk of unfairness to the defendant. Miller v. State, 916 N.E.2d 193 (Ind. Ct. App. 2009).

Miller v. State, 916 N.E.2d 193 (Ind. Ct. App. 2009) (trial court abused its discretion by allowing State to play a You Tube video of a person removing ten to twelve concealed firearms from his clothing to illustrate that firearms are easy to conceal in a robbery case where whether the robber had a gun was not even at issue and the video would not have been admissible at trial as it aroused the passions of the jury).

Diaz v. State, 934 N.E.2d 1089 (Ind. 2010) (trial court abused its discretion by refusing to admit a chart summarizing a certified translator's conclusion that translation at guilty plea was inaccurate; when the question at issue is the accuracy of the interpretation at a plea hearing, Court sees the use of a chart or a similar demonstrative exhibit as being nearly inevitable).

Fry v. State, 25 N.E.3d 237 (Ind. Ct. App. 2015) (no abuse of discretion in allowing witness to demonstrate how to load and unload defendant's gun; demonstration was relevant to State's claim that defendant shot victim).

13. Hearsay

Even if a statement satisfies the requirements of a hearsay exception, it is inadmissible if it is not relevant or if its probative value is substantially outweighed by the danger of unfair prejudice. Rhone v. State, 825 N.E.2d 1277 (Ind. Ct. App. 2005).

Lichti v. State, 827 N.E.2d 82 (Ind. Ct. App. 2005) (a hearsay letter did not make defendant's guilt any more or less probable) *rev'd on other grounds*, 835 N.E.2d 478.

a. State of mind relevant where it has been put in issue

A victim's state of mind is relevant where it has been put in issue by the defendant. Angleton v. State, 686 N.E.2d 803 (Ind. 1997), *appeal after remand*, 714 N.E.2d 156 (Ind. 1999); Jester v. State, 724 N.E.2d 235 (Ind. 2000). For a detailed discussion of when a victim's state of mind is relevant, see the subsection addressing Indiana Rule of Evidence 803(3) in Chapter 8, *Hearsay.*

Kubsch v. State, 784 N.E.2d 905 (Ind. 2003) (hearsay that murder victim was afraid of defendant and that defendant wanted to kill him was irrelevant to any issue at trial; defendant did not put victim's state of mind at issue, but rather argued alibi).

Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (defendant did not put victim's state of mind in issue, thus her hearsay statement that "history is repeating itself" was inadmissible).

b. Investigation

Although course-of-investigation hearsay may help prosecutors give the jury some context, it is often of little consequence to the ultimate determination of guilt or innocence. Such testimony is of little value absent a direct challenge to the legitimacy of the investigation. Blount v. State, 22 N.E.3d 559 (Ind. 2014). For a detailed discussion of when hearsay is relevant to the course of investigation, see Chapter 8, *Hearsay*.

Headlee v. State, 678 N.E.2d 823 (Ind. Ct. App. 1997) (police officer's testimony that client said he had given attorney cocaine in exchange for legal services in the past was irrelevant to the course of investigation because tape recorded conversations between client and attorney adequately explained why police initiated the investigation).

14. Self-defense and insanity: Defendant's state of mind

Hirsch v. State, 697 N.E.2d 37 (Ind. 1998) (defendant's testimony that victim refused to stop fighting when asked to quit by defendant was relevant to self-defense claim).

Broome v. State, 687 N.E.2d 590 (Ind. Ct. App. 1997), *vacated on other grounds*, 694 N.E.2d 280 (testimony that male victim of homicide had reputation for picking up heterosexual men while driving and attempting to have sex with them was irrelevant to claim of self-defense; no indication that victim would use force on objects of sexual desire)

Weedman v. State, 21 N.E.3d 873, 884 (Ind. Ct. App. 2014) (admission of evidence of Defendant's withdrawn insanity defense was erroneous, as it "was simply not relevant to the issues in the case")

15. Negative test results

Commonwealth v. Hawk, 709 A.2d 373 (Pa. 1998) (forensic scientist's testimony concerning negative results of rape kit administered to complainant in rape prosecution should have been admitted; although such evidence is inconclusive, it is relevant to material issue of whether sexual intercourse occurred).

Christian v. State, 710 N.E.2d 582 (Ind. Ct. App. 1999) (reversible error to exclude evidence that breathalyzer machine was repaired within 180 days of its certification which could have rendered defendant's test results inaccurate).

Turner v. State, 720 N.E.2d 440 (Ind. Ct. App. 1999) (proffered testimony that psychologist interviewed defendant's own children and recommended that they remain in his home after finding nothing to indicate molestation was irrelevant as to whether the defendant molested his stepdaughter).

16. Defendant's age and size

Defendant's age and size compared to victim's age and size relevant in determining the defendant's intent to kill existed. Anderson v. State, 681 N.E.2d 703, 708 (Ind. 1997).

17. Motive

Evidence of motive is always relevant in the proof of a crime. Camm v. State, 908 N.E.2d 215, 224 (Ind. 2009). The admission of evidence having a tendency to create an inference of motive is within the discretion of the trial court. Tompkins v. State, 669 N.E.2d 394, 397 (Ind. 1996). The Tompkins opinion was criticized in O'Brien, *Survey of Recent Developments in Indiana Evidence Law*, 31 Ind. L. Rev. 589 n.45 (where evidence offered to show 'motive' is really evidence of the defendant's character, it is forbidden by Rule 404).

> Camm v. State, 812 N.E.2d 1127, 1131 (Ind. Ct. App. 2004) ("just because motive is 'always relevant,' this does not mean the State can introduce questionable character evidence simply by labeling it evidence of 'motive.' If the State's claim of relevance to motive is too strained and remote to be reasonable, then the extrinsic act evidence is inadmissible."); see also Corbett v. State, 179 N.E.3d 475 (Ind. Ct. App. 2021).

18. Battered woman syndrome relevant

If there is a proper foundation that the complaining witness is a battered woman, expert testimony concerning battered woman syndrome is admissible not to show the woman was previously battered but to explain some reasons why she would recant. Carnahan v. State, 681 N.E.2d 1164 (Ind. Ct. App. 1997).

A defendant who wishes to offer battered woman syndrome evidence on the issue of lack of intent or knowledge must comply with the terms of the 'insanity' or 'mental disease or defect' statute (Ind. Code 35-36-2-1, Ind. Code 35-41-3-6, and Ind. Code 35-41-4-1(b)). Marley v. State, 747 N.E.2d 1123 (Ind. 2001).

19. Expert opinion

a. No statistical analysis

DNA evidence that does not constitute a match or is not accompanied by statistical data regarding the probability of a defendant's contribution to a mixed sample is not relevant and should not be admitted. Deloney v. State, 938 N.E.2d 724 (Ind. Ct. App. 2010). Without statistical data, evidence of a non-match is meaningless, and does not assist the trier of fact in determining the guilt or innocence of the defendant. Id.

> Deloney v. State, 938 N.E.2d 724 (Ind. Ct. App. 2010) (where DNA analyst could not exclude or include the defendant and co-Defendant as contributors to a mixture of DNA found on a hat at the scene, the admission of the DNA was erroneous).

b. Connection between case and testimony

Cline v. State, 726 N.E.2d 1249 (Ind. 2000) (case worker's opinion that mothers whose babies die of crib death do not repeatedly state that they did not hurt their babies was irrelevant because the defendant never claimed baby died from crib death).

Drossos v. State, 442 N.E.2d 1 (Ind. Ct. App. 1982) (trial court did not err in excluding evidence that victim of reckless homicide/DWI resulting in death had traces of drugs and alcohol in blood stream, where expert found no connection between trace amount and victim's driving abilities; DISSENT argues evidence was relevant).

Odom v. State, 711 N.E.2d 71 (Ind. Ct. App. 1999) (expert testimony explaining why a victim of domestic violence who recanted before trial provides an explanation for the recantation when she testifies does not mean the expert testimony is necessarily irrelevant to rehabilitation of the victim; the victim may not understand the complexity of her behavior and be willing to admit everything to the jury; however, the expert's testimony must be limited to hypothetical based on evidence).

Wise v. State, 719 N.E.2d 1192 (Ind. 1999) (evidence that brand of baby monitor different, but with a similar electrical device, as that used in infant victim's room had been known to cause fires was irrelevant in prosecution for murder and arson).

Ivory v. State, 141 N.E.3d 1273 (Ind. Ct. App. 2020) (ample evidence supported trial court's conclusion that probative value of DNA test results related to T-shirt and handgun outweighed any confusion or undue prejudice).

20. Evidence of prior drug use

"Evidence of a witness's prior drug use is ordinarily irrelevant, although it may be relevant as to (1) the witness's ability to recall the events on the date in question, (2) the witness's inability to relate the facts at trial, or (3) the witness's mental capacity." West v. State, 755 N.E.2d 173 (Ind. 2001); Williams v. State, 681 N.E.2d 195, 199 (Ind. 1997); Williams v. State, 749 N.E.2d 1139 (Ind. 2001); see also 4 Weinstein's *Federal Evidence,* § 607.05(4) (2d ed. 1997). The same rule applies to victim's drug use. Pannell v. State, 686 N.E.2d 824 (Ind. 1997).

Anderson v. State, 681 N.E.2d 703 (Ind. 1997) (defendant's use of marijuana the night of the murder was relevant to assist jury in evaluating and understanding the defendant's claim that he did not hit the victim that hard in contrast to evidence of blunt force injuries resulting in victim's death; however, the defendant's attempt to hide marijuana paraphernalia was not relevant).

Lorimore v. State, 728 N.E.2d 860 (Ind. 2000) (defendant's marijuana use near the time of the murder was irrelevant; the only issue of consequence was the identity of the victim's killer).

21. Subsequent acts

Though cases discussing the Rule 404(b) exception typically involve prior acts of a party, the Rule applies equally to acts occurring after the charged conduct. For example, Indiana courts have consistently held that threats against potential witnesses as attempts to conceal or suppress evidence are admissible as bearing upon knowledge of guilt. See Bowman v. State, 51 N.E.3d 1174 (Ind. 2016).

Brown v. State, 830 N.E.2d 956 (Ind. Ct. App. 2005) (evidence offered by defendant that police had used excessive force when they arrested him was irrelevant in prosecution for resisting law enforcement and other offenses because the defendant had already completed his act of resisting by fleeing before the alleged excessive force was used).

Hollen v. State, 740 N.E.2d 149 (Ind. Ct. App. 2000), *aff'd,* 761 N.E.2d 398 (fact that defendant fought with officer a second time while in the hospital in another county was irrelevant in his battery on a law enforcement trial).

Breenan v. State, 639 N.E.2d 649 (Ind. 1994) (accomplice's specific acts of violence in jail after arrest for murder were inadmissible in defendant's trial since the acts had no relationship to attack on victim at time of murder).

Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App. 2005) (phone messages left by defendant for victim following alleged crimes were irrelevant).

Hill v. State, 91 N.E.3d 1078 (Ind. Ct. App. 2018) (defendant's actions and continued threats to complaining witness over eight days after charged intimidation were relevant to determining his intent behind the threats made on day of crime).

Davis v. State, 186 N.E.3d 1203 (Ind. Ct. App. 2022) (in burglary and domestic violence prosecution, trial court did not abuse discretion in admitting evidence of a subsequent altercation between defendant and the complaining witness to show defendant's intent (contrary to his claim of self-defense) and motive as it related to his hostile relationship with complaining witness).

22. Rebuttal evidence

Court may allow rebuttal evidence if it tends to: (1) explain; (2) contradict; or (3) disprove, adverse party's evidence. Smith v. State, 553 N.E.2d 832, 835 (Ind. 1990); Rule. 611(a).

III. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, OR OTHER REASONS - RULE 403

A. OFFICIAL TEXT:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

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1. Preservation of error

a. Opponent of relevant evidence must show inadmissibility

It is the responsibility of the opponent of evidence to show why relevant evidence is inadmissible. Mullins v. State, 646 N.E.2d 40, 48 (Ind. 1995).

b. Must object to irrelevant evidence or waive issue

Angleton v. State, 686 N.E.2d 803, 808-11, n.4 (Ind. 1997), *appeal after remand*, 714 N.E.2d 156 (Ind. 1999) (an objection solely on grounds of relevance does not preserve the issue of whether the prejudicial impact of the evidence outweighs its probative value).

But see Jackson v. State, 712 N.E.2d 986 (Ind. 1999) ("In view of Evidence Rule 401, a 'relevancy' objection at trial now preserves an appellate claim of relevancy under Rule 401 and the appropriate balancing for undue prejudice under Rule 403").

c. Evidentiary harpoon

'Evidentiary harpoon' occurs when the prosecution places inadmissible evidence before the jury with the deliberate purpose of prejudicing jurors against the defendant. Jewell v. State, 672 N.E.2d 417 (Ind. Ct. App. 1996); Evans v. State, 643 N.E.2d 877 (Ind. 1994). The defendant need not show that the evidentiary harpoon injured him to the extent that he would not have been found guilty but for harpooning but need only show that he was placed in a position of grave peril to which he should not have been subjected. Jewell v. State, 672 N.E.2d 417 (Ind. Ct. App. 1996).

d. Standard of appellate review

A claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected. See Rule 103(a). The standard of review for such claims is for abuse of discretion. Gant v. State, 694 N.E.2d 1125 (Ind. 1998).

2. Two-prong test

First, the court must determine the probative value of the evidence, including the proponent's need for that evidence. Second, the court must determine the likely prejudicial impact of the

evidence. In particular, court must look for the dangers that the jury will substantially overestimate the value of the evidence or that the evidence will arouse or inflame the passions or sympathies of the jury. Evans v. State, 643 N.E.2d 877, 880 (Ind. 1994).

a. Probative value

(1) Decreased by speculative component

Where the relevance of evidence is conditioned on a speculative fact, the speculative component of evidence may become part of the trial court's relevance inquiry. The trial court must determine whether the evidence is of no probative value, or whether its probative value is substantially decreased by its speculative component, and inadmissible under Rule 402 (relevance) or Rule 403 (balancing). Cox v. State, 696 N.E.2d 853 (Ind. 1998).

Cox v. State, 696 N.E.2d 853 (Ind. 1998) (State offered testimony that defendant's friend, Hammer, was charged with child molesting and held in jail, to show defendant's motive for killing alleged victim's father; relevance of this evidence was conditioned on the arguably speculative inference that defendant had knowledge of the charges and bond; it was reasonable to infer that defendant had knowledge because he was part of Hammer's circle).

(a) Lack of reliability

Hightower v. State, 735 N.E.2d 1209 (Ind. Ct. App. 2000) (the probative value of testimony concerning a facsimile that could not be properly authenticated was substantially outweighed by the prejudicial impact of the facsimile; the fact that the facsimile could not be authenticated proved it was unreliable).

(b) Prior acts

Carson v. State, 659 N.E.2d 216 (Ind. Ct. App. 1995) (where evidence linking defendant to a drive-by shooting of a home of woman who just buried her murdered son was not overly persuasive and could not help but to inflame the jury's passions, its prejudicial impact outweighed its probative value), *abrogated on other grounds*, Hicks v. State, 690 N.E.2d 215 (Ind. 1997)).

(2) Decreased by immateriality

(a) State of mind

Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996) (probative value of manuscript chronicling defendant's relationship with victim was substantially outweighed by danger of unfair prejudice; although defendant raised insanity and manuscript showed state of mind prior to murder, it did not show state of mind directly before murder and was replete with hearsay statements).

(b) Domestic violence

Evidence of domestic violence is probative of hostility between the parties, but at some point, testimony about every incident of violence between parties becomes more prejudicial than probative. Hicks v. State, 690 N.E.2d 215, 223 (Ind. 1997).

(3) Decreased by the passage of time

Hicks v. State, 690 N.E.2d 215, 223 (Ind. 1997) (testimony, though relevant to show the hostility of relationship, was of fairly low probative value in view of its remoteness in time (two years before murder); its probative value was further reduced because the State had ample evidence of hostility, including the other two more recent incidents and defendant's own statements, upon which it could rely; the prejudicial impact of the testimony, however, was sure to be high and substantially outweighed its probative value).

McEwen v. State, 695 N.E.2d 79 (Ind. 1998) (previous act which occurred within three months before killing was not so distant in time that evidence lost its probative force for point offered).

Berry v. State, 704 N.E.2d 462 (Ind. 1998) (even though statement was made six months prior to murders, defendant's statement to his parents that "I will kill you all and then leave" was not more prejudicial than probative).

McClendon v. State, 910 N.E.2d 826 (Ind. Ct. App. 2009) (evidence of confrontation that occurred eleven months before shooting was relevant to show that defendant harbored hostility toward victim's father; reference to marijuana provided context for ongoing conflict).

PRACTICE POINTER: Instead of objecting to evidence as being "too remote in time," it is better to object that evidence is "too remote in time to have significant probative value" and invoke Rule 403.

(4) Stipulation or bifurcation

A defendant's offer to concede a point generally cannot prevail over the State's choice to offer evidence showing guilt and all circumstances surrounding the offense. Kellett v. State, 716 N.E.2d 975 (Ind. Ct. App. 1999). But where status as a felon is an element of the crime charged and the defendant stipulates to his status as a felon, admission into evidence of the full record of a defendant's prior felony conviction is an abuse of discretion under Indiana Rule of Evidence 403. Hardister v. State, 849 N.E.2d 563, 577 (Ind. 2006).

Butler v. State, 647 N.E.2d 631 (Ind. 1995) (photographs of crime scene were admissible despite defendant's stipulations).

Duncan v. State, 23 N.E.3d 805 (Ind. Ct. App. 2014) (in pointing a firearm and resisting law enforcement prosecution, although defendant did not dispute that he

possessed a gun, Rule 403 did not bar admission of ammunition found in his garage, as it tended to make it more likely that defendant possessed the gun and loaded it and both facts were relevant to the charges).

Generally, the defendant may not avoid the impact of the State's evidence by a stipulation, but this rule does not apply when the issue is purely one of the defendant's legal statuses. Sams v. State, 688 N.E.2d 1323 (Ind. Ct. App. 1997). See also Old Chief v. U.S., 519 U.S. 172 (1997). In such cases, the better practice is to follow the U.S. Supreme Court's holding in Old Chief and the Indiana Supreme Court opinion in Russell v. State, 997 N.E.2d 351 (Ind. 2013), which state that bifurcation is a better or necessary practice in cases where defendant is charged only with possession of firearm by SVF or driving while under lifetime license suspension.

McAnalley v. State, 134 N.E.3d 488 (Ind. Ct. App. 2019) (harmless error to instruct jury on the specific nature of defendant's prior felony and admitting evidence of the specific prior felony, when defendant had offered to stipulate to his status as a person who could not lawfully possess a firearm. Defendant argued that given the repeated references to his prior robbery conviction, the jury was likely unfairly influenced to believe that he and not someone else constructively possessed the handgun. Bradford, J., concurring in result, believes that bifurcation of proceedings in not practical or even possible when defendant is charged with unlawful possession by a SVF. Rather, trial courts should craft instructions and accept defendants' stipulations that minimize potential for prejudice).

Sams v. State, 688 N.E.2d 1323 (Ind. Ct. App. 1997) (trial court abused its discretion in admitting defendant's entire driving record in prosecution for driving while under a lifetime suspension, where defendant offered to stipulate to the fact that his driving privileges had been suspended for life; in light of the offered stipulation, the probative value of the entire driving record was outweighed by its prejudicial impact).

McClain v. State, 898 N.E.2d 409 (Ind. Ct. App. 2008) (in trial for failure to register as sex offender, trial court erroneously admitted sex offender registration form over objection and despite defendant's offer to stipulate to his status; judgment reversed).

Ray v. State, 846 N.E.2d 1064 (Ind. Ct. App. 2006) (in unlawful possession of firearm by SVF prosecution, trial court abused its discretion when it instructed jury that the defendant had a prior robbery conviction despite the defendant's offer to stipulate that he had been convicted of a prerequisite prior felony); see also Hardister v. State, 849 N.E.2d 563, 577 (Ind. 2006).

Hollowell v. State, 753 N.E.2d 612 (Ind. 2001) (so long as done consistent with applicable rules of evidence, evidence of two predicate felonies in face of stipulation is admissible during habitual offender stage of trial). See also Herrera v. State, 710 N.E.2d 931 (Ind. Ct. App. 1999).

Spearman v. State, 744 N.E.2d 545 (Ind. Ct. App. 2001) (in prosecution for possession of firearm by serious violent felon, where prior conviction was an element of the instant offense, the probative value of evidence of the prior conviction was essential to the trial and was not outweighed by its prejudicial impact).

PRACTICE POINTER: In addition to stipulation, there are other methods of reducing prejudice of prior felonies in status cases. For instance, in habitual cases where the nature of the prior felony is admissible despite stipulation offer, the trial court can limit the prejudicial effect of evidence of prior conviction by excluding evidence regarding the underlying facts of the prior felony and limiting prosecutorial references to them. Bayes v. State, 779 N.E.2d 77 (Ind. Ct. App. 2002). In serious violent felon cases which are joined with other charges, the defendant is entitled to bifurcate the serious violent felon charge from the other charges in order to reduce prejudice. Hines v. State, 801 N.E.2d 634 (Ind. 2004).

b. Prejudicial Impact

Relevant evidence is not inadmissible merely because it is prejudicial. Hopkins v. State, 668 N.E.2d 686 (Ind. Ct. App. 1996). However, unfair prejudice which will potentially warrant exclusion of probative evidence addresses the way in which the jury is expected to respond to the evidence and looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis. Ingram v. State, 715 N.E.2d 405 (Ind. 1999). Courts will look for dangers that the jury will substantially overestimate the value of the evidence or that the evidence will arouse or inflame the passions or sympathies of the jury. Evans v. State, 643 N.E.2d 877 (Ind. 1994).

(1) Unfair prejudice

Unfair prejudice appeals to jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other emotions that may lead jury to decide on basis of something other than propositions proven in case. Cook v. Hoppin, 783 F.2d 684, 689 (7th Cir. 1986), quoted with approval in Stone v. State, 536 N.E.2d 534, 539 (Ind. Ct. App. 1989).

United States v. Ridlehuber, 11 F.3d 516, 523 (5th Cir. 1993) (unfairly prejudicial evidence tends to persuade through illegitimate or improper means to a greater extent than it tends to persuade legitimately); see also Camm v. State, 908 N.E.2d 215, 224 (Ind. 2009).

The term "unfair prejudice" speaks to the capacity of some relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644 (1997).

(a) Unnecessary and inflammatory detail

Courts must be cautious of inflammatory and cumulative evidence that impermissibly sways the jury. Young v. State, 696 N.E.2d 386 (Ind. 1998).

Rules of Evidence require courts to guard against exploitation of gruesome details. Unnecessary and inflammatory detail may require reversal. Thompson v. State, 690 N.E.2d 224, 235-36 (Ind. 1997).

Thompson v. State, 690 N.E.2d 224 (Ind. 1997) (although defendant's access to murder weapon through a prior murder he committed was relevant, fact of defendant's murder conviction and detailed evidence surrounding that murder was wholly irrelevant to establishing his access to weapon and resulted in an unfair trial).

Williams v. State, 677 N.E.2d 1077 (Ind. Ct. App. 1997) (although the State properly admitted evidence that the defendant committed Intimidation when he threatened to do harm to witness if witness testified against him, the State committed "blatant overkill" by putting into evidence details and extrinsic offenses; the evidence served to focus attention of jury upon other offenses rather than offense for which the defendant was charged).

Brown v. State, 746 N.E.2d 63 (Ind. 2001) (details in information and probable cause charging murder defendant's sister with murder, including references to sister's criminal record and specifics of how murder occurred, offered to prove motive to murder victim, a witness to defendant's sister's murder, were irrelevant and gruesome and should have been excluded to avoid guilt by association).

Rhodes v. State, 771 N.E.2d 1246 (Ind. Ct. App. 2002) (trial court committed reversible error by admitting flood of irrelevant and prejudicial evidence regarding the defendant and witness's character, rendering fair trial impossible).

Baker v. State, 695 N.E.2d 925 (Ind. 1998) (although evidence of two assaults on State's witness was arguably probative of the defendant's motive for kidnapping, highly prejudicial details of these assaults were of little or no probative value, and failed balancing test required by Rule 403).

Jones v. State, 708 N.E.2d 37 (Ind. Ct. App. 1999) (in operating while HTV trial, trial court erred by admitting defendant's entire criminal history, in absence of any attempt to mitigate prejudicial nature of irrelevant evidence whether through a curative instruction or admonishment).

(b) Evidence which is likely to be misused

Julian v. State, 811 N.E.2d 392 (Ind. Ct. App. 2004) (where trial court monitored State's impeachment of witnesses and there was other evidence placing defendant at scene, probative value of incriminating evidence substantially outweighed danger of unfair prejudice resulting from jury considering portion of witness's prior inconsistent statement as substantive evidence).

Boyd v. State, 650 N.E.2d 745 (Ind. Ct. App. 1995) (the probative value of a knife that was not similar to the one used in the murders outweighed the danger

of unfair prejudice; trial court's admonishment that knife is to only be considered as impeachment of defendant's statement that he never owned a knife).

(c) Evidence with a great tendency to inflame prejudices and emotions

Some types of evidence cannot "help but inflame the passions of the jury." Carson v. State, 659 N.E.2d 216 (Ind. Ct. App. 1995), *abrogated on other grounds by* Hicks v. State, 690 N.E.2d 215 (Ind. 1997). The more inflammatory the evidence, the greater probative value the evidence must have to be admissible.

Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006) (accomplice's videotaped walk-through of crime scene after he was deemed unavailable by his own refusal to testify was reversible error; only purpose of videotaped statement was to expose jurors to vivid description of horrific and senseless crime).

Carson v. State, 659 N.E.2d 216 (Ind. Ct. App. 1995) (accusation that defendant participated in drive-by shooting of a home of woman who just buried her murdered son is highly inflammatory evidence; the probative value did not outweigh the risk of unfair prejudice), *abrogated on other grounds by* Hicks v. State, 690 N.E.2d 215 (Ind. 1997).

