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EVIDENCE

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§19-1
Right to Present Evidence

Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) 1. Whether based on due process or the compulsory process and confrontation clauses of the Sixth Amendment, the federal constitution guarantees a meaningful opportunity to present a complete defense. This right is violated by a rule which infringes on the ability to present a defense and which is arbitrary or disproportionate to its intended purpose. However, the Federal Constitution permits rules of evidence which exclude evidence on the ground that the probative value is outweighed by other factors such as unfair prejudice, confusion of the issues, or potential to mislead a jury.

2. Under a rule adopted by the South Carolina Supreme Court, defense evidence showing that someone other than the defendant committed the crime is admissible if it raises a reasonable inference of the defendant's innocence. Such evidence is inadmissible, however, if it merely casts bare suspicion on another or raises a "conjectural inference" of a third party's guilt. In this case, the South Carolina Supreme Court interpreted the rule as precluding defense evidence of third party guilt if the State has strong forensic evidence of the defendant's guilt.

The Supreme Court concluded that the South Carolina rule violated the constitutional right to present a defense, because it excluded evidence of third party guilt based solely on the strength of the prosecution's case, even if the defense evidence had great probative value and did not cause harassment, prejudice or confusion of the issues. In addition, the court criticized the South Carolina rule because it took the prosecution's evidence at face value, without any examination of credibility or reliability, and because it was not rationally related to its intended purpose - to focus the trial on central issues by excluding evidence which has only a weak logical connection to those issues. See also, Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (due process does not guarantee the right to present, and have considered by the trier of fact, all relevant evidence to rebut the prosecution's evidence concerning the elements of the offense, as relevant evidence may be excluded because it is incompetent or privileged, because the defendant has failed to comply with procedural requirements, or because the probative value is substantially outweighed by the danger of unfair prejudice, undue delay or the needless presentation of cumulative evidence; although due process does place limits on a State's ability to restrict the introduction of relevant evidence, those limits arise only where the restriction "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

U.S. v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) 1. The right to present relevant evidence is subject to reasonable restrictions, and may be required to "accommodate other legitimate interests in the criminal trial process." Thus, State and Federal rulemakers have broad latitude to establish rules excluding evidence from criminal trials. Such exclusionary rules do not abridge the right to present a defense so long as they are not "arbitrary" or "disproportionate" to their purpose; the exclusion of evidence is unconstitutionally "arbitrary" or "disproportionate" only if "it [infringes] upon a weighty interest of the accused."

2. A per se ban of polygraph evidence in military justice proceedings serves the legitimate governmental interest of insuring that the trier of fact in a criminal trial considers only reliable evidence. Because there is no consensus in the scientific community that polygraph evidence is reliable, a per se ban cannot be considered "arbitrary" or "disproportionate."

3. A plurality of the court found that a per se prohibition of polygraph evidence serves two additional governmental interests: (1) preserving the jury's function of making credibility determinations (i.e., preventing the trier of fact from being unduly persuaded by polygraph evidence), and (2) avoiding litigation over collateral issues such as the appropriateness of the test procedures, the qualifications of the examiner, the validity of interpretations of the test results, and whether the examinee was able to use countermeasures to distort the polygraph readings.

4. **Rock v. Arkansas** (admission of the defendant's hypnotically refreshed testimony), **Washington v. Texas** (testimony by an accomplice in the defendant's favor) and **Chambers v. Mississippi** (exclusion of a third party's confession to the crime with which the defendant was charged), all of which struck down per se bans on certain types of evidence, do not require admission of polygraph evidence when offered by a criminal defendant. In those cases, the per se exclusions "significantly undermined fundamental elements of the accused's defense" by excluding factual evidence or testimony about the case itself. By contrast, no fundamental element of the defense is undermined by exclusion of polygraph evidence - the respondent is merely barred from introducing an expert's opinion to boost his own credibility.

5. In a footnote, the court observed that Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which superseded Frye v. U.S., 293 F. 1013 (C.A.D.C. 1923) concerning the admissibility of expert testimony, was not intended to foreclose per se exclusionary rules for certain types of expert or scientific evidence.

People v. Manion, 67 Ill.2d 564, 367 N.E.2d 1313 (1977) An accused has the right to present a defense, including calling witnesses to establish a defense and presenting his version of the facts to the trier of fact.

Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) Criminal defendants have the right to present relevant, competent evidence and witnesses in their defense.