Camm v. State, 812 N.E.2d 1127, 1141 (Ind. Ct. App. 2004) (accusation that defendant molested his five-year-old daughter is highly inflammatory and can only be admissible if the probative value outweighs the risk of unfair prejudice).

Jenkins v. State, 729 N.E.2d 147 (Ind. 2000) (even if rape victim's prior drug use was relevant to a highly collateral issue of whether the victim purchased drugs for the defendant, such relevance was clearly outweighed by danger of unfair prejudice); see also House v. State, 61 N.E.3d 1230 (Ind. Ct. App. 2016) (evidence of alcohol and drug use was an attempt to smear victim's character).

Cf. Cox v. State, 854 N.E.2d 1187 (Ind. Ct. App. 2006) (probative value of evidence that defendant had lost custody of two older children to ex-husband in divorce was not substantially outweighed by danger of unfair prejudice; details of the earlier custody dispute were not explored).

c. Undue delay; Cumulative

Rule 403 allows exclusion of evidence if undue delay or needless presentation of cumulative evidence substantially outweighs probative value of evidence.

Harrison v. State, 699 N.E.2d 645 (Ind. 1998) (photograph of victim lying on ground was highly probative of defendant's self-defense claim and only marginally cumulative).

Friend v. State, 134 N.E.3d 441, 448 (Ind. Ct. App. 2019) ("Evidence Rule 403 precludes needlessly presenting cumulative evidence. It is not unreasonable to find that the 137 exhibits of text messages and conversations between A.F. and Friend and A.F. and Kathy, in addition to the lengthy testimony of Dr. Wingard, amounted to cumulative evidence.").

Repetition of a victim's out-of-court statements unduly emphasized inflammatory aspects of the State's case, perhaps causing jury to decide case on emotional basis. Additionally, repetition enhanced alleged victim's credibility. Stone v. State, 536 N.E.2d 534 (Ind. Ct. App. 1989). Admitting both a child's live testimony and consistent statements is cumulative evidence and can be unfairly prejudicial and unnecessary. Tyler v. State, 903 N.E.2d 462, 467 (Ind. 2009). In other words, testimony of a protected person may be presented in open court or by pre-recorded statement through I.C. § 35-37-4-6, the protected person statute, but not both except as authorized under the Rules of Evidence. Id.

Cox v. State, 937 N.E.2d 874 (Ind. Ct. App. 2010) (trial court erred by admitting videotaped interview of complaining witness in lieu of direct examination in molestation case where complaining witness was never found to be unavailable under the protected persons statute and, in fact, was subject to cross-examination; even if the procedure did not violate the letter of Tyler, it violated its spirit).

Stone v. State, 536 N.E.2d 534 (Ind. Ct. App. 1989) (drumbeat repetition caused by admitting six different out-of-court accusations of victim unduly prejudiced the defendant and was reversible error).

Willis v. State, 776 N.E.2d 965 (Ind. Ct. App. 2002) (detective's testimony about victim's statements was less than one-third of twenty pages of testimony; under these circumstances, admission of testimony and videotaped interview did not amount to drumbeat repetition).

d. Confusion of issues; misleading jury

Relevant evidence may be excluded if the potential for confusion of issues or misleading of jury substantially outweighs its probative value. Rule 403.

Sanders v. State, 840 N.E.2d 319 (Ind. 2005) (probative value of redacted version of defendant's letter to trial court in which he claims he felt awful and did not want to cause alleged victim and family any more pain or suffering, substantially outweighed the dangers of unfair prejudice and misleading jury in prosecution for child molesting despite portion regarding victim's previous molestations by third parties was redacted); see also Zanussi v. State, 2 N.E.3d 731 (Ind. Ct. App. 2013).

(1) Child abuse syndrome evidence

Where a jury hears evidence of an alleged child victim's behaviors, paired with expert testimony, the invited inference--that the child was sexually abused because he or she fits the syndrome profile--will be as potentially misleading and equally as unreliable as expert testimony applying the syndrome to the facts of the case and stating an

explicit opinion that abuse has occurred or merely allows the jury to draw the final conclusion of abuse. Exclusion of such evidence is authorized by Rule 403. Steward v. State, 652 N.E.2d 490, 499 (Ind. 1995).

(2) Scientific testimony in general - judge has more control

Scientific evidence presents special risks of potential harm and prejudice to the parties involved. Because expert evidence can be both powerful and quite misleading, the judge in weighing possible prejudice against probative force under Rule 403 exercises more control over experts than over lay witnesses. Harrison v. State, 644 N.E.2d 1243, 1252 (Ind. 1995), *cert. den.*, 117 S. Ct. 307 (1996).

(3) Negative tests

Stroud v. State, 809 N.E.2d 274 (Ind. 2004) (testimony concerning DNA testing done on inner soles of shoes which excluded defendant was relevant; the shoes were a key piece of evidence linking defendant to murder scene and possibility of misleading jury would not substantially outweigh probative value of DNA test excluding defendant).

3. Balancing probative value with unfair prejudice

a. Background facts

The court may exclude background facts that might tend to appeal unduly to jury's sympathy, confuse issues, or cause undue waste of time. Mitchell v. State, 484 N.E.2d 24, 26 (Ind. 1985).

Redmon v. State, 734 N.E.2d 1088 (Ind. Ct. App. 2000) (no error in excluding evidence that burglary victim was the defendant's custodial parent; there is no authority that a dependent child cannot be found guilty of burglarizing custodial parent's home, regardless of whether child actually lives with that parent).

Gaston v. State, 451 N.E.2d 360 (Ind. Ct. App. 1983) (past physical intimacy between the defendant and a witness is of no logical relevance in proving the defendant gave/sold cocaine to witness; the testimony was highly prejudicial, and conviction was reversed on other grounds).

Mason v. State, 689 N.E.2d 1233, 1236 (Ind. 1997) (where defendant's defense was that he was merely a drug user and not dealer, the police investigation, and thus the informant's tip, were not relevant to any contested issue). See also Ortiz v. State, 741 N.E.2d 1203 (Ind. 2001); Headlee v. State, 678 N.E.2d 823 (Ind. Ct. App. 1997).

b. Gang membership

Robinson v. State, 682 N.E.2d 806 (Ind. Ct. App. 1997) (not error to admit evidence of gang membership; prejudicial impact of evidence did not substantially outweigh high probative value that gang membership showed witness's bias in favor of defendant).

Kilpatrick v. State, 746 N.E.2d 52 (Ind. 2001) (prejudicial impact of photos of defendant showing gang tattoos on his arms and chest did not outweigh their probative value).

Kimble v. State, 659 N.E.2d 182 (Ind. Ct. App. 1995) (in trial for accessory to murder of black victim, the prejudicial effect of defendant's participation in racially biased group did not substantially outweigh its probative value to show motive; though evidence most likely would stir emotions, guilt was overwhelming).

Brand v. State, 766 N.E.2d 772 (Ind. Ct. App. 2002) (fact that victim was gang member, offered to corroborate murder defendant's testimony regarding reasonableness of his fear of victim, was admissible, as it was crucial to claim of self-defense).

cf. Daniels v. State, 683 N.E.2d 557 (Ind. 1997) (admission of calendar confiscated from the defendant's home had clear prejudicial effect under Ind. Evid. Rule 403 because of its gang-related statements and drawing of guns; error held harmless).

c. Expert opinion

Introduction of evidence with an unknown probative value regarding the only issue to be decided by the jury could be prejudicial to the opposing party and could cause confusion amongst the jury by giving them extraneous information to consider. Ollis v. Knecht, 751 N.E.2d 825, 831 (Ind. Ct. App. 2001).

Because expert evidence can be both powerful and quite misleading, the judge in weighing possible prejudice against probative force under Rule 403 exercises more control over experts than over lay witnesses. Harrison v. State, 644 N.E.2d 1243, 1252 (Ind. 1995), *cert. den.*, 117 S. Ct. 307 (1996).

Buzzard v. State, 669 N.E.2d 996 (Ind. Ct. App. 1996) (psychologist's testimony was unduly prejudicial in trial for child molestation where psychologist did not examine defendant or victims, broadly defined "pedophiles" and speculated that a single pedophile could molest between five and eight hundred children in his lifetime).

Steward v. State, 652 N.E.2d 490 (Ind. 1995) (where jury is confronted with evidence of alleged child abuse victim's behaviors, paired with expert testimony concerning similar syndrome behaviors, invited inference, that child was sexually abused because he fits syndrome profile, will be potentially misleading and equally as unreliable as expert applying syndrome to facts of case and stating outright conclusion that child was abused).

But see Howard v. State, 761 N.E.2d 449 (Ind. Ct. App. 2002) (probative value of cash with narcotics odor in defendant's possession outweighed the danger of unfair prejudice; evidence had probative value to show conspiracy existed to obtain and deliver narcotics).

Wentz v. State, 766 N.E.2d 351 (Ind. 2002) (evidence that hair left at crime scene was consistent with defendant's was proper where witness did not testify it was a conclusive match; remedy is cross-examination). See also Carter v. State, 766 N.E.2d 377 (Ind. 2002).

Williams v. State, 690 N.E.2d 162, 175 (Ind. 1997) (purchase of weapon three hours before shooting, evidence of rarity of unrecovered weapon demonstrated by admitting sample of the weapon into evidence, and evidence of seized weapons was highly probative and admissible).

d. Live demonstration of victim's injuries

Bowman v. State, 73 N.E.3d 731 (Ind. Ct. App. 2017) (removal of prosthetic eye in front of jury was relevant and probative given the State's burden to prove a protracted injury in aggravated battery case).

e. Autopsy and crime scene photographs

Relevant photos should be excluded if its prejudicial effect outweighs its probative value. Amburgey v. State, 696 N.E.2d 44 (Ind. 1998).

(1) Crime scene

Byers v. State, 709 N.E.2d 1024 (Ind. 1999) (pathologist's testimony regarding crime scene photographs do not transform them into autopsy photographs for determining admissibility).

Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006) (accomplice's videotaped walk-through of crime scene after he was deemed unavailable by his own refusal to testify was reversible error; only purpose of videotaped statement was to expose jurors to vivid description of horrific and senseless crime).

Collins v. State, 826 N.E.2d 671 (Ind. Ct. App. 2005) (photo of victim's burnt corpse found in a car in trial for arson and murder was admissible under Rule 403).

Lee v. State, 735 N.E.2d 1169 (Ind. 2000) (where victim's wife's facial expression was not visible in photo, photo of wife kneeling over murder victim's body at crime scene was admissible).

(2) Pre-autopsy

Pruitt v. State, 834 N.E.2d 90 (Ind. 2005) (probative value of pre-autopsy photo of victim depicting extreme swelling of body as a result of sepsis, in showing several day process of disease from the time of injury to death was not outweighed by any tendency to inflame prejudices). See also Martin v. State, 784 N.E.2d 997 (Ind. Ct. App. 2003); and Kilpatrick v. State, 746 N.E.2d 529 (Ind. 2001).

(3) Autopsy

"Generally, photographs that depict a victim's injuries or demonstrate the testimony of a witness are inadmissible." Ward v. State, 903 N.E.2d 946 (Ind. 2009). "Though autopsy photographs have been found to be inadmissible to avoid the risk that the fact-finder could mistakenly infer that the defendant inflicted the autopsy

incisions, exclusion of such photos is not necessary if they are accompanied by testimony to explain what had been done to the body, thus minimizing the potential for confusion and showing that the probative value outweighed the prejudicial effect," Id. (citations omitted).

Photographs of victim's corpse are relevant not only to prove his or her identity, but to serve as an aid to understanding the pathologist's findings on the cause of death. Photographs showing the victim in his or her natural state following death are relevant. Woods v. State, 677 N.E.2d 499, 504 (Ind. 1997). However, a pathologist's testimony does not render any and all autopsy photographs admissible. Willey v. State, 712 N.E.2d 434 (Ind. 1999).

Thompson v. State, 728 N.E.2d 155 (Ind. 2000) (trial court erred in admitting photo of victim, which allegedly depicted lividity of victim's body, where pathologist unequivocally testified that lividity was not a reliable way to determine time of death).

Halliburton v. State, 1 N.E.3d 670 (Ind. 2013) (autopsy photos showing skin and hair pulled away from victim's skull were necessary to demonstrate pathologist's testimony).

Burns v. State, 59 N.E.3d 323 (Ind. Ct. App. 2016) (although unpleasant, 28 photographs of victim's bodily remains were relevant to material issues and to testimony of criminal investigator and forensic pathologist).

See also Bradley v. State, 770 N.E.2d 382 (Ind. Ct. App. 2002) (photos admitted to explain pathologist's testimony); Wheeler v. State, 749 N.E.2d 1111 (Ind. 2001); Dunlap v. State, 761 N.E.2d 837 (Ind. 2002); and Gant v. State, 694 N.E.2d 1125 (Ind. 1998).

Crain v. State, 736 N.E.2d 1223 (Ind. 2000) (trial court did not abuse discretion by admitting victim's skull; skull was neither particularly gruesome nor ominous as it lay in three separate pieces and was relevant to defendant's claim of accidental death).

Albrecht v. State, 737 N.E.2d 719 (Ind. 2000) (photo of victim's decapitated body was admissible where defendant had stated his intention to kill the victim and remove her head so she could not be identified through dental records).

Kubsch v. State, 784 N.E.2d 905 (Ind. 2003) (eight photos admissible); Helsley v. State, 809 N.E.2d 292 (Ind. 2004) (ten photos).

Wilson v. State, 765 N.E.2d 1265 (Ind. 2002) (autopsy photos were gruesome, but admissible). See also Green v. State, 587 N.E.2d 1314 (Ind. 1992); Ketcham v. State, 780 N.E.2d 1171 (Ind. Ct. App. 2003); Price v. State, 765 N.E.2d 1245 (Ind. 2002); and Harris v. State, 163 N.E.3d 938 (Ind. 2021).

For cases where use of autopsy photographs was disapproved, see Loy v. State, 436 N.E.2d 1125 (Ind. 1982); Warrenburg v. State, 260 Ind. 572, 298 N.E.2d 434 (1973);

Kiefer v. State, 239 Ind. 103, 153 N.E.2d 899 (1958); and Turben v. State, 726 N.E.2d 1245 (Ind. 2000). These cases addressed the prejudicial impact of such photographs on a jury but are inapplicable where the trial is conducted before the court. Johnson v. State, 501 N.E.2d 442 (Ind. 1986).

(4) Stipulation

Even when the defendant concedes the cause of the victim's death, the photographs may be admissible. See, e.g., Oliver v. State, 755 N.E.2d 582 (Ind. 2001); Butler v. State, 647 N.E.2d 631, 633-34 (Ind. 1995); and Kellett v. State, 716 N.E.2d 975 (Ind. Ct. App. 1999). However, the fact that the extent of victim's injuries is not being contested is considered in determining the probative value of the photographs.

Willey v. State, 712 N.E.2d 434 (Ind. 1999) (autopsy photographs showing the inside of the murder victim's skull and the pathologist holding the victim's brain were inadmissible under Rule 403 where extent of injuries was not at issue).

Davis v. State, 892 N.E.2d 156 (Ind. Ct. App. 2008) (despite the fact defendant stipulated that the murders occurred during her trial for assisting the murderer after the fact, the trial court did not abuse its discretion by allowing gruesome testimonial and pictorial evidence of the murders to prove defendant knew of the murders at the time she assisted the defendant).

PRACTICE POINTER: A defense offer to stipulate to victim's identity and cause of death may diminish the probative value of photograph and require prosecution to attempt to minimize photograph's tendency to inflame jury's passions. Stamps v. State, 515 N.E.2d 507, 510-11 (Ind. 1987); see Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644 (1997).

f. Mug shots

The test for admission of mug shots, like other photographs, is whether the probative value is substantially outweighed by the danger of unfair prejudice. Wheeler v. State, 749 N.E.2d 1111 (Ind. 2001). When the State has made an effort to disguise the nature of the photographs by redacting criminal information, the photograph is not unduly prejudicial, and when the perpetrator's identification is at issue, mug shots are probative. Jenkins v. State, 677 N.E.2d 624 (Ind. Ct. App. 1997); see also Carson v. State, 672 N.E.2d 74 (Ind. 1996).

Alvarez v. State, 983 N.E.2d 626, 628 (Ind. Ct. App. 2013) (mug shots are admissible if they are not unduly prejudicial and have substantial independent probative value; where defendant fails to appear at trial, defendant's mug shot has substantial probative value for purpose of proving identity).

Splunge v. State, 641 N.E.2d 628 (Ind. 1994) (pre-evidence rules, court held there is merit to defendant's argument that photographs, even after being redacted of criminal history information, still are recognizable as mug shots; however, although the mug shot had little probative value because identity was not at issue, there was little

prejudice to the defendant because the mug shots were carefully redacted and there was overwhelming evidence; held, no reversible error).

g. Jailhouse calls

Baer v. State, 866 N.E.2d 752, 763 (Ind. 2007) (substance of recorded telephone calls from jail was obviously relevant and of high probative value, but also quite prejudicial to the defense; Court was not persuaded that there was anything unfairly prejudicial in the excerpts that were played for the jury; the high probative value was not outweighed by unfair resulting prejudice).

h. CI tapes

Prejudice may result from admission of partly unintelligible audio tape when it is used to bolster credibility of vulnerable witness, such as police informant with criminal record. Lahr v. State, 640 N.E.2d 756 (Ind. Ct. App. 1994).

i. Racial bias

Evidence of racial bias, though held to be relevant, has been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. The court must assign weight to each factor and determine the balance. Tompkins v. State, 669 N.E.2d 394, 398 (Ind. 1996). Whereas a defendant's use of a racially inappropriate name may not be sufficiently relevant to motive to harm or murder a person of a different race, statements and acts associated with violence towards the other race will be relevant. Id.

j. Battered woman syndrome

Expert testimony about battered woman syndrome may be admissible to explain why an alleged victim of domestic violence has recanted prior allegations of abuse, if a proper foundation is laid for the expert testimony. It has probative value because it is directly relevant to a testifying victim's credibility. The trial court must weigh the probative value against the danger of misleading the jury in each case. Carnahan v. State, 681 N.E.2d 1164, 1167-168 (Ind. Ct. App. 1997). See Ind. Code 35-41-3-11 for pretrial notice requirements affecting battered women cases.

k. Identity

It is error to admit prejudicial evidence which has only a slight probative value in identifying the assailant. Daniels v. State, 683 N.E.2d 557, 559 (Ind. 1997).

Daniels v. State, 683 N.E.2d 557, 559 (Ind. 1997) (harmless error in admission of evidence of gang-related statements and drawings of guns on a calendar allegedly signed with the alias of defendant).

Echeverria v. State, 146 N.E.3d 943, 949 (Ind. Ct. App. 2020) (drug ledgers containing names, dates, and dollar amounts of prior drug transactions were admissible due to their "substantial probative value for purposes of establishing

intent, identity, or even preparation, and while they might have some prejudicial effect, it does not outweigh their probative value"),

l. Nicknames/aliases

The unnecessary, excessive, or unproved use of aliases could create a connotation of criminality sufficient to thwart the fairness of a trial. Edgecomb v. State, 673 N.E.2d 1185, 1194 (Ind. 1996). The use of a nickname is questionable where there is no apparent reason not to use a defendant's proper name, and even more so where the nickname itself carries at least the implication of wrongdoing. McAbee v. State, 770 N.E.2d 802, 805 (Ind. 2002).

Wilson v. State, 4 N.E.3d 670 (Ind. Ct. App. 2013) (evidence of defendant's use of nicknames was admissible on cross-examination where defendant testified during direct as to his use of the nickname "Mike," thus opening the door to questioning as to his use of other nicknames; further, none of the nicknames explored by the State carry any implication of wrongdoing); see also Harrison v. State, 32 N.E.3d 240 (Ind. Ct. App. 2015).

Taylor v. State, 86 N.E.3d 157 (Ind. 2017) (four references to defendant as "Looney the Shooter" during murder and conspiracy trial were improper because they invoked his "unsavory or lawless character or reputation," which is precisely the use prohibited under Rule 404(a)(1); error was not fundamental).

m. Bizarre behavior

Evidence that the defendant masturbated during a confession to the police should have been excluded under Rule 403 because it was apparently not relevant to any issue in the case, but only tended to prove that the defendant had a propensity for bizarre behavior. While the prejudicial impact of this evidence may not have been greater than that of other evidence in the case, the other evidence in the case had considerable probative value. Pierce v. State, 761 N.E.2d 826 (Ind. 2002).

n. Drug activity

Jenkins v. State, 729 N.E.2d 147 (Ind. 2000) (even if the rape victim's prior drug use was relevant to the highly collateral issues of whether she purchased drugs from the defendant, its probative value was clearly outweighed by danger of unfair prejudice).

House v. State, 61 N.E.3d 1230 (Ind. Ct. App. 2016) (evidence of rape victim's past drug use, offered to show she stayed at defendant's trailer voluntarily, was not relevant as to whether she was held against her will and repeatedly sexually assaulted).

Jackson v. State, 712 N.E.2d 986 (Ind. 1999) (evidence that witness took marijuana into jail to give to defendant was inadmissible under Rule 403 in murder trial).

o. Bias and prejudice

While the Rules of Evidence allow for the admission of evidence showing bias or prejudice of a witness without any qualifications, provision should be read in conjunction with separate rule requiring a balancing of probative value of evidence against the danger of unfair prejudice. Ingram v. State, 715 N.E.2d 405 (Ind. 1999).

Thorton v. State, 712 N.E.2d 960 (Ind. 1999) (evidence that murder victim's fourteen-year-old daughter had a child with the victim's boyfriend was properly excluded where defendant was permitted to cross victim's daughter at length to establish her resentment and bias toward defendant, who was victim's husband; fact that victim's boyfriend and daughter had been sexual partners was already placed into evidence). See also Wood v. State, 804 N.E.2d 1182 (Ind. Ct. App. 2004); and Tinkham v. State, 787 N.E.2d 440 (Ind. Ct. App. 2003).

p. Victim impact

Sandifur v. State, 815 N.E.2d 1042 (Ind. Ct. App. 2004) (the probative value of evidence that person to which the defendant admitted delivering drugs died substantially outweighed the prejudice of the evidence; her death was inextricably bound to the State's charge of dealing).

State v. Lewis, 883 N.E.2d 847 (Ind. Ct. App. 2008) (defendant could not stipulate to victim's death in order to keep evidence of death from the jury in aggravated battery case).

Humphrey v. State, 680 N.E.2d 836 (Ind. 1997) (picture of victim with his young child should have been excluded as victim impact evidence; held, harmless error).

Woods v. State, 677 N.E.2d 499, 504 (Ind. 1997) (generally, testimony regarding the number of children the victim had is irrelevant, prejudicial, and not a proper part of state's case). See also Kelley v. State, 470 N.E.2d 1322 (Ind. 1984).

4. Exception

The trial court is not required to balance the prejudicial effect of impeachment evidence that the witness has been convicted of a crime in Rule of Evidence 609 with the probative value of such evidence before it is introduced. Jenkins v. State, 677 N.E.2d 624 (Ind. Ct. App. 1997).

IV. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS - RULE 404

A. OFFICIAL TEXT:

(a) Character Evidence.

(1) ***Prohibited Uses***. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a Defendant or Victim in a Criminal Case***. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) ***Exceptions for a Witness***. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses***. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case***. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

B. DEFINITION OF CHARACTER

"Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness." 1 *McCormick on Evidence,* § 195, at 1080 (7th ed. 2013).

C. OBJECTIONS

1. Specificity

King v. State, 799 N.E.2d 42 (Ind. Ct. App. 2003) (objection to evidence on relevance and prejudice grounds does not preserve an objection based on inadmissible character evidence). See also Lampkins v. State, 682 N.E.2d 1268 (Ind. Ct. App. 1997), *modified on reh'g*, 685 N.E.2d 698.

Abdul-Musawwir v. State, 674 N.E.2d 972 (Ind. Ct. App. 1996) (defendant can waive any error in admission of 404(b) evidence absent notice if he fails to object to admission of evidence at trial).

2. Fundamental error

The admission of bad character evidence may rise to fundamental error.

> Oldham v. State, 779 N.E.2d 1162 (Ind. Ct. App. 2002) (despite the fact that defense counsel stipulated to its admission, evidence of bad character was fundamental error; the State admitted business cards bearing the name "Rob-Goddie" and "Goddie" and phrases "Tre Block" and "Dope City," a novelty photograph of the defendant and another youth with superimposed brightly-colored printed text bearing words "America's Most Wanted," "Wanted for: robbery, assault, arson, jaywalking," "Considered armed and dangerous," and "approach with extreme caution," and photographs of two guns found in the defendant's garage). But see Pagan v. State, 809 N.E.2d 915 (Ind. Ct. App. 2004).

When the trial has become more about the defendant's character than about the crimes charged, the introduction of prior bad act evidence constitutes fundamental error.

> Rhodes v. State, 771 N.E.2d 1246 (Ind. Ct. App. 2002) (fundamental error where the prosecutor flooded the courtroom with irrelevant and prejudicial evidence concerning the defendant and defense witness' character). But see Goodwin v. State, 783 N.E.2d 686 (Ind. 2003).

Evidence of prior convictions for similar offenses, particularly the very crime for which the defendant is on trial, can be a "poison pill" (and fundamental error) in cases where defendant testifies, and the case turns solely on the credibility of the witnesses. Sasser v. State, 945 N.E.2d 201, 204 (Ind. Ct. App. 2011), *transfer denied* (in trial for failure to register as a sex offender, defense did not 'open the door' to prior convictions for the same offense by questioning a state's witness about two other occasions when defendant had registered as required).

D. RULE 404(a) EXCEPTIONS ALLOWING EVIDENCE OF CHARACTER

Character evidence is not admissible for proving action in conformity therewith except in the following situations.

1. Character of accused

Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same is admissible. See Indiana Rule of Evidence 404(a)(1).

a. Defense evidence of a pertinent trait

(1) Character is at issue by reference to substantive law and pleadings

A person's character evidence will be admissible if the nature of the underlying action places that person's character at issue. When character has been put in issue by the pleadings [or charges], evidence of character must be brought forth. Matter of J.L.V., 667 N.E.2d 186, 190 (Ind. Ct. App. 1996) (citing *McCormick on Evidence* § 187, at 789-90 (4th ed. 1992)) (see *now* 7th ed. page 1019). "If a party's character constitutes an essential element of proof of a charge, claim or defense by a party, character is 'in issue.'" Miller, 12 Indiana Practice 409, § 404.103 (3d Ed.). This will rarely be the case in criminal trials. Not even a claim of self-defense automatically places the defendant's character at issue.

Johnson v. State, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996) (merely asserting self-defense is not the equivalent to asserting a propensity to act in self-defense in a similar situation, nor does such an assertion automatically put defendant's character in issue; thus, harmless error to have admitted prior incident of fighting).

PRACTICE POINTER: Although a claim of self-defense does not automatically place a defendant's character at issue, a claim of self-defense does present a contrary intent which the State may negate with relevant prior acts. See, e.g., Sanders v. State, 704 N.E.2d 119 (Ind. 1999); Pinkston v. State, 821 N.E.2d 830 (Ind. Ct. App. 2004); and Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App. 2005).

(2) Defendant offers evidence of good character

(a) Defendant's evidence

Even when the accused's character is not at issue due to the charges, Rule 404(a) allows the defendant to choose to present evidence of his own pertinent character traits. See 22 C. Wright & Graham, *Federal Practice and Procedure,* § 5235, at 369 (1978), 2004 Supplement, p. 407. ("Where the defendant offers evidence of his good character to prove his innocence, this opens the door to prosecution rebuttal with evidence of bad character, but it does not make character an ultimate issue in the case ***.") (alteration in original).

Maslin v. State, 718 N.E.2d 1230 (Ind. Ct. App. 1999) (defendant's testimony in rape case that he would never do something like rape opened the door to uncharged accusation by a third party of rape), *overruled on other grounds by* Ludy v. State, 784 N.E.2d 459 (Ind. 2003).

Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006) (mere remark in the defendant's opening statement that "this young lady [is] gullible, easily

misled, [and] very trusting of all individuals," without more, is insufficient for the State to introduce character evidence to the contrary as there is no evidence yet "to rebut.").

(b) State's rebuttal evidence

Rebuttal evidence is limited to that which tends to explain, contradict, or disprove evidence offered by the adverse party. Schwestak v. State, 674 N.E.2d 962 (Ind. 1996). "Such rebuttal evidence must be limited to the character traits about which the defendant offered evidence, but if the defendant presented general character evidence, the prosecution may present evidence of the defendant's general reputation." Miller, 12 Indiana Practice 416-17, § 404.105 (3d. Ed.).

Ortiz v. State, 741 N.E.2d 1203 (Ind. 2001) (defendant's assertion that he is not a killer was not evidence of a pertinent character trait that a prior conviction for criminal recklessness would rebut; one can be convicted of criminal recklessness and still not be a killer; thus, evidence of a prior criminal recklessness charge against someone other than the victim does not rebut the statement).

The State may ask whether defendant's character witnesses "know" or "have heard" of conduct by defendant that would be inconsistent with good character. Lineback v. State, 301 N.E.2d 636, 637 (Ind. 1973) (even though conduct might be criminal), *cert. den.*, 94 S. Ct. 1440 (1974). The State may ask the character witness about relevant specific instances. Forrest v. State, 655 N.E.2d 584, 586-87 (Ind. Ct. App. 1995).

If defendant introduces evidence of his own character trait for peacefulness, the State may offer rebuttal evidence as to defendant's peacefulness or to inquire as to relevant specific acts by defendant on cross-examination. Johnson v. State, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996).

Forrest v. State, 655 N.E.2d 584, 586-87 (Ind. Ct. App. 1995) (on cross, character witnesses were asked whether they knew of defendant's arrests for disorderly conduct and resisting arrest; question was relevant to defendant's alleged peaceful nature and admissible under Rule 404(a) to rebut evidence of peacefulness presented by defendant).

Schwestak v. State, 674 N.E.2d 962 (Ind. 1996) (defendant's first offered testimony that he was hard-working, decent and peaceful individual opened the door to cross-examination of defense witness regarding defendant's reputation for violent behavior while drinking).

(c) Exception: State cannot rebut defendant's dress and appearance at trial

The State is not permitted to rebut defendant's appropriate dress for court and respectful courtroom conduct and demeanor with evidence of defendant's bad character. Wallace v. State, 836 N.E.2d 985 (Ind. Ct. App. 2005).

Wallace v. State, 836 N.E.2d 985 (Ind. Ct. App. 2005) (trial court erred by allowing State to use the cover of defendant's CD, as well as a poster, which depicted the defendant wearing a dark cap, T-shirt, and baggy dark pants, with one hand grabbing his crotch and, with the other hand, holding a firearm at his side to rebut defendant's respectful demeanor and dress).

2. Character of victim: self-defense

A victim's violent nature is relevant to a defendant's theory of self-defense. Johnson v. State, 671 N.E.2d 1203, 1208, n.8 (Ind. Ct. App. 1996). There is a risk of prejudice when introducing evidence of a victim's character, as "[l]earning of the victim's bad character could lead the jury to think that the victim merely 'got what he deserved' and to acquit for that reason. Nevertheless, at least in murder and perhaps in battery cases as well, when the identity of the first aggressor is really in doubt, the probative value of the evidence ordinarily justifies taking this risk." *McCormick on Evidence* § 193, at 1072 (7th ed. 2013).

a. Method of proof

Evidence of victim's character may be admitted for either of two purposes: (1) to show that victim had a violent character giving defendant reason to fear him; or (2) to show that victim was the initial aggressor. Coleman v. State, 694 N.E.2d 269 (Ind. 1998). "Evidence of specific bad acts is admissible to prove that the victim had a violent character which frightened the defendant. However, only general reputation evidence of the victim's violent character is admissible to prove that the victim was the initial aggressor." Id. at 277 (Ind. 1998) (*quoting* Holder v. State, 571 N.E.2d 1250, 1253 (Ind. 1991)). For more thorough discussion of the method of proof, see the discussion of Rule 405, hereinafter.

b. Reason to fear victim

(1) Victim character evidence must illustrate violence

"The evidence introduced by a defendant to show his apprehension of the victim must imply a propensity for violence on the part of the victim." Brand v. State, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002).

Broome v. State, 687 N.E.2d 590, 601 (Ind. Ct. App. 1997), *affirmed on transfer* 694 N.E.2d 280 (trial court's refusal to admit evidence of victim's homosexual conduct was not error; nothing in testimony would have indicated that victim had a reputation for physically injuring, or using force against, the objects of his sexual advances, and thus, was not probative).

Russell v. State, 577 N.E.2d 567 (Ind. 1991) (fact that defendant knew the victim had just been released from prison could place him in fear or apprehension because it is not unreasonable to assume such a person may have violent character and is admissible to prove self-defense claim).

Brand v. State, 766 N.E.2d 772 (Ind. Ct. App. 2002) (defendant's evidence that the victim had dealt drugs, been a gang member, and had offered to sell defendant a firearm was probative of the reasonableness of defendant's fear; the defendant did, in fact, know about the drug dealing, gang membership and firearm).

(2) Reasonableness of fear

When a claim of self-defense is interposed, any fact which reasonably would place a person in fear or apprehension of death or great bodily injury is admissible. Hirsch v. State, 697 N.E.2d 37 (Ind. 1998).

Whether the defendant must know about the victim's violent act in order for the act to be admissible is unclear. The Indiana Supreme Court has held that a defendant must have known about the specific bad act for it to be relevant to the defendant's fear. Coleman v. State, 694 N.E.2d 269 (Ind. 1998).

Welch v. State, 828 N.E.2d 433 (Ind. Ct. App. 2005) (events which occurred after stabbing could not be relevant to the defendant's state of mind or reasonable fear at time of stabbing).

But the Indiana Supreme Court has held that a claim of self-defense requires both subjective belief that force is necessary to prevent serious bodily injury and that such actual belief is reasonable under the circumstances. Littler v. State, 871 N.E.2d 276 (Ind. 2007). Thus, "a defendant claiming self-defense is not necessarily restricted to producing evidence of his own state of mind or belief. It is ultimately the defendant's belief that is at issue; however, the beliefs of others may shed light upon the reasonableness of the defendant's beliefs." Hood v. State, 877 N.E.2d 492, 495-96 (Ind. Ct. App. 2007).

Littler v. State, 871 N.E.2d 276 (Ind. 2007) (in murder prosecution, trial court erroneously excluded evidence of victim's prior acts of violence, his mental condition and history of violent behavior to corroborate the defendant's fear).

But see Wells v. State, 904 N.E.2d 265 (Ind. Ct. App. 2009) (victim's violent act of forcing a sexual encounter with another previously was not admissible under Rule 404(b) to corroborate the defendant's story that the victim acted similarly towards him).

c. Victim as first aggressor

The victim's character trait for violence is pertinent to a claim of self-defense. Proving victim's aggressive character may be accomplished only by reputation or opinion testimony. Coleman v. State, 694 N.E.2d 269, 277 (Ind. 1998); Johnson v. State, 671 N.E.2d 1203, 1208 (Ind. Ct. App. 1996).

Brooks v. State, 683 N.E.2d 574 (Ind. 1997) (trial court did not err in excluding testimony that victim had been charged with two counts of battery, one of which resulted in conviction; the defendant argued that evidence regarding victim's violent

propensities would have supported his claim that victim was initial aggressor in confrontation). See also Bell v. State, 820 N.E.2d 1279 (Ind. Ct. App. 2005); Guillen v. State, 829 N.E.2d 142 (Ind. Ct. App. 2005); and Price v. State, 765 N.E.2d 1245 (Ind. 2002).

E. RULE 404(b) - OTHER CRIMES, WRONGS, OR ACTS

A court assessing the admissibility of evidence under Rule 404(b) must first determine whether it is relevant to a matter at issue other than the defendant's propensity to commit the charged act, and then balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. Turner v. State, 953 N.E.2d 1039, 1057 (Ind. 2011).

1. Applies to defendants and non-defendants alike

The admissibility of evidence about prior bad acts by persons other than defendants is subject to Rule 404(b). The defendant may offer evidence of another person's prior bad acts if the exceptions of Rule 404(b) apply. Garland v. State, 788 N.E.2d 425, 430 (Ind. 2003). When the defendant offers Rule 404(b) evidence, it is called "reverse 404(b)." Id. "[T]he rule acts as an appropriate restraint on admissibility of evidence about events or acts that are by definition largely extraneous to those for which a defendant is on trial." Id. at 429.

However, Garland left undecided whether the Sixth Amendment requires a lower degree of similarity between the prior crimes and the instant offense when the defendant introduces evidence to show the identity of a third party whom the defendant believes is guilty. Garland, 788 N.E.2d at 430. Argue that Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727 (2006) requires a lower standard.

Rohr v. State, 866 N.E.2d 242, 247 (Ind. 2007) (prior beatings of child-victim by mother were essential to defendant's explanation that mother, not defendant, caused victim's extensive injuries).

Montgomery v. State, 21 N.E.3d 846 (Ind. Ct. App. 2014) (distinguishing Rohr, Court found no error in excluding defendant's evidence of mother's pattern of abusing murder victim, because it was irrelevant to charges against defendant that victim's death was result of single blow to the head).

Yeary v. State, 186 N.E.3d 662 (Ind. Ct. App. 2022) (in drug-induced homicide prosecution, trial court erred in excluding evidence of text messages the victim sent and received in the days immediately preceding his death; the messages point to potential alternate sources of the fentanyl the victim ingested, and therefore they affect the probability of whether the drugs defendant sold him proximately caused his death).

Tibbs v. State, 59 N.E.3d 1005 (Ind. Ct. App. 2016) (no error in excluding evidence that a third person was previously indicted for victim's murder, gave inconsistent statements regarding his whereabouts the night victim disappeared, and threatened to kill victim four years earlier if she disclosed that he sexually molested her).

Kien v. State, 866 N.E.2d 377 (Ind. Ct. App. 2007) (trial counsel was not ineffective for failing to investigate and present evidence of girlfriend's vindictive behavior and that

complaining witness's half-brother could have molested victim; the acts were too remote and unconnected to the charged crimes).

Ramirez v. State, 174 N.E.3d 181 (Ind. 2021) (in murder prosecution, trial court did not abuse its discretion in excluding evidence of mother's prior bad acts involving her children — specifically, the murder victim's buckle fracture suffered a year before her death which the trial court deemed "too remote"; Defendant did not demonstrate that the fracture was evidence of a "strikingly similar" crime or was caused by mother specifically, as required by Garland).

Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App. 2004) (no error in excluding evidence of a hostile relationship between the murder victim and her husband because the events showing hostility were too remote).

Camm v. State, 908 N.E.2d 215 (Ind. 2009) (third party's prior attacks of women to steal their shoes motivated by his foot or shoe fetish were not admissible to prove he committed murders; the murders were not strikingly similar to the prior crimes and there was no evidence connecting the murders to the third party's foot or shoe fetish beyond the wife's shoes being off and her feet being bruised).

Saintignon v. State, 118 N.E.3d 778 (Ind. Ct. App. 2019) (evidence that prior suspect once held knives to another woman's throat and threatened to decapitate her was irrelevant to charged murder and inadmissible as character evidence under Rule 404(b); exclusion of two witnesses' testimony that the same prior suspect confessed to killing victim three years after crime did not violate due process because defendant "utterly failed" to show that the testimony would have borne persuasive assurances of trustworthiness).

Newland v. State, 126 N.E.3d 928 (Ind. Ct. App. 2019) (trial court properly prevented defendant from further cross-examining witness on details of his prior theft conviction for the sole purpose of creating the "forbidden inference," i.e., prior wrongful conduct in similar circumstances suggesting present guilt).

Mathews v. State, 186 N.E.3d 1182 (Ind. Ct. App. 2022) (no abuse of discretion in excluding testimony from one of the murder victim's friends, who tried to contact police with information that another suspect was the real killer; the testimony was not relevant to show the police's failure to investigate other suspects because there is no evidence that a detective or any other officer actually received the information about the other suspect).

Rule of Evidence 404(b) has also been applied to prior acts of the victim.

Wells v. State, 904 N.E.2d 265 (Ind. Ct. App. 2009) (victim's violent act of forcing a sexual encounter with another previously was not admissible under Rule 404(b) to prove that the victim acted similarly in this case).

PRACTICE POINTER: Many jurisdictions either do not apply Rule 404(b) or apply a lesser standard when the defendant uses Rule 404(b) to show that someone else committed the crime. Commonwealth v. Thompson, 779 A.2d 1195 (Pa.Super 2001); Sessoms v. State, 744 A.2d 9 (Md. 2000); Beaty v. Commonwealth, 125 S.W.3d 196 (Ky. 2003). This approach is consistent with Joyner v. State, 678 N.E.2d 386, 389 (Ind. 1997), and Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006). In Joyner, the Indiana Supreme Court admitted evidence of a third party's motive solely because it made it more probable that the third party, and not the defendant, committed the crime. Id. at 430. In Holmes, *supra*, the only legitimate interests identified by the Supreme Court for excluding third party evidence were "that is repetitive . . ., only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" Id. at 1732 (quoting Crane, 106 S. Ct. at 2142). Thus, arguably, Garland should be re-examined in light of Holmes.

2. Purpose: prohibits "forbidden inference"

Rule 404(b) prevents the jury from making the "forbidden inference" that prior wrongful conduct suggests present guilt. Barker v. State, 695 N.E.2d 925, 930 (Ind. 1998). The rule excludes evidence of misconduct where it is offered solely for purpose to show the defendant possesses certain character traits and acts in conformity therewith. Bacher v. State, 686 N.E.2d 791 (Ind. 1997). Indiana cases refer to this reasoning as the "forbidden inference." Fairbanks v. State, 119 N.E.3d 564, 568 (Ind. 2019).

The rule was designed to ensure that the State may not punish a person for his character by relying on evidence of uncharged misconduct. Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997). The principle that the State may not punish a person for his character is one of the foundations of our system of jurisprudence. Evidence of "uncharged misconduct" will naturally give rise to the inference that the defendant is of bad character. This, in turn, poses the danger that the jury will convict the defendant solely on this inference. Johnson v. State, 655 N.E.2d 502, 503 (Ind. 1995). Evidence must relate to the crime, not the criminal. Id. at 505.

Collins v. State, 966 N.E.2d 96, 104 (Ind. Ct. App. 2012) ("The rule is designed to prevent the jury from assessing a defendant's present guilt on the basis of past propensities.").

Anderson v. State, 681 N.E.2d 703, 707 (Ind. 1997) (witness statements that defendant was a drug user -- casual or not -- only go to show defendant was a "bad person"; Rule 404(b) excludes this type of evidence).

Lay v. State, 659 N.E.2d 1005, 1009 (Ind. 1995) (prior, uncharged bad acts can be highly and unfairly prejudicial, requiring an accused to defend both against the charged crime and the alleged uncharged misconduct).

Stevens v. State, 691 N.E.2d 412, 423 (Ind. 1997) (videotaping a baseball game, attending a neighborhood Bible study, and taking a child fishing are not activities which by themselves indicate any unsavory character trait with which defendant could have acted in conformity on the day of victim's murder; only after corroborating the direct evidence of motive does the challenged evidence take on a darker inference; its

admissibility must be questioned under Rule 403 and not Rule 404(b)) *cert. den.*, 119 S. Ct. 550 (1998).

3. State must provide defense notice of intent to use prior acts

a. Defendant must request notice

The defendant must request pretrial notice of evidence the State intends to offer under Rule 404(b) in order to trigger the notice requirement. The notice requirements of Rule 404(b) control over Ind. Code 35-37-4-14, the statute which previously governed the admissibility of evidence of a prior battery in a murder prosecution. McEwen v. State, 695 N.E.2d 79 (Ind. 1998).

> McEwen v. State, 695 N.E.2d 79 (Ind. 1998) (State introduced evidence of another battery in a murder case and did not give defendant notice under the statute; State allowed to rely on Rule 404(b) and not required to give notice without request from defendant).

b. Reasonableness of the notice

Determining whether State's notice is reasonable requires examination of whether the purpose of the notice provision is achieved in light of the circumstances of the particular case. Hatcher v. State, 735 N.E.2d 1155 (Ind. 2000). The reasonableness of the State's notice does not turn on its relation in time to either the defendant's request for notice or the date of trial; rather, the reasonableness of the notice requires an examination of whether the purpose of the notice provision was achieved based upon the circumstances of a particular case. Id.; Erickson v. State, 72 N.E.3d 965, 973 (Ind. Ct. App. 2017).

(1) Timeliness

> Hatcher v. State, 735 N.E.2d 1155 (Ind. 2000) (State's 404(b) notice filed six days prior to trial and eleven months after the defendant's request for notice was reasonable because prior acts had been disclosed by state in discovery and six days was sufficient to resolve admissibility issues).

(2) Specificity

The purpose of the notice provision is to reduce surprise and promote early resolution of questions of admissibility. The prosecution must characterize conduct to a sufficient degree to apprise the defendant of its general nature. Prosecution also has continuing obligation to disclose "other crimes" evidence that it discovers after it has initially either provided or denied its intent to use such information. Dixon v. State, 712 N.E.2d 1086 (Ind. Ct. App. 1999).

> Dixon v. State, 712 N.E.2d 1086 (Ind. Ct. App. 1999) (State's 404(b) response indicating that it would utilize testimony of "[c]onfidential Informant 900 . . .." was sufficient notice where, in an interview, informant told defense counsel that the defendant had sold her cocaine on prior occasions).

Burgett v. State, 758 N.E.2d 571 (Ind. Ct. App. 2001) (evidence of prior bad acts is properly admissible despite State's late notice of intent to use such evidence where defense counsel was well aware of evidence and its likelihood of being presented at trial).

PRACTICE POINTER: Motions to compel disclosure (Rule 404(b) requests): Defendant filed pre-trial Motion to Compel Disclosure of Evidence pursuant to Rule 404(b). State filed certain pre-trial responses to the defendant's motion. During the fourth day of the jury trial, the State filed an additional response to the defendant's 404(b) request. Arguments were heard with respect to all of the State's responses and the trial court entered preliminary rulings and orders allowing and disallowing certain of the State's proposed evidence. Ross v. State, 676 N.E.2d 339 (Ind. 1996).

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

4. Test for admissibility

a. Is the evidence an act?

Clark v. State, 915 N.E.2d 126, 130 (Ind. 2009) (Defendant's Myspace entry describing himself: "Society labels me as an outlaw and criminal... To those people I say, if I can do it and get away. Bull S***. And with all my obstacles, why the f*** can't you" is not inadmissible character evidence because it only contained statements about himself and not prior bad acts; defendant's words, and not his deeds were at issue, and thus Rule 404(b) did not apply).

Bell v. State, 29 N.E.3d 137 (Ind. Ct. App. 2015) (defendant's statement to police officer that he could "read" people constituted bragging, not inadmissible character evidence).

b. Is the act a prior "bad" act?

Although Evidence Rule 404(b) refers to "other crimes, wrongs, or acts," some courts have applied Rule 404(b) only to prior "bad acts." Rogers v. State, 897 N.E.2d 955, 960 (Ind. Ct. App. 2008) (quoting Williams v. State, 960 N.E.2d 162 (Ind. 1997)).

Rogers v. State, 897 N.E.2d 955 (Ind. Ct. App. 2008) (Court of Appeals is unable to say that the possession of a common steak knife is the sort of evidence to which Rule 404(b) applies).

c. Is there evidence of an extrinsic act?

(1) Rule 404(b) does not prohibit intrinsic acts

The *res gestae* exception to uncharged misconduct evidence, allowing the admission of prior acts in order to complete the story of the crime, has not survived adoption of Indiana Rules of Evidence. Swanson v. State, 666 N.E.2d 397 (Ind. 1996).

> Snow v. State, 77 N.E.3d 173 (Ind. 2017) ("We reiterate today our holding from over twenty years ago: res gestae - the common-law doctrine that made evidence admissible when it was part of a crime's story - is no more.").

Under the Rules of Evidence, if the prior acts are considered intrinsic to the crime, they are admissible if relevant and not unfairly prejudicial. If the prior acts are considered extrinsic to the crime, they must also be admissible under Rule 404(b). "The paradigm of [Rule 404(b)] inadmissible evidence is a crime committed on another day in another place, evidence whose only apparent purpose is to prove the defendant is a person who commits crimes." Id. at 398; Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997); Brown v. State, 684 N.E.2d 529, 536 (Ind. Ct. App. 1997), *cert. den.*

"Other acts are 'intrinsic' if they occur at the same time and under the same circumstances as the crimes charged." Wages v. State, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007) (*quoting* Holden v. State, 815 N.E.2d 1049, 1054 (Ind. Ct. App. 2004)).

> Hudson v. State, __ N.E.2d __, 2009 Ind. App. LEXIS 363 (although occurring during the same charged time period, 2000-06, evidence that defendant played a game with victim where she placed her hands on his penis was separate and unique from the charged sexual offenses and thus not "inextricably bound up" with the charged crimes: because the game did not fall under Rule 404(b) exception, it should not have been admitted into evidence; harmless error).
>
> Brown v. State, 747 N.E.2d 66 (Ind. Ct. App. 2001) (reversible error to admit evidence and testimony relating to shotgun, ski masks, and duct tape found in the vehicle at the time of arrest; these items had no relevancy to issue of the defendant's guilt or innocence on charge of possessing unlicensed handgun, nor did they prove or disprove any material fact in this case). See also Romack v. State, 446 N.E.2d 1346 (Ind. Ct. App. 1983).
>
> Hollen v. State, 740 N.E.2d 149, *aff'd by* 761 N.E.2d 398 (second battery against same person in different county on the same day was not relevant in trial concerning first battery).
>
> Wages v. State, 863 N.E.2d 408 (Ind. Ct. App. 2007) (witness may testify as to her observations of defendant's driving shortly before a fatal accident in a reckless homicide trial; the driving was either intrinsic and relevant or admissible to rebut defendant's assertion that his acts were an accident).

Seabrooks v. State, 803 N.E.2d 1190 (Ind. Ct. App. 2004) (evidence that the defendant searched through the murder victim's wallet while he was tied up but prior to his death was not excluded by Rule 404, as it was not evidence of a "crime committed on another day in another place").

Douglas v. State, 746 N.E.2d 424 (Ind. Ct. App. 2001) (defendant's statement that he sold drugs to make money to support his family was not evidence of other crimes, but rather, the defendant's response to officer's questioning with respect to present offense).

Sanders v. State, 724 N.E.2d 1127 (Ind. Ct. App. 2000) (evidence that defendant had, earlier in the evening on which the charged molest occurred, offered victim and two of her friend's money to engage in oral sex was admissible to show motive and inextricably bound up with charged offense).

Marshall v. State, 893 N.E.2d 1170 (Ind. Ct. App. 2008) (evidence of repeated molestations occurring within the time periods outlined in charging information were intrinsic to and direct evidence of the charged offenses); See also Mise v. State, 142 N.E.3d 1079 (Ind. Ct. App. 2020) (no error in admitting multiple undisclosed/uncharged acts of child molest where defendant was charged with only one count; testimony also admissible to show preparation or plan).

Anderson v. State, 15 N.E.3d 147 (Ind. Ct. App. 2014) (evidence of defendant's monitoring device showing he was not at home on June 4 leading up to his June 5 arrest was not error because it was part of one continuous crime of escape).

Meadows v. State, 785 N.E.2d 1112 (Ind. Ct. App. 2003) (in prosecution for possession of firearm by serious violent felon (aiding and abetting), trial court erred in admitting evidence regarding the general capabilities of the gun used by the principal to shoot at police while leading them on a chase during which the defendant was not present; error was harmless).

Bennett v. State, 5 N.E.3d 498 (Ind. Ct. App. 2013) (no abuse of discretion in admitting pictures of text messages related to drug deals not at issue in defendant's trial for dealing and possessing cocaine because messages were "intrinsically" related); see also Perryman v. State, 13 N.E.3d 923 (Ind. Ct. App. 2014) and Schnitzmeyer v. State, 168 N.E.3d 1041 (Ind. Ct. App. 2021).