People v. Buss, 187 Ill.2d 144, 718 N.E.2d 1 (1999) No error occurred where relevant evidence was admitted despite the defendant's offer to stipulate. Once a defendant pleads not guilty, the State is entitled to prove every element of the offense, even if the defense does not dispute the relevant facts or offers to stipulate to them. Thus, evidence that is relevant and more probative than prejudicial need not be excluded, even where the State rejects an offer to stipulate. See also, People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208 (1968) (when a defendant pleads not guilty, the State has the right to prove every element of the crime charged and is not obligated to rely on a defendant's stipulation). But see, Old Chief v. U.S., 519 U.S. 172, 117 S.Ct. 574, 136 L.Ed.2d 574 (1997) (prosecutor was not entitled to refuse an offer to stipulate to existence of prior conviction as predicate for offense; prior conviction was relevant only to establish defendant's legal status, and it was likely jury would consider details of prior conviction on issue of defendant's guilt of this offense).

People v. Walker, 211 Ill.2d 317, 812 N.E.2d 339 (2004) Adopting the reasoning of Old Chief v. U.S., 519 U.S. 172 (1997), the court held that where a prior felony conviction is introduced solely to prove the defendant's status as a convicted felon, the trial court errs by allowing the State to reject a defense offer to stipulate to the fact of the prior conviction. Where the sole purpose of the evidence is to establish felony status, the precise name and nature of the prior conviction present a risk of prejudice that outweighs the probative value.

The court noted that the same rule would not apply had the name and nature of the prior conviction been admissible for purposes other than to prove defendant's felony status.

People v. Melock, 149 Ill.2d 423, 599 N.E.2d 941 (1992) Under these circumstances, the due process right to present a defense, which includes the right to explain the circumstances of a confession so that the jurors may weigh its reliability, required an exception to the general rule barring polygraph evidence. The defense sought to introduce the fact that defendant was falsely told that the polygraph had proven his guilt, in order to explain why defendant had made a confession that he claimed was false.

People v. Reid, 179 Ill.2d 297, 688 N.E.2d 1156 (1997) Generally, the standard of review for questions involving the admission of evidence is "abuse of discretion."

People v. Wheeler, 151 Ill.2d 298, 602 N.E.2d 826 (1992) 1. The combined effect of Ch. 38, §115-7.1,

which barred a trial judge from ordering the victim in a sex offense to undergo a psychological examination, and Ch. 38, §115-7.2, which provides that expert testimony on post-traumatic stress syndrome shall be admitted, was to deny defendant's due process right to present witnesses in his own behalf. The State would enjoy an unfair advantage if it could introduce expert testimony based upon a personal examination while the defense expert was restricted to examining written reports and observing the complainant's testimony.

2. Although a complainant cannot be compelled to submit to an examination by a defense expert, her refusal to do so precludes the State from introducing rape trauma syndrome evidence based on a personal examination. See also, In re Kortte, 317 Ill.App.3d 111, 738 N.E.2d 983 (2d Dist. 2000) (725 ILCS 207/30(c), which provides that if the respondent in a sexually violent person proceeding fails to cooperate with an evaluating expert from the Department of Human Services he "shall be prohibited from introducing testimony or evidence from any expert or professional person who is retained or court appointed to conduct an evaluation of the person," violated due process where, although the respondent failed to cooperate, the State calls an evaluating expert who based his evaluation on written records rather than on a personal evaluation of the respondent; §30(c) was intended to assure a "level playing field" by precluding the defense from calling an examining witness where the respondent's failure to cooperate prevents the State from calling such an expert, and does not prevent the defense from eliciting expert testimony where the State is able to introduce such testimony despite the failure to cooperate).

People v. Lopez, 207 Ill.2d 449, 800 N.E.2d 1211 (2003) 1. Illinois courts have no authority to order a physical examination of the complainant in a sex offense case.

2. Under the rationale of People v. Wheeler, 151 Ill.2d 298, 602 N.E.2d 826 (1992), the State is precluded from introducing an examining expert's testimony if the complainant in a sex offense prosecution refuses to submit to a physical examination by a defense expert. To determine what medical evidence the State is allowed to introduce, the trial court must balance the due process rights of the defendant and the privacy rights of the alleged victim. Here, the defense conceded that the State should be able to introduce non-examining expert testimony concerning the complainant's physical condition. Furthermore, "it would be error . . . to exclude expert evidence by the State that is objectively verifiable without an independent physical examination."

People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 (1983) The trial court abused its discretion by refusing to allow the defense a continuance to locate and call a State's witness, who could have provided a foundation for testimony that the offense had been committed by the witness and a third party. The court noted that the evidence would have directly contradicted the State's chief witness and was crucial for the defense case.

People v. Quick, 236 Ill.App.3d 446, 603 N.E.2d 53 (1st Dist. 1992) Defendant's constitutional right to present a defense was denied when she was not allowed to testify that her family had been threatened when she attempted to withdraw from a conspiracy, especially when the man who allegedly made the statements was allowed to testify in rebuttal that he had not made any threats.

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) The trial judge did not err by denying a defense request to have a critical State's witness submit to a psychological and psychiatric evaluation. A reviewing court will not overrule the trial judge's ruling on the scope of cross-examination unless there has been a clear abuse of discretion resulting in manifest prejudice.