Swallow v. State, 19 N.E.3d 396 (Ind. Ct. App. 2014) (defendant's recorded statement that he was a drug dealer was inextricably intertwined with his attempt to mislead police about the charged murder); see also Kyle v. State, 54 N.E.3d 439 (Ind. Ct. App. 2016) (telephone conversation between defendant and witness to encourage witness's child to recant allegations was inseparable from crime).

Baumholser v. State, 62 N.E.3d 411 (Ind. Ct. App. 2016) (no error to allow complaining witness in child molesting case to testify that defendant "drank a lot and had weapons in the house"; testimony was not offered to show defendant's character but to explain why C.W. waited four years to report the crime).

Wilcoxson v. State, 132 N.E.3d 27 (Ind. Ct. App. 2019) (in attempted murder and criminal recklessness prosecution, evidence that defendant fired a gun as a SWAT team arrested him was properly admitted under Rule 404(b) to show motive and consciousness of guilt; while that evidence prejudiced him, it met the balancing test under Evidence Rule 403).

PRACTICE POINTER: Language such as "inexplicably bound up" or "the circumstances and context" used to justify admission of 404(b) evidence "have become invitations to revive a defunct res gestae exception." Snow v. State, 65 N.E.3d 1129 (Ind. Ct. App. 2016) (Vaidik, C.J., dissenting), *transfer granted*, vacated at 77 N.E.3d 173 (Ind. 2017). In addition, other jurisdictions have rejected the "inextricable intertwinement" doctrine. See United States v. Green, 617 F.3d 233 (3d Cir. 2010) (like the antiquated doctrine of *res gestae*, "the inextricably intertwined test if vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b)"); United States v. Gorman, 613 F.3d 711 (7th Cir. 2010).

Some Indiana cases have expanded the definition of intrinsic evidence to include uncharged crimes that did not occur even in the same day, let alone under the same circumstances of the crime. Argue these cases are incorrectly relying on the long-*overruled res gestae* exception and that the inextricable intertwinement doctrine should be abandoned. See, e.g., Willingham v. State, 794 N.E.2d 1110 (Ind. Ct. App. 2003) (defendant's admission to selling cocaine the week prior to his arrest for dealing in cocaine was probative of motive to sell cocaine detectives found in his bedroom, and was inextricably bound up with charged crime); Bocko v. State, 769 N.E.2d 658 (Ind. Ct. App. 2002) (evidence that heroin was found in one of three bags defendant threw to floor as he prepared to go to police office served to complete story of crime and was therefore admissible in prosecution for cocaine possession); Cowan v. State, 783 N.E.2d 1270 (Ind. Ct. App. 2003) (allowing admission of evidence of other acts as well as drug usage because it served as a basis for everything that followed charged incident and was necessary to explain and understand incident). In Snow v. State, 77 N.E.3d 173 (Ind. 2017), a gun that Defendant carried when she battered an arresting officer was admissible under Rule 401, but not because "it explained the circumstances and context of the…altercations between [Defendant] and Officer Peck," as the Court of Appeals had ruled.

(2) Required proof that the extrinsic act occurred

In 404(b) context, "there must be sufficient evidence from which the jury could reasonably find the defendant's misconduct proven by a preponderance of the evidence." Camm v. State, 812 N.E.2d 1127, 1140 (Ind. Ct. App. 2004); Camm v. State, 908 N.E.2d 215 (Ind. 2009); Huddleston v. U.S., 485 U.S. 681, 690, 108 S.Ct. 1496 (1988); Clemens v. State, 610 N.E.2d 236, 243 (Ind. 1993). "The Government 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, 485 U.S. at 690).

Camm v. State, 908 N.E.2d 215 (Ind. 2009) (although the State's expert testimony adequately supported an inference that defendant's daughter was molested, there was no evidence that defendant molested his daughter; thus, with no evidence connected the defendant to the injuries, the inquiry lacked purpose and the evidence of the injuries and molest was inadmissible to prove motive to murder).

Corbett v. State, 179 N.E.3d 475, 489-90 (Ind. Ct. App. 2021) (in murder and burglary prosecution, trial court abused its discretion in admitting evidence of other homes that were burglarized near the victims' home on date of offense, where State showed no proof defendant committed the attempted home invasions).

Wells v. State, 441 N.E.2d 458 (Ind. 1982) (expert testimony that bullets fired into the plant where defendant worked were from the same weapon as the bullet taken from the victim was inadmissible because an unreliable tip did not link the defendant the shooting with sufficient certainty).

Perry v. State, 956 N.E.2d 41, 60 (Ind. Ct. App. 2011) (where evidence of prior misconduct consists only of an arrest or charge, the fact of the arrest or charge alone will not suffice to sustain admission under Rules 404(b) and 104(b)).

However, the State's sole proof of the extrinsic act can be the defendant's admission to the prior act. Wilkes v. State, 917 N.E.2d 675 (Ind. 2009). The corpus delicti rule does not apply to the admission of prior acts under Indiana Rule of Evidence 404(b). Id.

d. Is the extrinsic act relevant and not unfairly prejudicial

The court must: (1) determine that the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act, and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. Barker v. State, 695 N.E.2d 925 (Ind. 1998). These two prongs incorporate Rules 401, 402, and 403 into Rule 404. Hicks v. State, 690 N.E.2d 215, 219 (Ind. 1997). When evaluating the possibility of unfair prejudicial impact, courts look for the dangers that: 1) the finder of fact will substantially overestimate the value of the evidence or 2) the evidence will arouse or inflame the passions or sympathies of the finder of fact. Newell v. State, 7 N.E.3d 367, 371 (Ind. Ct. App. 2014).

Swann v. State, 789 N.E.2d 1020 (Ind. Ct. App. 2003) (trial court properly excluded defendant's proffered evidence that he falsely confessed to the police in a prior, unrelated murder investigation to prove he falsely confessed in instant case).

(1) Relevance

"[E]vidence of a prior conviction is as prejudicial as evidence can get and requires a strong showing of probative value." Thompson v. State, 690 N.E.2d 224, 235 (Ind. 1997).

When inquiring into relevance, the trial court may consider any factor it would ordinarily consider under Rule 402. These may include similarity and proximity in time of prior bad act to charged conduct and will typically include tying the act to the defendant (the nexus between the act and the prior act). These factors are not in and of themselves separate requirements for admission under Rule 404(b), but are simply illustrative of many aspects that may, depending on context, be required to show relevance. Hicks v. State, 690 N.E.2d 215 (Ind. 1997).

(a) Nexus between prior act and crime

The proponent of prior act evidence must articulate a rational and legitimate connection between the evidence and some matter actually at issue in the case. Sundling v. State, 679 N.E.2d 988, 993 (Ind. Ct. App. 1997).

Weaver v. State, 583 N.E.2d 136 (Ind. 1991) (in trial for murder of one person, it was error to admit evidence that he had shot his wife two years subsequent, as there was no evidence that he shot wife to conceal or suppress evidence of earlier killing; wife had known about earlier killing for two years and had done nothing about it).

Houser v. State, 823 N.E.2d 693, 697 (Ind. 2005) (there is no correlation between an individual's enjoyment of particular music and individual's behavior). Cf. Bryant v. State, 802 N.E.2d 486 (Ind. Ct App. 2004).

Kien v. State, 866 N.E.2d 377 (Ind. Ct. App. 2007) (probative value of evidence of defendant's ex-girlfriend's vindictiveness in her past romantic relationships was substantially outweighed by its risk of substantial prejudice in defendant's trial for molesting ex-girlfriend's daughter; ex-girlfriend never accused others of molesting daughter and one relationship ended more than a decade before offense).

Turney v. State, 759 N.E.2d 671 (Ind. Ct. App. 2001) (Rule 403 prohibited evidence that defendant charged with sexual misconduct with minor had engaged others in sexual conversations and requested nude photographs; defendant was not accused of, nor did record indicate that defendant committed any sexual acts upon these witnesses, conversations were not directly tied to defendant's relationship with victim, and defendant's intent was not placed in issue).

Baker v. State, 997 N.E.2d 67 (Ind. Ct. App. 2013) (defendant's prior acts of theft were not properly admitted under knowledge, identity or intent exceptions of Rule 404(b) because he did not place his intent or knowledge into issue but rather presented an alibi defense, and there was no evidence charged theft was a "signature" crime).

(b) Speculative nature

The speculative component of evidence may decrease the evidence's probative value, and thus, makes the evidence inadmissible under relevance test of Rule 402 or the balancing test of Rule 403. Cox v. State, 696 N.E.2d 853, 861-62 (Ind. 1998).

Carson v. State, 659 N.E.2d 216 (Ind. Ct. App. 1995) (where evidence linking defendant to a drive-by shooting of a home of woman who just buried her murdered son was not overly persuasive and could not help but to inflame the jury's passions, its prejudicial impact outweighed its probative

value), *abrogated on other grounds*, Hicks v. State, 690 N.E.2d 215 (Ind. 1997). See also Camm v. State, 812 N.E.2d 1127, 1140 (Ind. Ct. App. 2004).

(c) Passage of time

Hicks v. State, 690 N.E.2d 215, 223 (Ind. 1997) (testimony, though relevant to show the hostility of relationship, was of fairly low probative value in view of its remoteness in time (two years before murder) and the fact the State had ample evidence of hostility, including the other two more recent incidents and defendant's own statements, upon which it could rely; the prejudicial impact of the testimony, however, was sure to be high and substantially outweighed its probative value).

Wiggins v. State, 727 N.E.2d 1, 9 (Ind. Ct. App. 2000) (evidence of defendant's income from 1973 to 1996 did not aid the jury in evaluating defendant's claim that he could not work in 1992 and 1993).

(2) Prejudice

(a) Evidence of prior crimes presumptively prejudicial

One crime cannot be proved in order to establish another distinct crime even though they are of the same kind. Even oblique or apparently innocuous references to prior convictions are impermissible. Thompson v. State, 690 N.E.2d 224, 235-36 (Ind. 1997) (setting forth a list of reversals based on improperly admitted prior convictions). The more similar the crimes are to one another, the more likely the jury will use the prior crime to prove action in conformity therewith.

Mote v. State, 775 N.E.2d 687 (Ind. Ct. App. 2002) (videotape of defendant's pre-polygraph interview including twelve references to the defendant's prior criminal history in violation of IRE 404(b) created grave peril; trial court erred in refusing to grant mistrial). See also Lehman v. State, 777 N.E.2d 69 (Ind. Ct. App. 2002).

Harris v. State, 878 N.E.2d 504 (Ind. Ct. App. 2007) (in prosecution for driving while HTV, simply denying that he drove did not open the door to prior crimes of a similar nature which were extremely prejudicial).

Simmons v. State, 760 N.E.2d 1154 (Ind. Ct. App. 2002) (probative value of officer's testimony in murder trial that victim claimed defendant had previously threatened him with a gun was outweighed by undue prejudice that the evidence would create, i.e., the inference that defendant acted in conformity).

(b) Gang membership

Richmond v. State, 685 N.E.2d 54, 55 (Ind. 1997) (Rule 403/404 might potentially apply when the prosecution introduces evidence of a prior conviction

under the criminal gang activity statute, Ind. Code 35-45-9-3, or when a defendant's gang membership becomes the entire theme of the trial, thereby raising a substantial threat of guilt by association).

(c) State may not flood courtroom with prejudicial details

In its effort to prove guilt, the State may not "flood the courtroom" with unnecessary and prejudicial details of prior criminal conduct merely because some of that evidence is relevant and admissible. Rule 404(b) is on the books because evidence of prior crimes is presumptively prejudicial. Even where a prior criminal act is relevant to a material fact, the potential for unfair prejudice dictates that the evidence of the prior misconduct be limited to that necessary to prove the disputed fact. Thompson v. State, 690 N.E.2d 224, 236 (Ind. 1997).

Even where questions involve proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident instead of character, there is certainly a point where repetitive nature of such questions stops proving one of listed exceptions under 404(b) and begins to prove the defendant's character. Therefore, while evidence of prior bad acts may have been relevant to a matter at issue, the cumulative nature of such questions may have a prejudicial effect that outweighs their collective probative value. Wertz v. State, 771 N.E.2d 677 (Ind. Ct. App. 2002).

Jones v. State, 708 N.E.2d 37 (Ind. Ct. App. 1999) (in prosecution for operating motor vehicle while license suspended for life, trial court committed reversible error in admitting evidence of laundry list of fourteen of defendant's prior convictions; the prior convictions intolerably enlarged burden on defense and effectively negated due process presumption of innocence, thus violating the defendant's constitutional right to fair trial). See also Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App. 1999), *supplemented on reh'g*, 723 N.E.2d 460 (Ind. Ct. App. 2000), Wilson v. State, 931 N.E.2d 914 (Ind. Ct. App. 2010); but see Carpenter v. State, 743 N.E.2d 326 (Ind. Ct. App. 2001).

Baker v. State, 695 N.E.2d 925 (Ind. 1998) (although previous acts of violence against the victim that resulted in pending charges was admissible to prove defendant's motive in kidnapping victim, the inflammatory details of the defendant cutting the victim with a knife and submerging her in a bathtub until she blacked out should have been excluded).

(d) Prosecutor's use of prior act evidence

Where the prosecution's theme interweaves relevant evidence of the charged crime with other alleged uncharged crimes all centering around the defendant's bad character, the admission of the prior acts may even rise to fundamental error. Oldham v. State, 779 N.E.2d 1162 (Ind. Ct. App. 2002).

Rhodes v. State, 771 N.E.2d 1246 (Ind. Ct. App. 2002) (although State claimed it introduced prior domestic abuse against the witness to show the

witness was lying for the defendant out of fear, the State's use of the domestic abuse prior to the witness' testimony illustrated that the domestic abuse was offered to show the defendant's bad character). Cf. Goodwin v. State, 783 N.E.2d 686 (Ind. 2003).

5. Introducing prior act evidence

a. Identify purpose

The proponent of the evidence must identify the purpose for which the evidence is offered. United States v. Birch, 39 F.3d 1089, 1093 (10th Cir.1994).

b. Elements of foundation (from Imwinkelreid, *Evidentiary Foundations*)

The foundation for evidence offered under Rule 404(b) includes these elements:

(a) Where the other act occurred.
(b) When the act occurred.
(c) What the nature of the act was.
(d) The defendant committed the other act. See Clemens v. State, 610 N.E.2d 236, 243 (Ind. 1993); Huddleston v. United States, 485 U.S. 681, 108 S. Ct. 1496 (1988) (under Rule 104(b), the judge accepts foundational evidence at face value and asks only whether the evidence is sufficient to find that the defendant committed the act by a preponderance of the evidence).
(e) The surrounding circumstances making the uncharged act relevant to the charged crime. The prosecution must convince the judge that the prior bad act is logically relevant to a material fact other than defendant's criminal disposition or propensity.

If the evidence is admitted, the defense will be entitled to a limiting instruction under Rule 105 that the jury may not use the evidence as general character evidence but may only use the evidence in deciding the fact it was admitted to prove, e.g. motive, intent, or identity. The prosecutor "may mention the evidence only in connection with the non-character theory of logical relevance." Imwinkelreid, *Evidentiary Foundations* 281 (9th ed. 2015).

If the State's 404(b) evidence fails to meet the foundational requirements, the defendant should move to strike it. See United States v. Cuozzo, 962 F.2d 945, 949 (9th Cir.1992), *cert. den.,* 113 S. Ct. 475 (1992); Miller, 12 *Indiana Evidence* 367 § 404.204, n.6 (3d ed.).

PRACTICE POINTER: Sample limiting instruction for 404(b) evidence: "Evidence has been introduced that the accused was involved in a previous battery other than that charged in the information. This evidence has been received solely on the issue of accused's motive in this case. You should consider this evidence only for the limited purpose for which it was received." See also Ind. Pattern Jury Instruction 12.17 (2014).

6. Collateral estoppel - acquittal of prior crimes

Collateral estoppel is the analytical basis for determining the admissibility of evidence of former offenses for which the defendant has been acquitted. Little v. State, 501 N.E.2d 412 (Ind. 1986). "Application of collateral estoppel in this context requires that the trial court determine what facts were necessarily decided in the first lawsuit . . . Then the court must decide whether the government in a subsequent trial attempted to relitigate facts necessarily established against it in the first trial. (citation omitted). If so, evidence of the former offense must be suppressed." Id. at 415.

Little v. State, 580 N.E.2d 675 (Ind. 1991) (where the defendant was on trial for rape and the issue was identity, the trial court erred by allowing testimony from former alleged victim of previous rape for which the defendant was acquitted based on consent; consent was the very issue already litigated against the state in the first trial). See also Sloan v. State, 654 N.E.2d 797 (Ind. Ct. App. 1995).

Kuchel v. State, 570 N.E.2d 910 (Ind. 1991) (collateral estoppel should have barred evidence concerning twelve acts for which the defendant had been acquitted), *abrogated on other grounds by* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).

NOTE: The United States Supreme Court has held the opposite of Little, *supra.* The fact that the defendant was acquitted of the prior act does not prohibit its introduction under Rule 404(b), in part, because the standard of admissibility of 404(b) evidence is lower than proof beyond a reasonable doubt. Dowling v. United States, 493 U.S. 342, 110 S. Ct. 668 (1990). Although the Indiana Supreme Court has yet to address the effect Dowling had on its decision in Little which actually came after Dowling, there are at least two other jurisdictions that, despite Dowling, prohibit the introduction of prior crimes for which the defendant has been acquitted as Rule 404(b) evidence. Cook v. State, 921 So.2d 631, 637 n. 3 (Fla. App. Ct. 2005); State v. Shropshire, 45 S.W.3d 64, 76 N.8 (Tenn. Crim. App. 2000). Argue that under Indiana's more liberal double jeopardy protections, collateral estoppel prohibits this type of Rule 404(b) evidence. Richardson v. State, 717 N.E.2d 32 (Ind. 1999) (Indiana's constitution provides more protections against double jeopardy); Pierce v. State, 761 N.E.2d 826 (Ind. 2002) (Indiana's common law provides more protection against double jeopardy).

7. Acceptable purposes for evidence of other crimes, wrongs, or acts

Exceptions to general rule against uncharged misconduct must be applied with caution. Johnson v. State, 671 N.E.2d 1203 (Ind. Ct. App. 1996).

a. Motive

Although the State does not have to prove motive, nothing prevents it from doing so, and motive evidence can be relevant to proof of a crime. Houser v. State, 678 N.E.2d 95, 103 (Ind. 1997).

Narrow construction of intent exception to Ind. Evidence Rule 404(b) set forth in Wickizer, 626 N.E.2d 795, 799 (Ind. 1993), requiring a defendant to allege a particular contrary intent, does not apply to all exceptions under 404(b). Iqbal v. State, 805 N.E.2d 401 (Ind. Ct. App. 2004) (*citing* Hicks v. State, 690 N.E.2d 215, 224 (Ind. 1997)). A bad

relationship between the defendant and another person does not bear on the defendant's motive to harm the victim and will rarely be either relevant or admissible to show motive for the charged conduct. For this reason, evidence offered to show motive is less likely than intent to be relevant as a general matter and thus to create the forbidden inference. Hicks v. State, 690 N.E.2d 215, 222 (Ind. 1997).

(1) Relevance tied to facts of crime

The relevance and admissibility of motive is tied to the facts of the specific crime. Hicks v. State, 690 N.E.2d 215, 222 (Ind. 1997). Although motive is always relevant when proving a crime, this does not mean the State can introduce questionable character evidence simply by labeling it evidence of "motive." If the State's claim of relevance to motive is too strained and remote to be reasonable, then extrinsic act evidence is inadmissible. Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (*citing* Bassett v. State, 795 N.E.2d 1050 (Ind. 2003)). The "value of specific acts evidence to prove motive rests on the strength of proof that the defendant in fact committed that other act." Camm v. State, 908 N.E.2d 215, 224 (Ind. 2009).

(a) Drugs

Kirby v. State, 774 N.E.2d 523 (Ind. Ct. App. 2002) (the defendant's prior drug dealing was highly relevant to issue of defendant's state of mind at the time of a fatal collision and was offered to prove State's theory that defendant was motivated to commit suicide for fear she was under investigation for drug dealing and would lose her children as a consequence).

Houser v. State, 678 N.E.2d 95, 103 (Ind. 1997) (drug paraphernalia found in defendant's workplace tended to show that defendant had a drug habit to support and helps establish a motive to rob for drug money). See also Forrest v. State, 655 N.E.2d 584 (Ind. 1995).

(b) Prejudice for or against a specific group of people

Kimble v. State, 659 N.E.2d 182 (Ind. Ct. App. 1995) (defendant's membership in racially biased organization, the White Brotherhood, and defendant's statement that he considered himself an "official" member of White Brotherhood because he had committed a crime against black race was admissible to show motive in instant crime). See also Tompkins v. State, 669 N.E.2d 394 (Ind. 1996).

Turner v. State, 682 N.E.2d 491, 496 (Ind. 1997) (court properly admitted testimony that the defendant fired a gun into a Ball State party after being ejected from the party; the defendant's resulting anger toward the Ball State students helped explain why accomplice and defendant chose to rob and kill a different, unrelated Ball State student).

Buchanan v. State, 767 N.E.2d 967 (Ind. 2002) (drawings and photographs of little girls are not tied to the defendant's relationship with the victim and were improperly admitted in child molest case).

Williams v. State, 690 N.E.2d 162 (Ind. 1997) (gang membership was relevant to motive). See also Cadiz v. State, 683 N.E.2d 597 (Ind. Ct. App. 1997) (evidence of gang membership was admissible under Rule 403 to show motive); Richmond v. State, 685 N.E.2d 54 (Ind. 1997); but see Daniels v. State, 683 N.E.2d 557 (Ind. 1997).

(c) Volatile relationship between victim and defendant

Defendant's prior bad acts may be relevant to prove motive by showing the prior hostile relationship between the defendant and the victim. Hostility is a paradigmatic motive for committing a crime. Although the evidence may be relevant, it may still be inadmissible under the second prong of the 404(b) test if its probative value is outweighed by the danger of unfair prejudice. Hicks v. State, 690 N.E.2d 215, 222-23 (Ind. 1997)). These acts must go beyond just being a poor spouse. Smith v. State, 891 N.E.2d 163 (Ind. Ct. App. 2008).

Hicks v. State, 690 N.E.2d 215 (Ind. 1997) (although acts of violence between the defendant and victim were admitted, at some point the testimony about every incident of violence between the two became more prejudicial than probative; harmless error).

Bacher v. State, 686 N.E.2d 791 (Ind. 1997) (jealousy and overprotectiveness can be a motive for murder and allowed in under exception to Rule 404(b)).

Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (the defendant's marital infidelity is not automatically admissible as proof of motive in a trial for the spouse's murder; instead, the affairs must be accompanied by evidence that such activities had precipitated violence or threats between the defendant and victim in the past, or that the defendant was involved in an extramarital relationship at the time of the completed or contemplated homicide; admissibility of such evidence may be further constrained by concerns of chronological remoteness, insufficient proof of extrinsic act, or general Rule 403 concern; here, evidence of prior infidelity was reversible error).

Allen v. State, 925 N.E.2d 469 (Ind. Ct. App. 2010) (not only did the State present evidence that the affair was on-going at the time of defendant's wife and child's deaths, but also that he referred to his wife as "monster" and his three-month-old child as a "hollering, greedy mother f***er"; affair was relevant to motive).

Hatcher v. State, 735 N.E.2d 1155 (Ind. 2000) (emergency protective order that victim obtained against the defendant was admissible to show relationship between murder victim and the defendant, which in return showed the defendant's motive).

Miles v. State, 51 N.E.3d 305 (Ind. Ct. App. 2016) (text messages between defendant and murder victim showing they had been arguing and that

defendant had threatened violence in weeks leading up to shooting were relevant to show motive and absence of mistake).

Iqbal v. State, 805 N.E.2d 401 (Ind. Ct. App. 2004) (evidence that the defendant had put gun to victim's head four months prior to killing was admissible to show relationship between the parties). See also Evans v. State, 727 N.E.2d 1072 (Ind. 2000); Whitham v. State, 49 N.E.3d 162 (Ind. Ct. App. 2015).

Ross v. State, 676 N.E.2d 339, 346 (Ind. 1996) (evidence that the defendant threatened to harm and kill his wife two months before the murder was admissible).

Sudberry v. State, 982 N.E.2d 475 (Ind. Ct. App. 2013) (threat to kill brother that occurred a little over a year before the charged battery was relevant and probative of his intent at time of crime; defendant raised self-defense at trial).

Jackson v. State, 105 N.E.3d 1142 (Ind. Ct. App. 2018) (defendant's explicit threats to kill victim over something as trivial as a child's haircut was probative of his hostility towards victim and his motive in the shooting two and a half months later).

Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App. 2004) (prior threats to kill and violent acts against victim made by her husband were too remote to give husband a motive for murder; and thus, the defendant was properly denied the opportunity to present the evidence to show third party's guilt).

Luke v. State, 51 N.E.3d 401 (Ind. Ct. App. 2016) (404(b) evidence admissible in stalking and invasion of privacy case to "illuminate" the relationship between defendant and female pharmacy employees, to demonstrate defendant's intent to harass them when he was outside despite freezing temperatures and stared at them from his front porch and driveway, which was the central issue at trial).

A bad relationship between the defendant and another person does not bear on the defendant's motive to harm the victim and will rarely be either relevant or admissible to show motive for the charged conduct. Hicks v. State, 690 N.E.2d 215, 222 n. 12 (Ind. 1997).

Cook v. State, 734 N.E.2d 563 (Ind. 2000) (it was harmless error to permit the State to introduce testimony that defendant struck someone other than the victim for no reason earlier in the same night as the murder).

Pickens v. State, 764 N.E.2d 295 (Ind. Ct. App. 2002) (evidence that the defendant robbed and shot another person two weeks before the charged crime was admissible to show motive in murder prosecution, when State's theory was that the defendant killed the victim because he mistakenly believed the victim was the person he had robbed and shot).

(2) Motive to flee law enforcement

Fuentes v. State, 10 N.E.3d 68, 73 (Ind. Ct. App. 2014) (presence of rifle in defendant's car was admissible at trial because it was evidence of his motive to flee from police in the car and on foot).

Talley v. State, 51 N.E.3d 300 (Ind. Ct. App. 2016) (defendant's prior robbery conviction was relevant to prove motive for resisting law enforcement).

(3) Motive to testify falsely

Mitchell v. State, 730 N.E.2d 197 (Ind. Ct. App. 2000) (cases interpreting Rule 404(b) involve application of rule with respect to defendant's motive to commit crime, rather than victim's motive to falsely accuse the defendant of committing crime; admissibility of evidence and permissible scope of cross-examination to test credibility of witness is within sound discretion of the trial court).

(4) Similarity between acts

Similarity between the prior act and the charged conduct is not a major consideration when the prior act is offered to show motive, but it may be critical if offered to prove identity by a 'signature' technique. Hicks v. State, 690 N.E.2d 215, 222 (Ind. 1997) (*citing* Miller, *Courtroom Handbook on Indiana Evidence*, p. 68 (1998 ed.)).

Nicholson v. State, 963 N.E.2d 1096 (Ind. 2012) (evidence that defendant had been convicted of voyeurism against the same victim was admissible in his trial for stalking and harassment; acts in the voyeurism case were so strikingly similar to those in the stalking case that they tended to prove identity, and the voyeurism incidents were "inextricably linked" to the facts of the stalking, showing that defendant knew whose home he was targeting with harassing phone calls).

Shoultz v. State, 995 N.E.2d 647 (Ind. Ct. App. 2013) (evidence of defendant's prior cruelty to small dogs was admissible because it was relevant to his motive and intent for killing his father).

b. Opportunity

The 2014 amendment to Rule 404(b) included "opportunity" as one of the non-character purposes for which other acts can be offered without running afoul of Rule 404(b). Because the list of non-character purposes is illustrative rather than exhaustive, the amendment should have no substantive effect. Miller, 12 *Indiana Evidence*, 116 § 404.101 (3d ed. Supplement).

United States v. Jobson, 102 F.3d 214 (6th Cir. 1996) (in prosecution for being a felon in possession of an assault weapon, evidence of defendant's membership in a gang could properly be admitted to show opportunity, because gang membership "undoubtedly made it easier and more likely for him to possess an assault rifle than for the average citizen").

United States v. Heidebur, 122 F.3d 577 (8th Cir. 1997) (court reversed defendant's conviction for knowingly possessing sexually explicit photographs of his minor stepdaughter because evidence he had sexual contact with his stepdaughter was erroneously admitted; court rejected argument that evidence was admissible to prove defendant's "opportunity," as it was hardly an issue in this case; defendant lived in same house with the victim, was in contact with her every day and was often home alone with her, so probative value of the uncharged misconduct evidence was substantially outweighed by its prejudicial effect).

c. Intent

(1) Requires affirmative claim of contrary intent

Indiana Rule 404(b) "does not authorize the general use of prior conduct evidence as proof of the general or specific intent element in criminal offenses. To allow the introduction of prior conduct evidence upon this basis would be to permit the intent exception to routinely overcome the rule's otherwise emphatic prohibition against the admissibility of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. In this context, admission of prior bad acts would frequently produce the 'forbidden inference'...." Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993). Thus, the intent exception is available to the State only when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent. Hicks v. State, 690 N.E.2d 215, 222 (Ind. 1997) (*citing* Wickizer, 626 N.E.2d at 799). A defendant's denial that he participated in the crime does not place intent at issue. Baker v. State, 997 N.E.2d 67, 72 (Ind. Ct. App. 2013).

Craun v. State, 762 N.E.2d 230 (Ind. Ct. App. 2002) (defendant did not affirmatively present claim of contrary intent by stating that he tickled the complaining witness's upper thigh, since he never stated that he touched her vagina either accidentally or intentionally; the defendant's alleged inappropriate touching of other girls did not make it more or less probable that he touched the complaining witness with the intent to arouse or satisfy; even if the evidence would have been relevant, it would be inadmissible under Rule 403). See also Iqbal v. State, 805 N.E.2d 401 (Ind. Ct. App. 2004); Werne v. State, 750 N.E.2d 420 (Ind. Ct. App. 2001).

Udarbe v. State, 749 N.E.2d 562 (Ind. Ct. App. 2001) (where the defendant denied the charged acts and did not present claim of particular contrary intent, his intent was not at issue so as to justify admission of prior uncharged acts under intent exception to IRE 404(b)).

(a) Through pre-trial statement

There is a split of authority as to whether the defendant can place a contrary intent into issue through a pre-trial statement.

Butcher v. State, 627 N.E.2d 855 (Ind. Ct. App. 1994) (claim of contrary intent was made before State introduced evidence because of defendant's

pretrial statement to police and opening statement). See also Whiteahair v. State, 654 N.E.2d 296 (Ind. Ct. App. 1995).

But see Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (defendant's pre-trial statement does not open the door to prior misconduct because it was put into evidence by the State). See also Bassett v. State, 795 N.E.2d 1050 (Ind. 2003).

(b) Through defense opening

Ely v. State, 655 N.E.2d 372 (Ind. Ct. App. 1995) (where the defendant placed intent into issue during opening statement, evidence of prior bad acts contained in signed written statement was admissible).

Werne v. State, 750 N.E.2d 420 (Ind. Ct. App. 2001) (defense counsel's opening statement did not constitute an affirmative presentation of contrary intent, but rather suggested to jury that any touching of child occurred over clothes; there was no mention of accidental or inadvertent touching).

(c) Through cross-examination

A defendant does not put his intent into issue by questioning the alleged victim's credibility on cross-examination. A contrary rule would prevent defendants from exercising the right to confront a witness's credibility. Lafayette v. State, 917 N.E.2d 660 (Ind. 2009) (implicitly overruling Johnson v. State, 722 N.E.2d 382 (Ind. Ct. App. 2000)).

(d) Through defendant's testimony

Newell v. State, 7 N.E.3d 367 (Ind. Ct. App. 2014) (evidence about prior altercation involving meat cleaver in office of apartment complex was admissible where defendant testified, she never intended to threaten apartment manager but was instead merely expressing frustration at being evicted).

(e) Examples of affirmative claims of contrary intent

Johnson v. State, 655 N.E.2d 502 (Ind. 1995) (where defendant did not claim mistake, accident or self-defense, admission of prior act where he put a gun to the head of a person who knocked on his door was inadmissible in a case where he shot the victim who came to his door).

(i) Intoxication

Prewitt v. State, 761 N.E.2d 862 (Ind. Ct. App. 2002) (defendant's previous attempt to trade radio for cocaine was admissible to show plan and intent where defense was that he was too intoxicated for mens rea to complete crimes when he attempted to trade food and cigarettes for cocaine).

(ii) Self-defense

A claim of self-defense is a contrary intent which the State can negate with relevant prior acts. See, e.g., Evans v. State, 727 N.E.2d 1072 (Ind. 2000).

Sanders v. State, 704 N.E.2d 119 (Ind. 1999) (battery which occurred minutes after charged crime was admissible to show the defendant's intent by negating his claim of self-defense).

Pinkston v. State, 821 N.E.2d 830 (Ind. Ct. App. 2004) (defendant's statement that he had "killed a motherf****r before and got away with it and I'll get off on this one too" was highly probative to contradict his self-defense claim and to show that he intended to murder victim without justification).

Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App. 2005) (prior physical altercations between the defendant and his girlfriend were admissible to rebut the defendant's self-defense claim, but it was harmless error to admit threatening phone messages from the defendant seven occurring months after the crime). See also Embry v. State, 923 N.E.2d 1 (Ind. Ct. App. 2010).

Sudberry v. State, 982 N.E.2d 475 (Ind. Ct. App. 2013) (threat to kill brother that occurred a little over a year before the charged battery was relevant and probative of his intent at time of crime; defendant raised self-defense at trial).

(iii) Accident

Murray v. State, 742 N.E.2d 932 (Ind. 2001) (in attempted murder prosecution, the fact that the defendant was carrying and openly brandishing a handgun unlawfully at the time of the shooting was relevant to his intent where his defense was that the shooting was accidental).

(iv) Sudden heat

Boone v. State, 728 N.E.2d 135 (Ind. 2000) (sudden heat defense placed intent at issue for Rule 404(b) exception).

(v) Legal authority

Goodner v. State, 685 N.E.2d 1058, 1061 (Ind. 1997) (defendant's statements concerning his cocaine possession and drug activities prior to his arrest were properly admitted not only to counter his testimony indicating his purported intent to aid police in a set up operation, but also to demonstrate his intent to deliver the cocaine).

Ceaser v. State, 964 N.E.2d 911 (Ind. Ct. App. 2012), *transfer denied* (defendant's prior conviction for battering the same child in a similar manner

was admissible to show intent and absence of mistake or accident, where defendant asserted defense of parental privilege. Defendant was asserting the 'contrary intent' to correct her child's behavior rather than batter the child).

(vi) Entrapment

Stoker v. State, 692 N.E.2d 1386 (Ind. Ct. App. 1998) (the defendant asserted an entrapment defense, triggering the intent exception allowing into evidence prior drug sales).

(f) Consent defense is not a contrary intent

Lafayette v. State, 917 N.E.2d 660 (Ind. 2009) (by asserting that an alleged rape victim consented to sexual intercourse, a defendant does not present a claim of particular contrary intent; such claim actually puts the alleged victim's intent at issue); see also Thompson v. State, 15 N.E.3d 1097 (Ind. Ct. App. 2014).

(2) Probative value; risk of unfair prejudice

When a defendant alleges a particular contrary intent, whether in opening, by cross-examination, or by his own evidence, the court must determine whether the probative value of a prior act proving the defendant's intent is outweighed by the danger of unfair prejudice. Boone v. State, 728 N.E.2d 135, 138 (Ind. 2000).

Roach v. State, 699 N.E.2d 752 (Ind. Ct. App. 1998) (defendant's prior acts contained in prison conduct summary card and testimony concerning prison guard's prior altercation with the guard was not genuinely relevant to prove the defendant's specific intent to kill at time of offense, although intent to kill was made an issue by the defendant).

Monegan v. State, 721 N.E.2d 243 (Ind. 1999) (testimony that defendant had bragged that he killed a young girl in a gang-related drive-by shooting was irrelevant to defendant's claim that instant murder was accidental and inadmissible under the intent exception to 404(b); any probative value was outweighed by the risk of unfair prejudice).

Prairie v. State, 914 N.E.2d 294 (Ind. Ct. App. 2009) (where defendant conceded he placed intent into issue, the theoretical risk that the jury could conclude that defendant was guilty this time because he had used the victim's personal information before did not outweigh the probative value of the prior use of the victim's identification to show defendant's intent and access to the victim's information in an identity deception case).

d. Preparation; plan

(1) Must be preconceived plan

The plan must be preconceived and include crimes that are committed in conjunction with one another. Greenboam v. State, 766 N.E.2d 1247, 1255 (Ind. Ct. App. 2002)

(*citing* Moore v. State, 653 N.E.2d 1010 (Ind. Ct. App. 1995)). The prior criminal activity "must . . . be so related in character, time and place of commission as to establish some plan which embraced both the prior and subsequent criminal activity and the charged crime." Moore v. State, 653 N.E.2d 1010 (Ind. Ct. App. 1995) (*quoting* Hardin v. State, 611 N.E.2d 123 (Ind. 1993)); Turner v. State, 682 N.E.2d 491, 496, n.5 (Ind. 1997). However, the "plan" exception is not construed as narrowly as the "intent" exception. Goodner v. State, 685 N.E.2d 1058, 1061 (Ind. 1997).

Greenboam v. State, 766 N.E.2d 1247 (Ind. Ct. App. 2002) (evidence that defendant committed prior molestations was not evidence of a 'plan' to commit the instant offense and was not admissible either under the old 'common scheme or plan' or the modern 'plan' exception; the only similarity between the prior and instant molests is that they both allegedly occurred in the same home; this did not show a preconceived plan). See also Sloan v. State, 654 N.E.2d 797 (Ind. Ct. App. 1995).

Buchanan v. State, 767 N.E.2d 967 (Ind. 2002) (pornographic drawings and photographs did not show that the defendant had a common plan to sexually molest little girls); see also Remy v. State, 17 N.E.3d 396 (Ind. Ct. App. 2014).

Laird v. State, 103 N.E.3d 1171 (Ind. Ct. App. 2018) (defendant's internet search history was admissible under "plan" exception because searches were both close in time and very similar to charged molest offenses against complaining witness).

Southern v. State, 878 N.E.2d 315 (Ind. Ct. App. 2007) (subsequent sexual intercourse with the victim was admissible to prove a plan where in each instance the defendant lured the victim to a secluded and remote place for sex).

Spires v. State, 670 N.E.2d 1313 (Ind. Ct. App. 1996) (evidence of prior uncharged marijuana sale was admissible under narrow "plan" exception; the charged and uncharged sale were tangibly connected in that they involved same parties, took place at same location, and were within one hour of one another).

Goodner v. State, 685 N.E.2d 1058, 1061 (Ind. 1997) (defendant's statements regarding earlier drug transactions earlier in the same week were relevant and admissible as part of a plan to dispose of the half-ounce of cocaine charged in the instant case).

Guffey v. State, 42 N.E.3d 152 (Ind. Ct. App. 2015) (jail telephone calls were relevant to conspiracy to commit child molesting charge and showed defendant's preparation and grooming of co-conspirator and her son to prime them for a sexual act).

Piercefield v. State, 877 N.E.2d 1213 (Ind. Ct. App. 2007) (evidence of victims' past massages of defendant's feet, back and buttocks was relevant to establishing preparation or plan in child molestation; massages were either requested or demanded by defendant and, thus, admissible to show grooming of the victims).

Cf. Ware v. State, 816 N.E.2d 1167 (Ind. Ct. App. 2004) (prejudicial effect of sexual acts between defendant and victim that occurred outside the jurisdiction outweighed its probative value in prosecution for sexual misconduct with minor; although it had some relevance to State's theory that defendant was "grooming" victim by regaling him with vacations and other luxuries, evidence appeared only to be relevant to show propensity to commit sexual misconduct with minor).

Remy v. State, 17 N.E.3d 396 (Ind. Ct. App. 2014) (court cautioned on overuse of the "plan" and "grooming" rationales for admitting evidence normally inadmissible under Rule 404(b)).

(2) Pre-Rules of Evidence law

The "plan" exception under Rule 404(b) is narrower than the old "common scheme and plan" exception which is obsolete under Indiana law. Greenboam v. State, 766 N.E.2d 1247 (Ind. Ct. App. 2002). The old common scheme rule which did not survive the adoption of the Rules of Evidence "tended to degenerate into an all-purpose excuse for admitting pretty much any old prior misconduct." Lay v. State, 659 N.E.2d 1005, 1015 (Ind. 1995) (Shepard, C.J., dissenting); Lannan v. State, 600 N.E.2d 1334 (Ind. 1992) (pre-Indiana Rules case adopting Federal Rule 404(b) approach).

e. Knowledge

Whether evidence is admissible under the "knowledge" exception depends on the tendency of the evidence to prove knowledge, rather than on how similar the prior bad acts are to the charged offense. See Miller, 12 *Indiana Evidence* 518 § 404.223 (3d ed.).

Samaniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005) (trial court properly admitted evidence of defendant's involvement in a controlled buy that occurred at his house one day prior to the execution of the resulting search warrant where the defendant intentionally fostered impression that he knew nothing about cocaine found in his house).

Johnson v. State, 785 N.E.2d 1134 (Ind. Ct. App. 2003) (testimony of defendant's previous sex partners detailing their previous sexual relationships with defendant and their subsequent positive test results for HIV, and testimony that defendant admitted he was HIV positive, were admissible to show that defendant knew he was HIV positive).

Manufacture, destruction, or suppression of evidence may properly be considered by the jury as an admission of the defendant's guilt or his guilty knowledge. Larry v. State, 716 N.E.2d 79 (Ind. Ct. App. 1999).

Larry v. State, 716 N.E.2d 79 (Ind. Ct. App. 1999) (fact that the defendant called the co-defendant a "snitch" and beat him up was admissible to prove the defendant's guilty knowledge and consciousness of guilt).

f. Identity

Rule 404(b) does not exclude evidence which is relevant for a purpose other than suggesting propensity to commit the charged offense. Freed v. State, 954 N.E.2d 526 (Ind. Ct. App. 2011) (evidence that defendant wrote a letter soliciting an unrelated burglary, forgery and murder "contextualized" a jailhouse letter and made it more probable that defendant was the author of a confession to the robbery with which he was charged).

(1) Identity must be at issue

Baker v. State, 695 N.E.2d 925 (Ind. 1998) (evidence of defendant's previous assault on one murder victim was inadmissible where identity was not at issue). See also Moore v. State, 653 N.E.2d 1010 (Ind. Ct. App. 1995).

(2) Similarity between prior and instant crimes

The identity exception to the general prohibition on propensity evidence is crafted primarily for "signature" crimes with a common modus operandi. The exception's rationale is that the crimes, or means used to commit them, were so similar and unique that it is highly probable that the same person committed all of them. Thompson v. State, 690 N.E.2d 224, 234 (Ind. 1997). Mere repetition of similar crimes does not warrant admission of evidence of those crimes under modus operandi rule. Penley v. State, 506 N.E.2d 806 (Ind. 1987).

Roop v. State, 730 N.E.2d 1267 (Ind. 2000) (evidence suggesting that grandfather of child molestation victim may have molested victim's mother during her childhood was properly excluded; evidence was offered only to show that grandfather had molested before and molested again; there was no evidence of similarity between the accusation and the instant molest).

Wilhelmus v. State, 824 N.E.2d 405 (Ind. Ct. App. 2005) (given striking similarities between a 2000 methamphetamine lab and the one at issue, the prior lab could be used to prove identity; however, it was harmless error for the trial court to refuse to admonish the jury concerning the prior lab evidence).

Browning v. State, 775 N.E.2d 1222 (Ind. Ct. App. 2002) (defendant's prior acts of approaching females around Anderson college in van, making sexual comments, exposing himself and/or masturbating was not sufficiently similar to a sexual attack of another Anderson college student).

The court should consider the timing of the prior crimes.

Fisher v. State, 641 N.E.2d 105 (Ind. Ct. App. 1994) (evidence of prior molest occurring twenty-three years before charged offenses was too remote to be genuinely relevant, and offenses were not sufficiently similar to make up for the remoteness in time, despite the fact that both victims were the same age and were allegedly molested in family home and in the defendant's truck).

Bassett v. State, 795 N.E.2d 1050 (Ind. 2003) (evidence that the defendant had raped two other women and threatened to kill them to avoid probation revocation was not sufficiently similar to charged offense of murder to be "signature" crimes admissible on the issue of identity under IRE 404(b); the connection is too strained to hold that the similarity between the motive to commit crimes twelve and sixteen years earlier and the instant crimes illustrates a signature).

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

The court should consider the uniqueness of the similarities of the prior and instant crimes.

Johnson v. State, 544 N.E.2d 164 (Ind. Ct. App. 1989) (prior beatings, which occurred over prolonged period of time, are not unusual, distinctive, or similar to each other or to present beating; at most, they indicate chronic behavioral pattern equivalent to "wife-beating"; they do not indicate common scheme or plan, but at most show propensity to commit violent acts against victim and are inadmissible).

Allen v. State, 720 N.E.2d 707 (Ind. 1999) (evidence of a prior rape of which the defendant was acquitted was admissible to show identity in murder and deviate sexual conduct, where both victims were African-American teenage girls who knew the defendant by the name of "Play", both incidents occurred in the same neighborhood within two months of each other, involved anal penetration, and both victims were bound with duct tape, which is rare).

Berry v. State, 715 N.E.2d 864 (Ind. 1999) (similarities relied on by State -- that perpetrator of each crime was using shotgun and wearing blue jacket -- are not sufficiently distinctive to make evidence of second crime admissible under Rule 404(b); there was no evidence that same shotgun was used in both crimes, and navy-blue jacket is simply too commonly found).

Bolin v. State, 634 N.E.2d 546 (Ind. Ct. App. 1994), *abrogated on other grounds by* Hicks v. State, 690 N.E.2d 215 (Ind. 1997) (two offenses, although similar, were also not sufficiently unique to qualify as signature; similarities were: the defendant hired the same person to commit both arsons; the defendant told the person each time that if he burned the structure he would be paid agreed-upon amount; the same amount was paid after the fires for each; the defendant told how to enter each house; each house was entered at night; and the person set each fire by setting fire to clothes in closet with “inflamant” and then leaving; however, these methods were not unique and were common to many arson for hire).

Caldwell v. State, 43 N.E.3d 258 (Ind. Ct. App. 2015) (trial court should not have admitted evidence of crime involving similar victim in same neighborhood under identity exception to Rule 404(b), because conduct was not strikingly similar).

Schumpert v. State, 603 N.E.2d 1359 (Ind. Ct. App. 1992) (where in different robberies man robbed thrift stores by entering at closing time, bringing merchandise to counter, demanding money from cashier while exhibiting brown paper bag he said was covering gun, and then locking employees in back room, modus operandi was sufficiently distinct to create signature and his identity was sufficiently at issue). See also Witte v. State, 550 N.E.2d 68 (Ind. 1990).

Attkisson v. State, 190 N.E.3d 447 (Ind. Ct. App. 2022) (defendant's acts of wearing a disguise and conduct at second bank was relevant to show motive, plan, and identity of defendant as person who robbed first bank two weeks earlier).

g. Absence of mistake or accident

Rule 404(b) evidence may be used to rebut defense of mistake or accident. Brown v. State, 684 N.E.2d 529, 535-36 (Ind. Ct. App. 1997), *cert. den.* Because a criminal defendant claiming an act was accidental is necessarily claiming a lack of the requisite criminal intent, the State may offer other-bad-acts evidence of lack of accident if: (1) the State had "reliable assurance" that an accident defense would be raised, or (2) the defendant placed accident at issue at trial.

Fairbanks v. State, 119 N.E.3d 564 (Ind. 2019) (defendant's statements to police and news media were sufficient to give State the reliable assurance of a forthcoming accident defense, thus trial court did not abuse its discretion in finding other-bad-act evidence relevant to a matter at issue other than defendant's propensity to commit charged acts).

Brown v. State, 684 N.E.2d 529 (Ind. Ct. App. 1997) (defensive strategy was an attempt to show defendant's conduct was the product of youth and inexperience--that he was prone to make innocent mistakes; strategy opened the door to evidence of other alleged incidents of ghost employment to demonstrate that defendant, rather than making a few honest mistakes, had engaged in a deliberate, intentional, on-going scheme to misuse state resources).

The "absence of mistake or accident" exception is not triggered by the defendant arguing or asserting that the State's witnesses are mistaken. The exception applies to situations where the defendant asserts the mistake of fact defense or alleges that the prohibited conduct was accidental. McCloud v. State, 697 N.E.2d 96, 98-99 (Ind. Ct. App. 1998).

Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006) (defendant's opening statement that defendant did not take her alleged co-conspirators seriously and her role in the murders was too minor to be sufficient evidence did not open the door to a letter which she wrote that it would be easy to rob or burglarize her employer under an accident or mistake exception).

Miles v. State, 51 N.E.3d 305 (Ind. Ct. App. 2016) (text messages between defendant and murder victim showing they had been arguing and that defendant had threatened violence in weeks leading up to shooting were relevant to show motive and absence of mistake).

PRACTICE POINTER: A mistake of fact defense involves the mental state of the defendant. It requires the defendant to convince the finder of fact that *his* honest and reasonable mistake about a matter of fact negated the culpability required to commit the crime. The "mistake exception" to Rule 404(b) is not triggered where the defendant merely alleges that the police made a mistake by arresting him or that the prosecution made a mistake by charging him with a crime. McCloud v. State, 697 N.E.2d 96, 99 (Ind. Ct. App. 1998). The mistake of fact defense is defined at Ind. Code 35-41-3-7. See Potter v. State, 684 N.E.2d 1127, 1135 (Ind. 1997); and Sureporn Roll v. State, 473 N.E.2d 161, 166 (Ind. Ct. App. 1985).

h. Other unlisted purposes

Prior actions may be admissible to show motive, intent, or other proper purpose. The list of other purposes in Rule 404(b) is illustrative, not exhaustive. Hicks v. State, 690 N.E.2d 215, 218-19 (Ind. 1997).

Thompson v. State, 690 N.E.2d 224, 233 (Ind. 1997) (access to the murder weapon, particularly where the evidence is circumstantial as in this case, is such a permissible purpose).

Grund v. State, 671 N.E.2d 411, 417 (Ind. 1996) (defendant murdered husband and made it look like a burglary similar to one that previously had occurred at the defendant's home; because the prosecutor did not link defendant with the earlier burglary, admission of the evidence did not violate Rule 404(b)).

Hackney v. State, 649 N.E.2d 690 (Ind. Ct. App. 1995) (in child molesting prosecution, alleged victim's testimony regarding alleged domestic abuse she observed was admissible for limited purpose of showing her state of mind; evidence showed that the victim did not come forward about defendant's abuse because she feared him).

(1) To prove predisposition in entrapment defense

Where the defendant has raised the defense of entrapment, the State may use extrinsic acts evidence to rebut the defense. McGowan v. State, 674 N.E.2d 174, 175 (Ind. 1996). The court may ask the defendant whether entrapment will be an issue, in order to rule on the admissibility of evidence that might bear upon predisposition. Hutcherson v. State, 507 N.E.2d 969, 971-72 (Ind. 1987); Miller, 12 *Indiana Evidence,* 545 § 404.231 (3d ed.).

Dixon v. State, 712 N.E.2d 1086 (Ind. Ct. App. 1999) (defendant's prior sale of cocaine to informant was admissible when the defendant asserted the defense of entrapment in a dealing cocaine trial). See also Stoker v. State, 692 N.E.2d 1386 (Ind. Ct. App. 1998).

Dockery v. State, 644 N.E.2d 573 (Ind. 1994) (prior possession of 1.1 ounces of marijuana and a pistol-grip shotgun was "simply irrelevant" to issue of predisposition to deal in cocaine and was inadmissible).

(2) Defendant's state of mind in self-defense case

The only statutory element of self-defense to which the defendant's state of mind might be relevant is to whether he is being subjected to imminent unlawful force and has reasonable belief that force is necessary to prevent serious injury to himself. Gillespie v. State, 832 N.E.2d 1112 (Ind. Ct. App. 2005).

Gillespie v. State, 832 N.E.2d 1112 (Ind. Ct. App. 2005) (evidence the State offered involving defendant's aggressive act towards other people not involved in the altercation and allegations of the defendant's drug use earlier in the evening could not be relevant to the defendant's state of mind at the time of the altercation and "under the then existing circumstances" and was inadmissible).

(3) To correct a misleading impression

Simply denying instant offense does not open the door to other similar prior convictions. See, e.g., Harris v. State, 878 N.E.2d 504 (Ind. Ct. App. 2007). The evidence opening the door must leave the trier of fact with a false or misleading impression of the facts related. Crafton v. State, 821 N.E.2d 907 (Ind. Ct. App. 2005).

Crafton v. State, 821 N.E.2d 907 (Ind. Ct. App. 2005) (defendant "opened the door" to other bad act evidence after not objecting to a juror question and answering it; in a battery case involving domestic issues, the defendant answered the juror's question about previous domestic disputes with instances where he was the victim; this opened the door to his prior battery on the victim).

Koo v. State, 640 N.E.2d 95 (Ind. 1994) (testimony of two witnesses regarding alleged prior uncharged acts of sexual misconduct by doctor charged with rape of patient during examination was admissible to rebut specific factual claim that victim hallucinated sexual misconduct).

Pavey v. State, 764 N.E.2d 692 (Ind. Ct. App. 2002) (defendant opened the door to testimony that he had talked about killing people when, on cross-examination, he gave jury the impression that it was not his "nature" to talk about killing people).

Escobedo v. State, 987 N.E.2d 103 (Ind. Ct. App. 2013), *summ. aff'd*, 989 N.E.2d 1257 (Ind. 2013) (no error in admitting rebuttal testimony from orthopedist and DCS caseworker regarding injuries victim suffered in 2007, where defendant testified that he lied to hospital staff about victim's injuries because DCS had wrongfully removed victim from his home).

Wright v. State, 836 N.E.2d 283 (Ind. Ct. App. 2005) (defendant's attempt to "pin" cocaine he was charged with dealing on his brother through his brother's

reliance on Fifth Amendment right against self-incrimination opened the door to questions about the defendant's prior involvement with drugs).

Swain v. State, 647 N.E.2d 23 (Ind. Ct. App. 1995) (defendant's attempt to show that arresting officer was prejudiced against blacks, and that officer's presence at street corner on night of arrest was solely based on that prejudice did not open the door to the defendant's prior dealing convictions).

Sundling v. State, 679 N.E.2d 988 (Ind. Ct. App. 1997) (defendant's voir dire concerning whether children's testimony could be manipulated did not create the impression that the children/victims fantasized their molestation and could not serve as excuse for admission of the defendant's extraneous prior molestations).

McIntyre v. State, 717 N.E.2d 114 (Ind. 1999) (where defendant had not placed his sanity in issue yet, his insanity defense did not open the door to all evidence relevant to his sanity, including criminal acts).

Weedman v. State, 21 N.E.3d 873 (Ind. Ct. App. 2014) (harmless error to admit evidence that defendant had pursued and later withdrew an insanity defense; where, as here, insanity defense is withdrawn before trial, the latitude in admitting defendant's other prior conduct becomes substantially limited).

(4) To rehabilitate or bolster witness testimony

Testimony related to extrinsic acts is admissible but only to the extent it is relevant to a material fact. Evidence of prior misconduct by the defendant, offered to bolster a key witness's testimony as to the current charge, may be probative of the witness's veracity but is also quite prejudicial. Thompson v. State, 690 N.E.2d 224, 235 (Ind. 1997).

(5) To show the relationships between the victim, various witnesses, and the defendant

Evidence which is necessary for the jury to understand the relationships between the victim, various witnesses, and the defendant may be admissible. Whatley v. State, 908 N.E.2d 276, 281 (Ind. Ct. App. 2009).

Whatley v. State, 908 N.E.2d 276 (Ind. Ct. App. 2009) (defendant's girlfriend's testimony that defendant had been using crack cocaine for five days and visited motel to deliver drugs was admissible to explain why defendant was up for five days, why girlfriend needed to drive him to motel, why victim confronted girlfriend when she tried to retrieve defendant from motel room, and any motive defendant may have had to attack victim).

Schnitzmeyer v. State, 168 N.E.3d 1041 (Ind. Ct. App. 2021) (text messages spanning time period prior to charges were relevant in establishing defendant's intent, his relationship with shooting victim, and his identity, and any prejudice does not substantially outweigh the highly probative value of the text messages).

8. Improper purpose; depraved sexual instinct exception abandoned

Rule 404 does not provide a "depraved sexual instinct" exception to the general rule. Thus, prior sex acts in trials for sex offenses must fall under one of the Rule 404(b) exceptions to be admissible. Lannan v. State, 600 N.E.2d 1334 (Ind. 1992) (adopting the standard of Federal Rule 404(b)). Ind. Code 35-37-4-15, codifying the depraved sexual instinct rule, conflicts with Rule 404(b) and case law and is therefore a nullity. Brim v. State, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993), Day v. State, 643 N.E.2d 1 (Ind. Ct. App. 1994), *transfer denied*.

9. Requirements for trial court

a. Abuse of discretion

A trial court abuses its discretion when it admits evidence of extrinsic acts that are relevant to no issue other than character and to proof of behavior in conformity with that character. Heavrin v. State, 675 N.E.2d 1075, 1083 (Ind. 1996).

Johnson v. State, 655 N.E.2d 502, 505 (Ind. 1995) (court abused discretion in allowing prosecution to prove by extrinsic acts the very theory of the prosecution's case that defendant, when he shot the victim, acted in conformity with what it alleged to be his violent character, born of his days in Chicago.)

PRACTICE POINTER: The State cannot avoid a trial court's order excluding 404(b) evidence by dismissing and refiling charges in another court. Johnson v. State, 740 N.E.2d 118 (Ind. 2001)

b. Test for mistrial

(1) Two-step analysis

To determine if testimony of prior uncharged misconduct should warrant a new trial, the circumstances must be analyzed as to: (1) whether the evidence was intentionally injected or came in inadvertently; (2) what degree the defendant was subjected to improper speculation by the jury. Greenlee v. State, 655 N.E.2d 488, 490 (Ind. 1995).

Lay v. State, 659 N.E.2d 1005, 1008 (Ind. 1995) (when the alleged ground for a mistrial is the exposure of the jury to evidence of prior bad acts, the gravity of the peril is to be judged by the probable persuasive effect of such evidence on the jury).

(2) Admonishment

Even if evidence of uncharged misconduct is heard by the jury, a prompt admonishment to the jury to disregard the improper testimony is usually enough to support a denial of a motion for mistrial. Greenlee v. State, 655 N.E.2d 488, 490 (Ind. 1995); but see Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004).

c. When reversal is required

In determining whether a remark about uncharged conduct prejudiced the defendant, reviewing court must ask whether, absent the improper comment, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty. Greenlee v. State, 655 N.E.2d 488, 491 (Ind. 1995).

To obtain reversal based on erroneous admission of evidence of uncharged misconduct, defendant must show prejudice to his substantive rights. Prejudice cannot be based on erroneously admitted evidence which is cumulative of properly admitted evidence having the same probative value. Brown v. State, 684 N.E.2d 529, 536 (Ind. Ct. App. 1997), *cert. den.*, 118 S. Ct. 1316 (1998).

V. METHODS OF PROVING CHARACTER - RULE 405

A. OFFICIAL TEXT:

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct. If, in a criminal case, a defendant provides reasonable pretrial notice that the defendant intends to offer character evidence, the prosecution must provide the defendant with any relevant specific instances of conduct that the prosecution may use on cross-examination.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

B. METHOD OF PROVING CHARACTER EVIDENCE

If character evidence falls under one of the exceptions in Rule 404(a), Rule 405 establishes the methods by which it may be proved. Johnson v. State, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996).

Rule 405 establishes the following methods by which character evidence may be proved:

(1) testimony as to reputation;
(2) testimony in the form of an opinion; and
(3) testimony concerning specific instance of conduct only:

  (a) on cross-examination of a character witness; or
  (b) when character is an essential element of a charge, claim or defense.

Rules 608 and 609 (and not Rule 405) govern the use of character evidence offered to affect a witness's credibility. See Miller, 12 *Indiana Evidence* 558 § 405.101 (3d ed.).

C. RULE 405(a) - SPECIFIC INSTANCES AVAILABLE TO REBUT REPUTATION AND OPINION EVIDENCE

Rule 405(a) sets out the methods of proving character, once evidence of character or a trait of character of a person is admissible. Once admissibility is established, 405(a) provides that on cross examination, inquiry is allowable into relevant specific instances of conduct. United States v. Manos, 848 F.2d 1427, 1430 (7th Cir.1988).

1. Party can offer reputation or opinion evidence of character

A defendant may not offer evidence of character through specific instances, only reputation or opinion, on direct. Bell v. State, 820 N.E.2d 1279 (Ind. Ct. App. 2005). Reputation

evidence is not admissible as substantive evidence of guilt in a criminal case. Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95, 103 (1974).

Bell v. State, 820 N.E.2d 1279 (Ind. Ct. App. 2005) (trial court properly excluded evidence of specific instances when child victim asserted herself to show that had she really been molested, she would have asserted herself).

2. Evidence of specific instances allowed only on cross-examination

a. Witness must first testify as to defendant's character through reputation or opinion

Opinion, along with reputation, is specifically listed in Rule 405(a), therefore, both opinion and reputation witnesses are subject to cross-examination regarding specific instances of conduct. Opinion witnesses may be asked if they know of or heard about specific instances of conduct, even if evidence of the specific acts otherwise would not be admissible. Swartz v. State, 597 N.E.2d 977, 980-81 (Ind. Ct. App. 1992); United States v. Manos, 848 F.2d 1427, 1431 (7th Cir.1988). For prosecution to rebut by using character evidence, defendant must first have introduced evidence as to his character. Rule 404(a); Schwestak v. State, 674 N.E.2d 962, 964-65 (Ind. 1996).

Brooks v. State, 683 N.E.2d 574 (Ind. 1997) (because the prosecution witness offered no character reputation or opinion testimony as to victim, she could not be cross-examined as to specific acts of violence by the victim; a defense witness would have been equally disabled by Rule 405(a) from direct examination as to specific acts).

Schwestak v. State, 674 N.E.2d 962, 964-65 (Ind. 1996) (defendant sought to establish that he was a hard-working, decent, and peaceful individual; the State was entitled to rebut this evidence with evidence of its own, Rule 404(a)(1), including reputation evidence. Rule 405(a)).

Johnson v. State, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996) (merely asserting self-defense is not equivalent to asserting a propensity to act in self-defense in a similar situation, nor does such an assertion automatically put defendant's character in issue).

b. Character need not be an element or at issue

Rule 405(b) does not limit the cross-examination allowed by Rule 405(a). United States v. Manos, 848 F.2d 1427, 1431 (7th Cir. 1988).

c. Prohibition against hypothetical guilt- assuming questions

A hypothetical question that assumes the guilt of the defendant should not be asked of a non-expert witness. United States v. Oshatz & Messinger, 912 F.2d 534, 537 (2d Cir.1990), *cert. den.*, 111 S.Ct. 1695 (1991).

The majority consensus in federal courts condemns the use of guilt-assuming hypothetical questions asked of lay character witnesses. United States. v. Mason, 993 F.2d 406, 409 (4th Cir.1993). See this manual, Rule 102.

U.S. v. Shwayder, 312 F.3d 1109, 1121 (9th Cir. 2002) (use of guilt-assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process).

United State v. Williams, 738 F.2d 172, 177 (7th Cir. 1984) (asking defendant's character witnesses whether their favorable testimony would change if defendant were proven guilty in the instant trial was impermissible; this line of questioning assumes away the presumption of innocence).

d. Specific acts must be relevant

Rebuttal evidence is limited to that which tends to explain, contradict, or disprove evidence offered by the adverse party. Schwestak v. State, 674 N.E.2d 962, 964-65 (Ind. 1996).

3. Notice requirements in criminal cases

Rule 405(a) establishes a notice provision applicable only in criminal cases. If the accused gives reasonable notice of an intention to use character evidence, the prosecution must provide the accused with any specific instances of conduct to be used in cross examination.

4. Victim's character in self-defense cases

"Evidence of specific bad acts is admissible to prove that the victim had a violent character which frightened the defendant. However, only general reputation evidence of the victim's violent character is admissible to prove that the victim was the initial aggressor." Coleman v. State, 694 N.E.2d 269, 277 (Ind. 1998) (*quoting* Holder v. State, 571 N.E.2d 1250, 1253 (Ind. 1991)).

a. Character to prove victim is aggressor

Defendant is permitted under Rule 404(a)(2) to introduce evidence of a pertinent trait of character of the victim of the crime. The victim's reputation for violence is pertinent to a claim of self-defense. Rule 405 permits proof of the violent character of the victim by reputation or opinion testimony. Brooks v. State, 683 N.E.2d 574, 576 (Ind. 1997). Evidence of specific incidents is permissible only on cross-examination of a character witness pursuant to Rule 405(a), or when character 'is an essential element of a charge, claim, or defense' pursuant to Rule 405(b). Price v. State, 765 N.E.2d 1245, 1250 (Ind. 2002). A claim of self-defense does not put the victim's character at issue. Johnson v. State, 671 N.E.2d 1203, 1209 (Ind. Ct. App. 1996).

Price v. State, 765 N.E2d. 1245 (Ind. 2002) (the trial court properly refused to admit evidence of victim's prior conduct to show that he had violent propensities).

Guillen v. State, 829 N.E.2d 142 (Ind. Ct. App. 2005) (in battery prosecution, the trial court properly excluded evidence demonstrating victim's alleged character trait of recklessness when intoxicated; victim's character was not an essential element of the defendant's defense under 405(b)).

b. Specific violent acts to prove fear of defendant

Specific violent acts of victim known to the defendant may be admissible to show the defendant reasonably feared the victim. Brand v. State, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002); Littler v. State, 871 N.E.2d 276 (Ind. 2007). See discussion on Rule 404(a), *supra*.

c. Presenting evidence of victim's violent character does not open door to evidence of defendant's character

Evidence of a victim's violent character is not subject to rebuttal by evidence of the defendant's violent character. If defendant introduces evidence of his own character trait for peacefulness, then State may rebut evidence as to defendant's peacefulness or inquire as to relevant specific acts by defendant on cross-examination. Johnson v. State, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996).

D. RULE 405(b) - SPECIFIC INCIDENT EVIDENCE ADMISSIBLE TO PROVE CHARACTER WHEN CHARACTER ITSELF IS AN ISSUE

Rule 405(b) "does nothing more than make the common law explicit, so as to avoid any misapprehension that the common law in this area did not retain its vitality." United States v. Manos, 848 F.2d 1427, 1431, n.4 (7th Cir.1988). When character is in issue, specific instances of conduct are relevant to prove character and Rule 402 makes all relevant evidence admissible. Id.; 22 Wright & Graham, *Fed. Prac. & Proc.,* § 5267, p. 603 (1977). "[C]haracter, when truly in issue, deserves the most searching inquiry and convincing proof. Specific incidents meet that standard and are therefore admitted despite problems of collateral issues and possible surprise." United States v. Manos, 848 F.2d 1427, 1431, n.4 (7th Cir. 1988).

1. Prerequisites

Evidence of prior acts, whether offered under Rule 404(b) or 405(b) by the prosecution or the defense, must be sufficiently related and proximate in time to the crime charged to be relevant under Rule 403. United States v. Manos, 848 F.2d 1427, 1432 (7th Cir. 1988).

Evidence admissible under Rule 405(b) is still subject to exclusion if the risk of prejudice outweighs its probative value. Rule 403. U.S. v. Waloke, 962 F.2d 824, 830 (8th Cir. 1992).

2. Direct examination

a. Defendant's law-abiding character

Where the defendant seeks to prove her character for law abiding behavior, if it is relevant, the proper method is by opinion and reputation evidence and not by evidence of

specific "law-abiding" acts. United States v. Hill, 40 F.3d 164 (7th Cir. 1994), *cert. den.*, 115 S. Ct. 1385 (1995).

> United States v. Hill, 40 F.3d 164 (7th Cir. 1994), *cert. den.*, 115 S. Ct. 1385 (1995) (postal employee charged with stealing mail, offered evidence of having handled "test letters" properly and without stealing them, arguing that it tended to prove her character for abiding by the law; specific instances of law-abidingness such as the "test letters" incident would have been admissible only if law-abidingness was an essential element of the charge or defense).

b. Character in CHINS and termination of parental rights proceedings

A parent's character is at issue in a child in need of services (CHINS) determination and pursuant to Rule 405(b), specific instances of a parent's character will be admissible. V.B. v. Ind. Dep't of Child Servs. (In re Eq.W.), 124 N.E.3d 1201 (Ind. 2019).

> S.T. v. Ind. Dep't of Child. Servs. (In re L.T.), 145 N.E.3d 864 (Ind. Ct. App. 2020) (trial court properly admitted father's 2010 criminal conviction because the father's character was a material issue, and the CHINS proceeding was the first pertaining to the child).

Ind. Code 31-6-7-13, which allows for the admission of such evidence in CHINS determination, is consistent with Rule 404(b) and Rule 405(b). Matter of J.L.V., 667 N.E.2d 186, 190-91 (Ind. Ct. App. 1996); see also Matter of D.G., 702 N.E.2d 777, 780 (Ind. Ct. App. 1998) (parent's character is at issue in proceedings to terminate parental rights).

c. Entrapment

A defendant who raises an entrapment defense, and thus puts at issue his predisposition to commit the charged offense, may introduce evidence of his prior good acts under Federal Rule of Evidence 404(b). U.S. v. Thomas, 134 F.3d 975 (9th Cir. 1998).

Likewise, when the defendant raises an entrapment defense, the State may use character evidence to prove predisposition, if its probative value outweighs its potential for unfair prejudice. The State may use extrinsic acts evidence to prove predisposition. Predisposition is an essential element of the prosecution's case once the issue of entrapment has been raised; thereafter, the government is required to prove beyond a reasonable doubt that the accused was predisposed to commit the crime and was not entrapped. United States v. Murzyn, 631 F.2d 525, 528 (7th Cir.1980), *cert. den.*, 101 S. Ct. 1373 (1981) (interpreting the Federal Rules of Evidence).

PRACTICE POINTER: Reputation and opinion testimony:

A defendant may offer witnesses to a pertinent trait of his character in a case where character is not an element of the crime charged. (Rule 404(a)(1).) Traditionally a witness testifies to the fact of, or his belief or opinion of, defendant's reputation in the community as to that character trait (a reputation witness). A witness may testify to his own opinion not that of the community, of defendant's character trait (an opinion witness).

On cross-examination of a reputation witness, the prosecution may ask, to test the breadth of the witness's knowledge, if he has heard of specific instances of defendant's conduct for which the prosecution has a good faith basis. (Rule 405(a).) The witness also may be asked about his relationship to the defendant to expose possible bias. The prosecution perhaps may ask a reputation witness his personal opinion of the defendant's character.

On cross-examination, an opinion witness may be asked if he knows or has heard of specific instances of conduct. Opinion witnesses also may be questioned about their relationship to the defendant. See C. Wright & K. Graham, *Federal Practice and Procedure*, § 5264, pp. 583-84 & § 5265, pp. 586-87 (1978).

The State may not ask a witness whether his opinion of the defendant would change if he knew the defendant was guilty of the crime charged. See United States v. Mason, 993 F.2d 406, 408 (4th Cir.1993). Guilt-assuming hypothetical questions arguably violate the presumption of innocence.

Cross-examination questions such as "Have you heard about incident X?" and "Did you know about event Y?" are permitted only to affect the weight of the character evidence, and not as substantive evidence that the prior acts occurred. United States v. Tempesta, 587 F.2d 931, 936 (8th Cir.1988), *cert. den.*, 99 S.Ct. 2005 (1979); Miller, 12 *Indiana Evidence* 562 § 405.104 (3d ed.). If the prosecution is allowed to use questions such as this, ask for an admonishment and limiting instruction. Id.

VI. HABIT; ROUTINE PRACTICE - RULE 406

A. OFFICIAL TEXT:

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

B. HABIT

Habit evidence serves as circumstantial proof of conduct. It requires proof of a very specific, frequently repeated behavioral pattern. Under the modern view, either party in a civil or criminal case may introduce habit evidence. See Rosenburg v. Lincoln Am. Life Ins. Co. v. United States, 883 F.2d 1328, 1336 (7th Cir. 1989).

Habit is distinguished from character. "[W]hile character evidence permits the proponent to prove general character or character traits, habit evidence requires proof of a very specific, consistent, frequently repeated behavioral pattern." Imwinkelried, *Evidentiary Foundations* § 6.03[2], at 277 (9th ed. 2015). The distinction between habit and character evidence takes on added importance in criminal cases; accordingly, courts have been reluctant to accept evidence of a defendant's reputation or prior acts of misconduct offered as proof of a "habit" of criminal conduct. U.S. v. Mascio, 774 F.2d 219, 222 n.5 (7th Cir. 1985).

1. Definition

"Habit evidence is generally defined as '[e]vidence of one's regular response to a repeated specific situation.'" Weinberger v. Boyer, 956 N.E.2d 1095, 1108 (Ind. Ct. App. 2011) (alteration in original), quoting Black's Law Dictionary 597 (8th ed. 2004).

A habit is the person's regular practice of responding to a particular kind of situation with a specific type of conduct. Thus, a person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's work, or of driving his automobile without using a seatbelt. The doing of the habitual act may become semi-automatic, as with a driver who invariably signals before changing lanes. United States v. Mascio, 774 F.2d 219, 222 (7th Cir.1985) (*citing McCormick on Evidence* § 195, at 575 (3d. 1984)).

2. Foundation

Before a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature. Thompson v. Boggs, 33 F.3d 847, 854 (7th Cir. 1994), *cert. den.*, 115 S. Ct. 1692 (1995).

Party offering the evidence must establish the habitual nature of the alleged practice. Thompson v. Boggs, 33 F.3d 847, 854 (7th Cir.1994), *cert. den.*, 115 S.Ct. 1692 (1995). Mere similarity does not present the kind of sufficiently similar circumstances to outweigh the danger of prejudice and of confusion. Simplex, Inc. v. Diversified Energy Sys., Inc., 847 F.2d 1290, 1294 (7th Cir.1988); see also *McCormick on Evidence* § 195, at 1080-87 (7th ed. 2013).

a. Elements of the foundation for opinion habit evidence (from Imwinkelried, Evidentiary Foundations)

1) The witness is familiar with the person or business.
2) The witness has been familiar with the person or business for a substantial period of time.
3) In the witness' opinion, the person or business has a habit, a specific behavioral pattern.
4) The witness has observed the person or business act in conformity with the habit on numerous occasions.

In some jurisdictions, in addition to establishing these elements of the foundation, the proponent must show that:

5) The record indicates that there were no eyewitnesses to the person's or business's conduct on the occasion involved in the case; or
6) The record contains corroboration that the person or business acted in conformity with the habit on the occasion involved in the case, e.g., an eyewitness who described the person's conduct as consistent with the habit.

Imwinkelried, *Evidentiary Foundations* § 6.03[2], at 278 (9th ed. 2015).

b. Factors

Although there are no precise standards for determining whether a behavior pattern has matured into a habit, two factors are considered controlling: (1) adequacy of sampling; and (2) uniformity of response. The factors focus on whether the behavior at issue occurred with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances. Thompson v. Boggs, 33 F.3d 847, 854 (7th Cir. 1994), *cert. den.*, 115 S. Ct. 1692 (1995).

PRACTICE POINTER: An example of proving habit: Evidence of decedent's habit in supervising the execution of wills is relevant to show that he supervised the execution of a will in conformity with that habit. Decedent's secretary testified that she worked for decedent for sixteen years. During that time, she witnessed more than 500 wills with decedent and typed wills for decedent "just about every day." As a result, she was aware of decedent's habit and routine practice in supervising the execution of the wills of clients. She testified that she could not recall a time when decedent did not follow this routine practice. Fitch v. Maesch, 690 N.E.2d 350 (Ind. Ct. App. 1998).

3. Habit evidence must be relevant

a. Individual

Broome v. State, 687 N.E.2d 590, 601, n.7 (Ind. Ct. App. 1997) (evidence that victim was in the habit of picking up men and seducing them did not aid the determination of whether defendant reasonably believed that serious bodily injury, or the commission of a forcible felony, was at hand; this evidence was not probative of defendant's self-defense claim), *disapproved on other grounds by* Voss v. State, 856 N.E.2d 1211 (Ind. 2006).

b. Organization

Evidence of the routine practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

Morphew v. State, 672 N.E.2d 461, 463-64 (Ind. Ct. App. 1996) (the program coordinator for the BMV testified that the BMV mails certain notices as a matter of routine business; under Rule 406, this evidence was sufficient to support the inference that the BMV mailed a notice of suspension to the defendant).

Bailey v. State, 440 N.E.2d 1130 (Ind. 1982) (evidence of standard office procedure, which required a signed letter to be returned to the secretary for mailing, was sufficient to support the trial court's conclusion that notice had been mailed and received by the defendant).

Rosenburg v. Lincoln Am. Life Ins. Co., 883 F.2d 1328, 1336 (7th Cir. 1989) (affirming award of damages and attorney's fees for trial and appeal; sufficient evidence of routine business practice that testimony in question was admissible under Federal Rule 406 to show that appellant acted in conformity with its routine business practice in the case at issue).

4. Habit evidence subject to exclusion under Rule 404

Sometimes parties try to use habit evidence to show a person's propensity to act in conformity with his or her general character, to circumvent Rule 404's prohibition against the use of character evidence. This can threaten the orderly conduct of trial while potentially coloring the central inquiry and unfairly prejudicing the party against whom it is directed. Simplex, Inc. v. Diversified Energy Sys., Inc., 847 F.2d 1290, 1293 (7th Cir.1988).

Lewis v. State, 34 N.E.3d 240 (Ind. Ct. App. 2015) (testimony that a person became "meaner" when they drank alcohol did not qualify as habit evidence under Rule 406, as it lacked the repeated, discrete action consistent with a finding of habit; evidence also ran afoul of Rule 404(b), but its admission was harmless error).

Evidence that the defendant is in the habit of committing the crime charged is not made admissible by Rule 406. Evidence of these habits would be identical to the kind of evidence that is the target of the general rule against character evidence. United States v. Mascio, 774 F.2d 219, 222 (7th Cir. 1985).

VII. SUBSEQUENT REMEDIAL MEASURES - RULE 407

A. OFFICIAL TEXT:

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

B. GENERALLY APPLICABLE IN CIVIL CASES

Evidence of remedial conduct after an accident is generally inadmissible to prove negligence or culpable conduct. Hagerman Constr. v. Copeland, 697 N.E.2d 948 (Ind. Ct. App. 1998). The rule does not bar the admission of evidence of a subsequent remedial measure when offered for a purpose other than proving negligence. Id.

The major purpose of Rule 407 is to avoid discouraging injurers from taking remedial measures after an accident; they would be discouraged if the remedial measures were treated as an admission of fault. Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055 (7th Cir.1987).

Evidence relevant to issues other than negligence or culpable conduct, is properly admitted. Utley v. Healy, 663 N.E.2d 229, 238 (Ind. Ct. App. 1996).

VIII. COMPROMISE OFFERS AND NEGOTIATIONS - RULE 408

A. OFFICIAL TEXT:

(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering, or accepting, promising to accept, or offering to accept a valuable consideration in order to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim. Compromise negotiations include alternative dispute resolution.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

B. PLEA OFFERS AND NEGOTIATIONS NOT ADMISSIBLE AT TRIAL

Rule 410, and not Rule 408, governs the admission of withdrawn pleas, and offers.

Provisions such as Rule 408, prohibiting the admission of offers to compromise to prove the invalidity of a claim, and Ind. Code 35-35-3-4, prohibiting the admission of plea agreements not approved by a court, show a strong policy promoting compromise and settlement. Wisehart v. State, 693 N.E.2d 23, 64 (Ind. 1998), *cert. den.*, 119 S. Ct. 1338 (1999) (State's offer to dismiss the death penalty was not a mitigating circumstance); see also Horner v. Carter, 981 N.E.2d 1210, 1212 (Ind. 2013).

C. EXCEPTION - ADMISSIBLE FOR ANOTHER PURPOSE

1. When existence of agreement is an issue

Rule 408 does not require the exclusion of evidence of a compromise or settlement when that evidence is offered to prove the existence of the agreement. Cates v. Morgan Portable Building Corp., 780 F.2d 683, 691 (7th Cir. 1985).

> Horner v. Carter, 981 N.E.2d 1210, 1212 (Ind. 2013) (trial court correctly excluded husband's mediation statements from evidence; such statements were not admissible as extrinsic evidence to aid in construction of ambiguous agreement).

2. Mistake

Exhibits of previous agreements were not offered to show liability or invalidity of a claim, but to show the mistake in drafting the final agreed decree of dissolution. Because the exhibits were offered for the purpose of demonstrating mistake, the exhibits are admissible under the rule. Thomas v. Thomas, 674 N.E.2d 23, 26 (Ind. Ct. App. 1996).

3. To show that agreement was contrary to parties' intent

Exhibits relevant to demonstrate that final decree was contrary to the parties' intent. Thomas v. Thomas, 674 N.E.2d 23, 26 (Ind. Ct. App. 1996).

IX. PAYMENT OR OFFER TO PAY MEDICAL OR OTHER EXPENSES - RULE 409

A. OFFICIAL TEXT:

Evidence of paying, furnishing, promising to pay, or offering to pay:

(a) medical, hospital, or similar expenses resulting from an injury; or

(b) damage to property,

is not admissible to prove liability for the injury or damages.

B. PRE-TRIAL PAYMENTS INADMISSIBLE AT TRIAL

1. Barred by statute

Payments made to a plaintiff in advance of trial by a defendant or a defendant's insurer constitute advance payments and are inadmissible in evidence during the trial under Ind. Code 34-44-2. Curtis v. Clem, 689 N.E.2d 1261, 1263-64 (Ind. Ct. App. 1997).

Nealy v. American Family Mut. Ins. Co., 910 N.E.2d 842, 845-46 (Ind. Ct. App. 2009) (pretrial medical payments made by plaintiffs' insurer in uninsured motorist suit not "advance payments" within meaning of statute because insurer was not defendant or defendant's insurer).

2. Barred by rule

Similarly, Rule 409 precludes the admission of evidence of a party's payment of medical or similar expenses, such as the damage to property, to prove liability for such injury or damage. Curtis v. Clem, 689 N.E.2d 1261, 1263-64 (Ind. Ct. App. 1997).

X. WITHDRAWN PLEAS AND OFFERS - RULE 410

A. OFFICIAL TEXT:

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea or admission of the charge that was later withdrawn;

(2) a nolo contendere plea;

(3) an offer to plead to the crime charged or to any other crime, made to one with authority to enter into or approve a binding plea agreement; or

(4) a statement made in connection with any of the foregoing withdrawn pleas or offers to one with authority to enter into a binding plea agreement or who has a right to object to, approve, or reject the agreement.

(b) Exceptions. The court may admit such a plea, offer, or statement:

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

B. THE EVIDENCE RULE

1. Prerequisites to exclusion

A defendant's statements to victims or to the court, made in an effort to gain acceptance of a plea agreement, are "statements in connection with a plea agreement" and are not admissible in evidence under Rule 410. Gonzalez v. State, 929 N.E.2d 699, 700 (Ind. 2010).

The plea-bargaining process does not start until persons having the authority to make a binding agreement have agreed to negotiate. To qualify as a privileged communication, a statement must meet two requirements: (1) the defendant must have been charged with a crime at the time of the statement, and (2) the statement must have been made to someone with authority to enter into a binding plea agreement. Gilliam v. State, 650 N.E.2d 45, 49 (Ind. Ct. App. 1995).

"For a statement to be a privileged communication, the defendant must have been charged with a crime at the time of the statement and the prosecutor and the defendant must have initiated discussions related to a plea agreement. Second, the statement must have been made with the intent of seeking a plea agreement or in contemplation of a proposed agreement. Third, the statement is privileged if made to someone who has the authority to enter into or approve a binding plea agreement or who has a right to object to or reject the agreement." Gonzalez v. State, 929 N.E.2d 699, 702 (Ind. 2010).

PRACTICE POINTER: Some cases decided prior to 2010 and especially prior to the 1994 adoption of the Rules of Evidence may have been implicitly *overruled* or questioned by Gonzalez v. State, 929 N.E.2d 699, 702 (Ind. 2010). The Supreme Court in *Gonzalez* made clear that Rule 401 expanded the scope of the privilege to include statements to those with the right to object to plea agreements, as victims do under Ind. Code 35-35-3-5, and statements "in connection with" a plea agreement. Gonzalez v. State, 929 N.E.2d 699, 701-02 (Ind. 2010).

a. Statements must be made after plea negotiations have begun

To qualify as a privileged communication under this rule, the defendant must have been charged with a crime at the time of the statement, and the statement must have been made to someone with authority to enter into a binding plea agreement. Martin v. State, 537 N.E.2d 491, 493 (Ind. 1989) (statement to police officer before charges are filed is not privileged under this doctrine), *cited with approval* in Gonzalez v. State, 929 N.E.2d 699, 702 (Ind. 2010).

A defendant's unilateral offer of evidence to induce the State to negotiate is not privileged. Gilliam v. State, 650 N.E.2d 45, 49 (Ind. Ct. App. 1995).

Whether parties were engaged in plea negotiations when the defendant made the incriminating statements is a question of fact for the trial court which the appellate court reviews only for clear error. Green v. State, 870 N.E.2d 560 (Ind. Ct. App. 2007)

> Green v. State, 870 N.E.2d 560 (Ind. Ct. App. 2007) (defendant's pretrial incriminating statement to police, made in exchange for the State's agreement not to pursue the death penalty if he was charged, was not part of plea negotiations and was admissible; the defendant had not been charged when he made the statement, and, when the defendant made a bargain, and received the benefit of that bargain, it was not within the parameters of plea negotiations).

b. Statement must be made to person with right to object to plea

Gonzalez v. State, 929 N.E.2d 699 (Ind. 2010) (defendant's letter of apology to Evansville-Vanderburgh School Corporation was written to persuade the school corporation to accept the agreement and to reduce defendant's punishment; the corporation, which was the victim of the accident, had a right to express its opinion about the proposed agreement; thus, when the trial court rejected the agreement, the letter was privileged as the victim had the power to object to the agreement, and the letter was written in connection with the guilty plea).

Gilliam v. State, 650 N.E.2d 45, 49 (Ind. Ct. App. 1995) (the common law rule that a defendant's statements to a police officer who had no authority to enter into a binding plea agreement are not privileged plea negotiations is still good law under Rule 410).

c. Statements made in connection with a plea

"In the course of [the plea bargaining] process, the defendant may make statements to the victim, the trial judge, or other court officers. These statements are within the language of both the statute ('concerning' a plea agreement) and Evidence Rule 410 ('in

connection with' a plea agreement). Moreover, the purposes of the rule –to encourage candor and facilitate a plea agreement—are best furthered by excluding any concessions from evidence if the plea is not finalized." Gonzalez v. State, 929 N.E.2d 699, 702 (Ind. 2010).

Shanabarger v. State, 798 N.E.2d 210 (Ind. Ct. App. 2003) (admission of testimony about defendant's statements to his family members about the possibility of pleading guilty to murder to avoid a death sentence was not error under Rule 410; there were no withdrawn pleas or offers and the statements were not made in the course of negotiations).

Crandell v. State, 490 N.E.2d 377 (Ind. Ct. App. 1986) (telephone conversation between the defendant's counsel and victim did not constitute privileged communications concerning plea bargaining; counsel was asking victim what it would take to keep defendant out of jail).

2. Exceptions allowing admissibility

Such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel. Rule 410.

3. Comparison with Federal Rule of Evidence

Rule 410 of the Federal Rules is substantially similar to Indiana's Rule 410. The United States Supreme Court has allowed defendants to waive the rule.

a. Exclusionary provisions of Federal Rule 410 waivable

Absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of Rule 410 is valid and enforceable. United States v. Mezzanatto, 513 U.S. 196, 211, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995).

United States v. Mezzanatto, 513 U.S. 196, 211, 115 S. Ct. 797 (1995) (as a condition to proceeding with plea bargaining discussion, the prosecutor indicated that defendant would have to agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far; respondent conferred with his counsel and agreed to proceed under the prosecutor's terms.)

b. Presumption that defendant may waive constitutional and statutory protections

A criminal defendant may knowingly and voluntarily waive the protection of Federal Rule 410. United States v. Mezzanatto, 513 U.S. 196, 199-201, 115 S. Ct. 797 (1995). Courts have liberally enforced agreements to waive various exclusionary rules of evidence. Id. at 202.

C. STATUTORY EXCLUSIONARY RULES: SUBSTANTIVE LAW

Rule 410 has not preempted the exclusionary force of Indiana statutes making pleas and statements made in plea negotiations inadmissible. The rule prohibiting evidence of plea bargaining or statements made during bargaining, where the court does not accept an argument, is a rule of substantive law and not a mere evidentiary rule. Hensley v. State, 573 N.E.2d 913, 918 (Ind. Ct. App. 1991). Thus, if Rule 410 does not apply to sentencing hearings, the substantive rule does.

Hensley v. State, 573 N.E.2d 913 (Ind. Ct. App. 1991) ("cleanup" statement concerning the defendant's criminal activities in other counties, given as condition of obtaining plea agreement which later broke down, was not admissible at the defendant's sentencing hearing after conviction at trial).

1. Ind. Code 35-35-1-4(d)

Ind. Code 35-35-1-4(d) provides: (d) a plea of guilty, or guilty but mentally ill at the time of the crime, which is not accepted by the court or is withdrawn shall not be admissible as evidence in any criminal, civil, or administrative proceeding.

a. Factual basis statements

The establishment of a factual basis is inseparable from the actual entry of the plea of guilty. The statements made by the defendant at the guilty plea hearing establishing the factual basis for the plea are no more admissible than the fact that the defendant pled guilty. When a defendant has withdrawn a plea of guilty, statements forming the factual basis for the plea made by the defendant at the guilty plea hearing are not admissible in a subsequent proceeding on the same charges. Tyree v. State, 518 N.E.2d 814, 816-18 (Ind. 1988).

(1) Withdrawn guilty plea a nullity

When a guilty plea is withdrawn it is a nullity, which means that everything that transpired pursuant to the guilty plea is a nullity. Tyree v. State, 518 N.E.2d 814, 816 (Ind. Ct. App. 1988).

(2) Use of factual basis from withdrawn guilty plea has been considered fundamental error

To allow the State after the withdrawal of the guilty plea to retain in large part the benefit of its bargain, i.e., the incriminating statements, while denying the defendant his corresponding benefit is a procedure so fundamentally unfair as to constitute a denial of due process. Tyree v. State, 518 N.E.2d 814, 818 (Ind. Ct. App. 1988).

PRACTICE POINTER: Ind. Code 35-35-1-4(d) was adopted from the American Bar Association's Minimum Standards on Pleas of Guilty. Ind. Code 35-4.1-1-6, Criminal Law Study Commission Comments (Proposed Final Draft 1972 at 182). Later amendments to the minimum standards are similar to exceptions found in Rule 410. To permit the use of statements used during submission of a later withdrawn guilty plea for impeachment (or, even worse, as substantive evidence) would undermine the allowance of withdrawal of the plea and would place the accused in a dilemma inconsistent with the decision to award the accused a new trial. The history of the standard points out that if the plea itself is not admissible, then the defendant's statements made while entering the plea [factual basis] should be excluded as well. Such a result was clearly intended in the original standard from which the Indiana statute was adapted. Tyree v. State, 518 N.E.2d 814, 817 (Ind. Ct. App. 1988); Standards Relating to Pleas of Guilty § 14-2.2 (1980).

b. Clean-up statements

It is unclear whether "clean-up" statements made pursuant to a plea agreement are inadmissible in a subsequent trial after the plea has been withdrawn.

Hensley v. State, 573 N.E.2d 913 (Ind. Ct. App. 1991) ("cleanup" statement concerning the defendant's criminal activities in other counties, given as condition of obtaining plea agreement which later broke down, was not admissible at the defendant's sentencing hearing after conviction at trial).

But see Mundt v. State, 612 N.E.2d 566 (Ind. Ct. App. 1993) (the statutory protections do not apply after a bargain has been struck between the State and the defendant and negotiations have ended; the statutes only protect statements leading up to a plea agreement).

Williams v. State, 601 N.E.2d 347 (Ind. Ct. App. 1992) (trial court refused to address issue of the admissibility of clean-up statements where there was no objection and case law; *Tyree,* did not apply retroactively). See also Beeks v. State, 721 N.E.2d 339 (Ind. Ct. App. 1999).

PRACTICE POINTER: The above cases did not discuss the implication of the Fifth Amendment. Even if the statute of Evidence Rule 410 does not prohibit use of clean-up statements, use of such statements where defendant does not receive the promised benefit from the State may violate the Fifth Amendment. See, e.g., Bell v. State, 622 N.E.2d 450, 453 (Ind. 1993), *overruled on other grounds by* Jarmillo v. State, 823 N.E.2d 1187 (Ind. 2005).

2. Ind. Code 35-35-3-4

Ind. Code 35-35-3-4 provides: A plea agreement, or a verbal or written communication concerning the plea agreement, may not be admitted into evidence at the trial of the case, should the plea agreement not culminate in approval by the court.

The purpose of Ind. Code 35-35-3-4 and related case law is to facilitate final disposition of felony and misdemeanor charges through a communicative process of negotiations free of legal consequences. The policy behind this statute protects the State, not just the defendant. Statements made as part of plea negotiations as well as evidence of actual agreements, and all

of their parts, are inadmissible. Bell v. State, 622 N.E.2d 450, 453 (Ind. 1993), *overruled on other grounds by* Jarmillo v. State, 823 N.E.2d 1187 (Ind. 2005).

Stephens v. State, 588 N.E.2d 564 (Ind. Ct. App. 1992) (inculpatory statement made by the defendant to probation officer preparing pre-sentence report in anticipation of guilty plea, could not be admitted for impeachment of the defendant at subsequent trial occurring after judge refused to accept plea agreement).

D. RULE 410 AND STATUTORY PROTECTIONS APPLY ONLY TO DEFENDANT

Rule 410 and the statutory protections prohibit the use of plea negotiations only as to the negotiating accused person. Reed v. State, 748 N.E.2d 381, 389 (Ind. 2001).

Reed v. State, 748 N.E.2d 381 (Ind. 2001) (defendant was entitled to admit a statement made during plea negotiations between State and co-defendant in defendant's trial to impeach co-defendant).

E. CONSTITUTIONAL PROTECTION

The Fifth Amendment privilege against self-incrimination, as well as the statute, are barriers to the use of withdrawn guilty pleas in evidence. Bell v. State, 622 N.E.2d 450, 453 (Ind. 1993), *overruled on other grounds by* Jarmillo v. State, 823 N.E.2d 1187 (Ind. 2005). A statement made by the defendant as part of an agreement is a result of a direct or implied promise by the prosecutor and is involuntary and inadmissible. Id.

Note that the Indiana Constitution, Article 1, Section 14 also separately guarantees a privilege against self-incrimination.

XI. LIABILITY INSURANCE - RULE 411

A. OFFICIAL TEXT:

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

B. INSURANCE EVIDENCE

Rule 411 does not bar the use of evidence that a person was or was not insured for reasons other than to prove fault.

Informing the jury about indemnity is reversible error. Kirchoff v. Flynn, 786 F.2d 320, 324 (7th Cir.1986). However, referring to opposing counsel during voir dire as a "member of the litigation section [of an insurance group]" did not violate Rule 411. Stone v. Stakes, 749 N.E.2d 1277 (Ind. Ct. App. 2001), *opinion on rehearing* 755 N.E.2d 220.

XII. SEX-OFFENSE CASES: THE VICTIM'S OR WITNESS'S BEHAVIOR OR PREDISPOSITION - RULE 412

A. OFFICIAL TEXT:

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim or witness engaged in other sexual behavior; or

(2) evidence offered to prove a victim's or witness's sexual predisposition.

(b) Exceptions.

(1) ***Criminal Cases***. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's or witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's or witness's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) ***Motion***. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least ten (10) days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) ***Hearing***. Before admitting evidence under this rule, the court must conduct an *in camera* hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing is confidential and excluded from public access in accordance with the Rules on Access to Court Records.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

B. RULE 412 APPLIES OVER RAPE SHIELD STATUTE

Rule 412 incorporates the basic principles of Ind. Code 35-37-4-4, but the current version of the Rule is drawn from Federal Rule of Evidence 412, increasing the likelihood that the Rape Shield Act might conflict with the Evidence Rules on occasion. To the extent there are any differences, Rule 412 controls. Rules of evidence established by the Supreme Court prevail over any statute. Court has power to establish its own rules pursuant to the Constitution. Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997).

C. PURPOSE OF RULE 412 AND STATUTE

The purpose of Rule 412, and the Rape Shield Statute, is to prevent the inference that because a victim consented to sexual activity in the past, she or he must have consented at the time of the alleged offense. Skaggs v. State, 438 N.E.2d 301 (Ind. Ct. App. 1982).

The Rape Shield Statute "was designed to protect witnesses as well as victims, not to provide a defense for the accused." Forrester v. State, 440 N.E.2d 475, 479 (Ind. 1982); Skaggs v. State, 438 N.E.2d 301, 306 (Ind. Ct. App. 1982).

Purposes of Rule 412: (1) To prevent a generalized inquiry into the reputation or past sexual behavior of the victim in order to avoid embarrassing the victim and subjecting the victim to possible public denigration. (2) To prevent victim's past from becoming focus of defense. Rule also intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes. Past incidents of a victim's consent, except in limited circumstances, are not permitted to imply consent on the date in question. Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997).

> Williams v. State, 681 N.E.2d 195 (Ind. 1997) (testimony that on prior occasions the victim had committed acts of prostitution in exchange for money or cocaine properly excluded).

A victim's death does not abrogate the public policy advanced by the rape shield statute: encouraging victims to report rape. If the statute is not applied to victims who ultimately are murdered, then perpetrators of sex crimes will be encouraged to kill their victims, thus enabling them to defend the charges through exploitation of evidence of the victim's prior sexual activity. Jenkins v. State, 627 N.E.2d 789, 795 (Ind. 1993) *cert. den.*, 115 S. Ct. 64 (1994).

> Hobson v. State, 675 N.E.2d 1090, 1093 (Ind. 1996) (Rape Shield Statute bars use of evidence that the deceased victim was using oral contraceptives).

D. APPLICATION AND LIMITATIONS

1. Civil and Criminal cases

Rule 412 applies in criminal and civil cases alike, but Rule 412(b) establishes separate exceptions for criminal cases. In civil cases, the court has discretion to admit evidence offered to prove a victim's or witness's sexual behavior or sexual predisposition if the probative value of the evidence substantially outweighs the danger of harm to any victim and

of unfair prejudice to any party. Ind. Evid. R. 412(b)(2). The high burden the offeror must meet slants the rule against admissibility. Miller, *Courtroom Handbook on Indiana Evidence*, p. 121 (2015-16 ed.).

If the evidence consists of the victim's reputation, see Evid. R. 405(a), the judge can admit the evidence only if the victim—not the plaintiff or the defense—has placed reputation in controversy.

2. Protects against behavior only

Rape shield law does not preclude evidence which merely establishes a basis for the defendant's belief as to the victim's past sexual behavior because evidence of basis for belief is not same as evidence of actual prior sexual activity by victim. Clark v. State, 728 N.E.2d 880 (Ind. Ct. App. 2000).

Clark v. State, 728 N.E.2d 880 (Ind. Ct. App. 2000) (trial court committed reversible error by preventing the defendant from cross-examining the victim about the contents of letters her parents found and to which she testified on direct; the letters were from a neighbor boy and were of a sexual nature; the defendant's defense was that he inserted his finger into her vagina to determine if she had been sexually active based on his discovery of the letters).

Zawacki v. State, 753 N.E.2d 100 (Ind. Ct. App. 2001) (error to exclude minor victim's letters and verbal statements to defendant asking permission to have sexual relationship with defendant's daughter; victim's statements were not sexual conduct).

State v. Walton, 715 N.E.2d 824, 827 (Ind. 1999) (a demonstrably false prior accusation of sexual conduct is not sexual conduct subject to Rule 412).

Stephens v. Miller, 989 F.2d 264 (7th Cir. 1993) (granting habeas relief from Stephens v. State, 544 N.E.2d 137 (Ind. 1989) and holding that defendant's statements during sexual intercourse regarding his belief about her prior sexual conduct were not introduced as evidence of victim's prior sexual but rather to support defendant's defense the victim fabricated rape accusation because she was angry about the statements).

People v. Garcia, 179 P.3d 250 (Colo. Ct. App. 2007) (victim's statements regarding her rape fantasy were not evidence of sexual conduct, with Court noting that the fantasy could have been established without evidence that it was ever acted upon).

E. RULE 412 EXCEPTIONS

1. Someone other than defendant was source of semen, injury, or other physical evidence (Rule 412(b)(1)(A))

The wording of Rule 412(b)(1)(A) differs from the corresponding section of the Rape Shield Statute. The statute says "evidence . . . which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded . . ." Ind. Code 35-37-4-4(b)(2). Rule 412(b)(1)(A) allows admission of "evidence of specific instances of a victim's or witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." "[The Rule] only allows evidence of other sexual behavior

that—itself—could have 'produced' some physical evidence that is presented in the case." Killian v. State, 149 N.E.3d 1189, 1191 (Ind. Ct. App. 2020).

Evidence of sexual behavior offered for this purpose still must be relevant within the meaning of Rule 401 and can be excluded under Rule 403. Miller, *Courtroom Handbook on Indiana Evidence*, p. 119 (2015-16 ed.); Pribie v. State, 47 N.E.3d 629 (Ind. Ct. App. 2015).

PRACTICE POINTER: Risk of partial corroboration. The risk of partial corroboration arises when the State introduces evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator. Once admitted, such evidence may be impeached by the introduction through cross-examination of specific evidence which supports a reasonable inference and tends to prove that the conduct of a perpetrator other than the defendant is responsible for the victim's condition which the State has placed at issue. Steward v. State, 636 N.E.2d 143, 149 (Ind. Ct. App. 1994), *aff'd,* 652 N.E. 2d 490 (Ind. 1995). See subsection on constitutional implications, *supra.*

(1) Identity must be at issue

Where identity was not at issue, victim's prior sexual acts with another were not relevant. Morrison v. State, 824 N.E.2d 734 (Ind. Ct. App. 2005).

Caley v. State, 650 N.E.2d 54, 55-56 (Ind. Ct. App. 1995) (victim's sexual relationship with another man was immaterial where victim consistently and unequivocally named defendant as the perpetrator of the acts of molestation; identity was not at issue).

Pribie v. State, 47 N.E.3d 629 (Ind. Ct. App. 2015) (evidence of unknown male's DNA found in rape kit properly excluded by rape shield law, where State did not present any physical evidence to convict defendant and did not open the door in its direct examination of complaining witness or a biologist).

Wise v. State, 26 N.E.3d 137 (Ind. Ct. App. 2015) (affirming trial court's conclusion that there was no real evidentiary dispute regarding the identity of the male in the videos, thus no error in denying defendant the opportunity to explore whether someone else had the opportunity to have sex with complaining witness while she was unconscious).

Smith v. State, 140 N.E.3d 363 (Ind. Ct. App. 2020) (because State did not introduce any evidence of the injury to victim's vagina, there was nothing for defendant to rebut with his proffered evidence of victim's post-assault sexual history, thus Rule 412 exception did not apply).

(2) Must have reasonable inference that another person could have committed act

Trial court will consider the time frame and similarity of the prior sexual activity in order to determine its probative value.

McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007) (evidence that another man had recently been convicted of molesting the victim was inadmissible where the charged time frame of the other man's acts was different than that of the defendant's, despite fact there was evidence that other man had access to victim during time frame for which the defendant was charged).

Kielblock v. State, 627 N.E.2d 816 (Ind. Ct. App. 1994) (in child molesting trial, court properly excluded evidence that defendant's brother had witnessed sexual incident that was dissimilar to charged incident involving complaining witness and the defendant's son approximately 2-3 years before instant incident).

Killian v. State, 149 N.E.3d 1189 (Ind. Ct. App. 2019) (defendant convicted of sexual misconduct with a minor after impregnating his granddaughter wanted to introduce evidence at trial that his son was convicted of sexual misconduct with a minor in 1994, arguing it should be introduced under Rule 412 (b)(1)(A). But trial court did not err in excluding this evidence because the 1994 conviction could not have been the "source" of the victim's current pregnancy and was being introduced merely to add speculation that because the son had a prior conviction for the same offense, he may have been the perpetrator here).

Hobbs v. State, 160 N.E.3d 543 (Ind. Ct. App. 2020) (defendant was not entitled to present evidence that victim's mother taught the victim how to touch herself because the evidence did not fall under the exception in I.R.E. 412(b)(1)(A); the evidence did not relate to the allegations that defendant put his "wiener" in the victim's "vagina").

2. Rule 412(b)(1)(B): Acts with the defendant if offered to prove consent or if offered by the prosecutor

Where consent is not an issue, prior acts with the defendant may not be relevant. Munn v. State, 505 N.E.2d 82 (Ind. 1987).

Collins v. State, 740 N.E.2d 143 (Ind. Ct. App. 2000) (although IRE 412 permits evidence of victim's prior sexual relationship with the defendant, such evidence is relevant only to issue of guilt; existence of prior physical relationship between the defendant and victim cannot serve as mitigator in sentencing).

People v. Garcia, 179 P.3d 250 (Colo. Ct. App. 2007) (trial court erred in excluding evidence that defendant and the victim had a consensual sexual relationship, that she had told him about her rape fantasy and that they had acted it out on several occasions, and that they had engaged in anal sex, bondage, and rough sex).

Baker v. State, 750 N.E.2d 781 (Ind. 2001) (prohibiting rape defendant from offering evidence of his alleged recent and regular sexual relationship with victim was reversible error where issue was consent).

3. Rule 412(b)(1)(C): Evidence whose exclusion would violate defendant's constitutional rights

As amended in 2014, Rule 412(a) does not render inadmissible evidence of specific instances of the alleged victim's or witness's sexual behavior if exclusion would violate the defendant's constitutional right to confrontation or due process right to present a defense. Ind. Evid. R 412(b)(1)(C); see, e.g., Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480 (1988).

See G., Constitutional Implication, below.

F. COMMON LAW EXCEPTIONS

1. Prior false accusations

To the extent a defendant offers evidence of prior false accusations of rape to impeach the credibility of the witness, as opposed to the witness's general character, its admission does not violate the Rape Shield Rule. State v. Walton, 715 N.E.2d 824, 827 (Ind. 1999); Hall v. State, 36 N.E.3d 459 (Ind. 2015). The defendant must still comply with the notice provisions of the rule. Graham v. State, 736 N.E.2d 822 (Ind. Ct. App. 2000).

Evidence that victim has made prior false accusations of sexual misconduct allowed where: (1) victim has admitted falseness of prior allegations or (2) prior accusation is demonstrably false. Stewart v. State, 531 N.E.2d 1146, 1149 (Ind. 1988). Although no bright line rule can be established for determining whether a prior accusation is demonstrably false, the demonstrably false standard is "more stringent than a credibility determination." State v. Walton, 715 N.E.2d 824, 827 (Ind. 1999) (*quoting* State v. Walton, 692 N.E.2d 496, 501 (Ind. Ct. App. 1998)).

The trial court's determination of whether the prior accusation is "demonstrably false" will be affirmed on appeal unless it is "clearly erroneous." Candler v. State, 837 N.E.2d 1100, 1104 (Ind. Ct. App. 2005). Great deference must be given to the trial court's findings. Williams v. State, 779 N.E.2d 610, 613-14 (Ind. Ct. App. 2002).

a. Demonstrably false accusations

State v. Walton, 715 N.E.2d 824 (Ind. 1999) (where two witnesses testified that the alleged victim had previously accused another of rape, but the alleged victim denied the prior rapes and the prior accusations, the trial court did not abuse its discretion in finding that prior accusations were false and did occur). But see Koo v. State, 640 N.E.2d 95, 103 (Ind. Ct. App. 1994); Williams v. State, 779 N.E.2d 610, 613-14 (Ind. Ct. App. 2002).

Maldonado v. State, 908 N.E.2d 632 (Ind. Ct. App. 2009) (complaining witness's statement about sexual relationship with imaginary brother should have been admitted).

Hall v. State, 36 N.E.3d 459 (Ind. 2015) (trial court erred in prohibiting defendant from asking questions of the complaining witness's mother at deposition regarding C.W.'s prior false accusation of rape).

Blair v. State, 877 N.E.2d 1225 (Ind. Ct. App. 2007) (testimony that victim had told witness that a friend's stepfather had messed with victim while victim slept and that the witness did not believe victim because witness was a light sleeper and was less than five feet away from where victim slept did not prove the accusation was demonstratively false).

Hogan v. State, 616 N.E.2d 393 (Ind. Ct. App. 1993) (suspicions that prior false rape accusations were false is not sufficient evidence to demonstrate they were false for admissibility purposes; in one instance investigating officer indicated the victim's story sounded "fishy," that she didn't seem completely honest, and that further investigation was necessary to determine legitimacy of case; in other incident officer had opinion that allegation was false report).

Fugett v. State, 812 N.E.2d 846 (Ind. Ct. App. 2004) (evidence of prior allegation consisted of complaining witness's mother's testimony, which was contradicted by the lack of police report and the complaining witness, the defendant failed to show that there was a prior allegation).

Brown v. Commonwealth, 510 S.E.2d 751 (Va. Ct. App. 1999) (an accusation can be inferred false from its strikingly similar details to the current accusation).

b. Admitted false accusation

Candler v. State, 837 N.E.2d 1100 (Ind. Ct. App. 2005) (where complaining witness claimed she overreacted and misinterpreted her stepfather's intent when she said that her stepfather inappropriately touched her, trial court did not abuse its discretion in finding that the witness did not admit that the prior accusation was false; she still claimed her stepfather touched her).

Graham v. State, 736 N.E.2d 822 (Ind. Ct. App. 2000) (where witness did not concede that prior accusation was false and defendant failed to show it was false, the accusation was inadmissible).

PRACTICE POINTER: Factors that may be considered by the court in making a determination of admissibility of prior false accusations include whether:

- the prior accusation was made under oath or included in criminal charges of sexual misconduct;
- independent corroborative evidence of falsity exists; and a prima facie case in support of the prior accusation was established.

The court should also consider the extent to which:

- the victim, to defend herself against the accusations, would be forced to reveal private information afforded protection at the heart of the Rape Shield Rule; and
- the truth or falsity of the prior accusations would become trials within trials.

2. To correct a false or misleading impression

Hall v. State, 36 N.E.3d 459 (Ind. 2015) (trial court erroneously prohibited defendant from cross-examining complaining witness's mother on the fact she told defendant about a prior

false accusation in a phone conversation; the State opened the door on direct by asking the mother about the phone conversation to imply that defendant was baselessly searching for ways to undermine a 12-year-old's credibility).

Hook v. State, 705 N.E.2d 219 (Ind. Ct. App. 1999) (prosecutor's opening statement did not create a false impression that the alleged victim's conduct with the defendant was a new experience for her, opening the door to victim's past sexual conduct).

Morrison v. State, 824 N.E.2d 734 (Ind. Ct. App. 2005) (defendant's right to cross-examination was not violated by exclusion of evidence that victim's co-worker had previously touched victim's penis; defendant was able to cross, without reference to specific instance, to dispel notion that victim lacked knowledge of sexual matters, such as sex between two men).

3. No exception to prove defense of victim's age

A victim's past sexual conduct may not be admitted for purpose of showing defendant's belief as to victim's age. Little v. State, 650 N.E.2d 343, 345 (Ind. Ct. App. 1995).

G. CONSTITUTIONAL IMPLICATION

1. Facial constitutionality

Indiana's rape shield rule is not facially unconstitutional [based on cases construing the rape shield statute]. However, the constitutionality of such a law as applied to preclude particular exculpatory evidence remains subject to examination on a case- by- case basis. Williams v. State, 681 N.E.2d 195, 201 (Ind. 1997).

The State cannot use the Rape Shield Statute both as a shield and as a sword. It is error to apply a rule mechanistically to prohibit the defense from either offering its version of the facts or assuring through cross-examination that the trier of fact has a satisfactory basis for evaluating the truth of the witnesses' testimony. Steward v. State, 636 N.E.2d 143, 150 (Ind. Ct. App. 1994), *aff'd,* 652 N.E. 2d 490 (Ind. 1995).

2. Specific constitutional issues

a. Injury inflicted by another

When evidence of prior sexual activity is offered not to create an inference that the victim consented in the instant case, but rather to show that the victim's injuries could have been inflicted by someone other than the defendant, excluding the evidence may violate the defendant's Sixth Amendment right to present evidence. See Williams v. State, 681 N.E.2d 195, 201 (Ind. 1997); Tague v. Richards, 3 F.3d 1133, 1137 (7th Cir.1993).

Saylor v. State, 559 N.E.2d 332, 335-36 (Ind. Ct. App. 1990) (defendant offered to prove that his mentally handicapped stepdaughter, who had a poor concept of time, had been molested at least two years before the defendant met her to explain the victim's enlarged vagina, and to argue that her identification of defendant as the abuser was unreliable; the defendant had a Sixth Amendment's right to present

evidence that the victim had substituted defendant as the perpetrator of an act of child molesting which may have occurred earlier in her life). Tague v. Richards, 3 F.3d 1133, 1140 (7th Cir.1993).

Turner v. State, 720 N.E.2d 440 (Ind. Ct. App. 1999) (trial court properly excluded evidence that the defendant saw child molest victim in back yard with neighbor boy with pants pulled down because there was no evidence that neighbor and victim engaged in sexual activity and victim had no confusion as to who as perpetrator).

Pribie v. State, 47 N.E.3d 629 (Ind. Ct. App. 2015) (evidence of unknown male's DNA found in rape kit properly excluded by rape shield law, where State did not present any physical evidence to convict defendant and did not open the door in its direct examination of complaining witness or a biologist).

The Indiana Constitution, Article 1, Section 13 also guarantees the right to present evidence.

b. Partial corroboration

In partial corroboration, once there is evidence that sexual contact did occur, the witness's credibility is automatically bolstered. This invites the inference that because the victim was accurate in stating that sexual contact occurred, the victim must be accurate in stating that the defendant was the perpetrator. In such cases, the defendant must be allowed to rebut this inference by evidence that another person was the perpetrator. Steward v. State, 636 N.E.2d 143, 149 (Ind. Ct. App. 1994), *summarily aff'd,* 652 N.E. 2d 490 (Ind. 1995). The risk of partial corroboration arises when the State introduces evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator. Turney v. State, 759 N.E.2d 671, 676 (Ind. Ct. App. 2001).

Steward v. State, 636 N.E.2d 143, 149 (Ind. Ct. App. 1994), *summarily aff'd,* 652 N.E. 2d 490 (Ind. 1995) (evidence was admitted that victim suffered from child sexual abuse syndrome; the exculpatory evidence which defendant offered to prove would have shown that the victim reported that four other men had molested her at around the same time that she reported defendant's molestation; by the exclusion of evidence of other molestations, the jury was given the impression that it was defendant who caused victim's behavioral problems).

Turney v. State, 759 N.E.2d 671 (Ind. Ct. App. 2001) (reversible error; the prosecutor deliberately withheld information from the defense that the alleged victim in a sexual misconduct with a minor case had herself been sexually active at the age of 14 and 15 with two boys aged 12 and 15, and also bolstered its case with "child sexual abuse accommodation syndrome evidence" that the victim exhibited behavioral problems consistent with those experienced by victims of sexual abuse).

Redding v. State, 844 N.E.2d 1067 (Ind. Ct. App. 2006) (trial court committed reversible error by excluding evidence that victim had been previously molested by a third party where doctor testified that the victim had hymeneal damage).

Davis v. State, 749 N.E.2d 552 (Ind. Ct. App. 2001) (conviction may not stand where the State offered evidence that the victim had been sexually active at age 12, but defense was not allowed to offer evidence that the victim had engaged in sexual intercourse with another man because a reasonable jury juror would not think it typical that a 12-year-old was sexually active).

PRACTICE POINTER: In Lewis v. State, 451 N.E.2d 50 (Ind. 1983), the Court held that evidence of a victim's prior sexual conduct was properly excluded although there was medical testimony that child victim's vagina "had been used frequently" and jury could infer defendant was cause of medical testimony. This case pre-dates the above referenced cases and did not address the Sixth Amendment implications of the excluded evidence.

c. Restrictions on defendant's testimony

Federal constitutional questions arise when trial court restricts a defendant from giving his own account of the events at issue. Williams v. State, 681 N.E.2d 195, 201 (Ind. 1997); Stephens v. Miller, 13 F.3d 998, 1002 (7th Cir.1994), *cert. den.*, 115 S. Ct. 57 (1994), *affirming en banc* Stephens v. Miller, 989 F.2d 264 (7th Cir. 1993) (reversing Stephens v. State, 544 N.E.2d 137 (Ind. 1989) and holding that the trial court violated the defendant's Sixth Amendment right by refusing to allow him to testify about statements he made during intercourse with the victim regarding his belief about the victim's prior sexual conduct).

The Indiana Constitution, Article 1, Section 13 also guarantees a criminal defendant the right to be heard.

d. Impeachment; right to cross examine witnesses

Application of the rape shield rule complies with the dictates of the Confrontation and Due Process Clauses only if it does not actually impinge upon the defendant's right to cross-examination. The trial court's exclusion of evidence must not prevent the defendant from conducting a full, adequate, and effective cross-examination. Steward v. State, 636 N.E.2d 143, 148 (Ind. Ct. App. 1994), *aff'd,* 652 N.E.2d 490 (Ind. 1995).

Zawacki v. State, 753 N.E.2d 100 (Ind. Ct. App. 2001) (reversible error to exclude minor victim's letters and verbal statements to defendant asking permission to have sexual relationship with defendant's daughter; victim's statements were not "sexual conduct" and were offered to impeach her credibility and establish bias, prejudice or ulterior motive, not solely for the purpose of prejudicing the victim in the eyes of the jury).

Morrison v. State, 824 N.E.2d 734 (Ind. Ct. App. 2005) (defendant's right to cross-examination was not violated by exclusion of evidence that victim's co-worker had previously touched victim's penis; defendant was able to cross, without reference to specific instance, to dispel notion that victim lacked knowledge of sexual matters, such as sex between two men).

Conrad v. State, 938 N.E.2d 852 (Ind. Ct. App. 2010) (defendant was not denied his right to cross examination by the exclusion of evidence the complaining witness was "making out" with another man shortly before being sexually active with defendant was inadmissible; defendant's defense was consent and he would have used the evidence to impeach complaining witness's credibility and memory).

e. Victim prior pattern: modus operandi

Sixth Amendment may be implicated when a defendant establishes that the victim engaged in a similar pattern of sexual acts. Williams v. State, 681 N.E.2d 195, 201 (Ind. 1997).

Williams v. State, 681 N.E.2d 195, 201 (Ind. 1997) (victim's sexual history irrelevant in the absence of compelling evidence of modus operandi; prior pattern exception applies to the admission of certain evidence which reveals activity marked by characteristics tending to show an individual's unique "signature"). See Jeffries v. Nix, 912 F.2d 982 (8th Cir. 1990), *cert. den.*, 111 S. Ct. 1327 (1991).

PRACTICE POINTER: A defendant must do more to preserve a challenge to exclusion of rape shield evidence than merely make a pre-trial motion and renew it at commencement of trial. The defendant must attempt to offer any evidence to these matters at his trial. A defendant who fails to make an offer of proof waives the issue. Lacking specific evidence, an appeals court cannot review the allegation. Whited v. State, 645 N.E.2d 1138 (Ind. Ct. App. 1995).

f. To show pre-existing sexual knowledge, i.e., sexual innocence theory

In order for a defendant to admit evidence of a young complaining witnesses' sexual past in order to show the complaining witness has prior knowledge of the nature of sex, the defendant must show that the prior sexual act occurred, and the prior sexual act was sufficiently similar to the present sexual act to give the victim the knowledge to imagine the molestation charge. Oatts v. State, 899 N.E.2d 714, 724-25 (Ind. Ct. App. 2009).

Oatts v. State, 899 N.E.2d 714 (Ind. Ct. App. 2009) (defendant failed to show that prior molestation or pornographic video were so similar to current allegation that it was admissible to show complaining witness's knowledge of the nature of sex).

Alvarado v. State, 89 N.E.3d 442 (Ind. Ct. App. 2017) (no error in excluding evidence that complaining witness had been molested by her mother's new boyfriend after defendant molested her; while not rejecting "sexual innocence inference" theory, Court suggested that concerns about jury unduly inferring sexual innocence could be addressed in voir dire).

Watson v. State, 134 N.E.3d 1038 (Ind. Ct. App. 2019) (in child molesting and incest prosecution, trial court properly excluded evidence of complaining witness's internet searches conducted on a tablet that defendant and complaining witness shared, on topics related to the allegations; defendant failed to demonstrate that it was C.W. who made the searches and not him; exclusion of this evidence under Indiana's Rape Shield statute did not violate Sixth Amendment right to cross examination).

H. PRE-TRIAL NOTICE

Rule 412(c)(1) requires either party to give notice, at least ten days before trial, of evidence they intend to offer under Rule 412. The motion must specifically describe the evidence and state the purpose for which it is to be offered. The motion must be filed at least 10 days before trial unless the court sets a different time for good cause. The party offering the evidence must serve the motion on all parties and notify the victim or, when appropriate, the victim's guardian or representative. Ind. Evid. R 412(c)(1).

The constitutionality of requiring pretrial notice by a criminal defendant who intends to offer evidence of past sexual conduct was upheld by the United States Supreme Court in Michigan v. Lucas, 500 U.S. 145, 111 S. Ct. 1743 (1991), *cert. den.*, 115 S. Ct. 593 (1994) (Michigan's rule requiring notice within ten days after arraignment of intent to offer evidence of the victim's past sexual conduct was not *per se* unconstitutional).

Williams v. State, 681 N.E.2d 195, 202 (Ind. 1997) (no motion describing the evidence had been filed ten days prior to trial, as required by Rule 412(c)(1); the defendant was precluded by Rule 412 from introducing any evidence of the victim's past sexual conduct).

Graham v. State, 736 N.E.2d 822, 826 (Ind. Ct. App. 2000) (notice-and-hearing requirement of Ind. Evidence Rule 412(c) applies to common-law Rape Shield Rule exception allowing evidence of prior false rape allegations; here, the defendant's failure to file written notice at least ten days prior to trial was fatal to his attempt to introduce evidence of prior false allegations). See also Sallee v. State, 785 N.E.2d 645 (Ind. Ct. App. 2003).

Johnson v. State, 6 N.E.3d 491 (Ind. Ct. App. 2014) (defendant's failure to file proper notice of rape shield evidence waived exclusion issue for appeal despite fact that State did not raise the lack of notice until appeal).

PRACTICE POINTER: Rule 412 is less detailed in its requirements for pretrial notice than Ind. Code 35-37-4-4. However, if there is any conflict between Rule 412 and Ind. Code 35-37-4-4, Rule 412 applies. Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997).

Although Rule 412 requires the trial court to rule on rape shield evidence pre-trial, the requirement that the party seeking to challenge on appeal the trial court's ruling must still offer the evidence at trial applies to rape shield evidence. Miller v. State, 716 N.E.2d 367 (Ind. 1999).

I. HEARING ON ADMISSIBILITY - CONFIDENTIALITY

Rule 412(c) requires that the hearing on admissibility be conducted *in camera* and that the record of the hearing be excluded from public access. The Rule gives the alleged victim a right to attend or be heard at the hearing. Unless the judge orders otherwise, the motion, related materials, and record of the *in camera* hearing are deemed confidential and are to be excluded from public access. Ind. Evid. R. 412(c)(2); Admin. R. 9.

J. OFFER OF PROOF AT TRIAL REQUIRED TO PRESERVE ERROR

Unless the judge states that a ruling against admissibility at the hearing is definitive, the proponent of the evidence must make an offer of proof at trial to preserve any claim of error in the ruling. Miller v. State, 716 N.E.2d 367, 370 (Ind. 1999); Ind. Evid. R. 103(a)(1)(A).

K. EXAMPLES OF EVIDENCE PROPERLY EXCLUDED

1. Evidence of contraceptive use barred

Defendant sought to introduce evidence of victim's use of oral contraceptives. Appellate court held that this was a "none-too-thinly veiled attempt to create an inference of promiscuity" and that the evidence was properly excluded under the Rape Shield Statute. Hobson v. State, 675 N.E.2d 1090, 1093 (Ind. 1996).

2. Illegitimate children

Shaw v. State, 489 N.E.2d 952 (Ind. 1986) (evidence that unmarried 18-year-old had her two children with her on evening of rape fell clearly within purview of rape shield statute).

Roberts v. State, 268 Ind. 127, 373 N.E.2d 1103, 1106-07 (1978) (evidence that the victim's first child was illegitimate and given up for adoption properly excluded).

3. Pregnancy

Badgley v. State, 527 N.E.2d 713 (Ind. 1988) (evidence that victim told friends she thought she might be pregnant properly excluded).

Razo v. State, 431 N.E.2d 550, 555 (Ind. Ct. App. 1982) (evidence of aborted pregnancy properly excluded).

4. Evidence of absence of prior sexual activity

Skaggs v. State, 438 N.E.2d 301, 305-06 (Ind. Ct. App. 1982) (victim's lack of prior sexual activity properly excluded).

But see Drake v. State, 555 N.E.2d 1278, 1280-81 (Ind. 1990) (in light of doctor's testimony that victim's hymen was torn, victim's testimony that she was a virgin before incident occurred was probative to establish that penetration had occurred; probative value of testimony outweighed prejudicial impact).

5. Prior acts of prostitution

Alleged prostitute's prior sexual history does not become fair game simply by reason of her prior actions. Williams v. State, 681 N.E.2d 195, 200-02 (Ind. 1997).

6. Sexual conduct with another man shortly before sex with defendant

Conrad v. State, 938 N.E.2d 852 (Ind. Ct. App. 2010) (evidence the complaining witness was "making out" with another man shortly before being sexually active with defendant was inadmissible; defendant was not trying to show that the other man committed the sexual assault but trying to impeach complaining witness's credibility and memory).

7. Possession of sexual device

Sallee v. State, 777 N.E.2d 1204 (Ind. Ct. App. 2002) (evidence that victim's boyfriend had purchased a "sexual device" was "evidence of prior sexual conduct" by the victim, barred by Rule 412; defendant's offer made it clear that defense intended to present evidence that the boyfriend and victim had used the device).

XIII. MEDICAL EXPENSES - RULE 413

A. OFFICIAL TEXT:

Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements are prima facie evidence that the charges are reasonable.

B. EFFECT OF RULE 413

1. No absolute admissibility

Rule 413 should not be read as a rule of absolute admissibility for medical records. Miller, 12 *Indiana Evidence,* 669-70 § 413.101 (3d ed.). Rule 413 should be viewed as being subject to Rule 403. Id. Medical records are subject to the hearsay and authentication rules. Id. *at* 553; Barrix v. Jackson, 973 N.E.2d 22, 28-29 (Ind. Ct. App. 2012).

Statements made by a provider *to* a patient are not within the hearsay exception of Rule 803(4). Declarations made by a physician or other health care provider to a patient do not share the same indicia of reliability as statements made by a patient for purposes of medical treatment. Sibbing v. Cave, 922 N.E.2d 594, 598 (Ind. 2010).

2. Proper measure of damages

The proper measure of damages for medical services is the reasonable and fair value of medical expenses necessarily incurred by the plaintiff. Reasonable prong may be satisfied by: (1) showing the payment of medical bills; or (2) providing testimony of a treating physician. Proof that described medical care was reasonably necessary for identified injuries may not require expert testimony when that treatment is a matter of common knowledge. Smith v. Syd's Inc., 570 N.E.2d 126, 130-31 (Ind. Ct. App. 1991), *vacated in part*, 598 N.E.2d 1065 (Ind. 1992).

> Stanley v. Walker, 906 N.E.2d 852, 858 (Ind. 2009) (the reasonable value of medical services is the measure used to determine damages to an injured party in a personal injury matter; this value is not exclusively based on the actual amount paid or amount originally billed, though these figures certainly may constitute evidence as to the reasonable value of medical services; a defendant is liable for the reasonable value of medical services).

3. Past expenses only

Rule 413 allows the admission of bills for actual past medical charges but does not permit future estimates of costs. Cook v. Whitsell-Sherman, 796 N.E.2d 271, 277-78 (Ind. 2003). Estimates of future medical charges are not as reliable as medical bills already incurred because the amount of future medical charges is usually debatable as to both the probability of the need for the treatment and the method of estimating its future cost. Id.

PRACTICE POINTER: Be sure to adequately review assertions by the prosecution as to the victim's incurred expenses. In Kellett v. State, 716 N.E.2d 975 (Ind. Ct. App. 1999), counsel was ineffective because he: 1) failed to object to admission of ledger into evidence; 2) failed to adequately review ledger; and 3) failed to cross-examine victim's mother regarding accuracy and reliability of ledger.