Because the witness's mental health treatment records were provided to the judge in camera, defendant was allowed to use eight documents as impeachment, and the witness testified concerning his history of substance abuse, mental illness, and memory problems, the refusal to order a psychological and psychiatric examination did not constitute an abuse of discretion or cause manifest prejudice.

People v. Willis, 299 Ill.App.3d 1008, 702 N.E.2d 616 (1st Dist. 1998) 1. A trial judge has discretion to

allow testimony to be heard outside the courtroom. The trial judge did not err by having the jury transported to a hospital in order to hear the testimony of the victim of an attempt first degree murder.

The State was not required to agree to defendant's offer to stipulate, and had the right to present evidence of every element of the crimes although alternative means (such as an evidentiary deposition) were available. The court also held that viewing the witness in the hospital was no more prejudicial than having him transported to the courtroom, because his medical condition would have required the presence of medical personnel and equipment in either case.

2. The trial court did not err by allowing a physician to testify at the hospital rather than by coming to the courtroom. The doctor's testimony was important to demonstrate the injuries experienced by the victim, whose testimony was to be heard at the hospital.

Cumulative Digest Case Summaries **§19-1**

People v. Villa, 403 Ill.App.3d 309, 932 N.E.2d 90 (2d Dist. 2010)

1. In Illinois, rules of evidence are derived both from case law and statutory authority. The legislature does not offend the separation of powers doctrine by enacting new rules of evidence, or by altering existing rules that were originally adopted by Illinois Supreme Court decisions.

By contrast, the legislature may not modify a Supreme Court Rule, which is promulgated under the Supreme Court's constitutional authority over the court system.

2. A defendant may "open the door" to what would otherwise be inadmissible evidence by testifying in a manner which can be reasonably construed as an attempt to mislead the jury. Here, defendant "opened the door" to evidence of his prior juvenile adjudication.

Defendant claimed that he gave police a false statement because he was afraid, and because he had "never been in a situation like that before." Defendant also stated, "I've never been in prison or nothing like that." Because 18 months earlier defendant had given the same two officers a statement about a different offense, "it is not unreasonable to construe [his] attempt to portray himself as unseasoned" as an attempt to mislead the jury.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

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§19-2
Relevant Evidence

§19-2(a)
Generally

People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 (2001) It is within the trial court's discretion to decide whether evidence is relevant; the trial judge's decision will be reversed only if there was a clear abuse of discretion. An abuse of discretion occurs only where the trial court's decision is "arbitrary, fanciful or unreasonable," or where no reasonable man would take the trial court's view.

Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. Even relevant evidence may be excluded, however, where it is remote, uncertain or speculative.

People v. Monroe, 66 Ill.2d 317, 362 N.E.2d 295 (1977) Relevant evidence is evidence having any tendency

to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

People v. DeHoyos, 64 Ill.2d 128, 355 N.E.2d 19 (1976) Although relevant evidence is normally admissible, its admissibility may also depend on whether its probative value outweighs its prejudicial effect. Evidence should be excluded when its prejudicial effect far outweighs its probative value.

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) In the trial court's discretion, relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value.

People v. Patterson, 192 Ill.2d 93, 735 N.E.2d 616 (2000) The court rejected the State's argument that other suspects' allegations of beatings or torture are admissible only if the defendant suffered a physical injury. The existence of a physical injury is but one factor to be considered in determining whether evidence of prior allegations of police brutality are relevant in a particular case. See also, People v. Newbury, 53 Ill.2d 228, 290 N.E.2d 592 (1972) (evidence is inadmissible where its relevance depends upon unproved assumptions).

People v. Rivera, 145 Ill.App.3d 609, 495 N.E.2d 1088 (1st Dist. 1986) A witness's credibility is always a material issue. See also, People v. Adams, 106 Ill.App.3d 467, 435 N.E.2d 1203 (1st Dist. 1982) (the bias and relationship of a witness to the defendant are never collateral).

People v. Collins, 351 Ill.App.3d 175, 813 N.E.2d 285 (2d Dist. 2004) Where the State did not object in the trial court to consideration of the jury foreman's testimony about the effect of an unauthorized visit to the crime scene, and the prosecutor urged the trial judge to consider that testimony, the State was precluded from arguing on appeal that the evidence should have been excluded as improper evidence of the process by which the jury reached a verdict. "[A]bsent an objection, otherwise inadmissible evidence is to be given its full probative effect."

People v. Simmons, 372 Ill.App.3d 735, 867 N.E.2d 507 (1st Dist. 2007) The trial court erred by excluding defense evidence that someone else committed the crime. Generally, such evidence should be admitted if it tends to prove the particular offense in question. Although the evidence here was not clear, the court found that it was not so uncertain or speculative as to justify exclusion.

Cumulative Digest Case Summaries **§19-2(a)**

People v. Pikes, 2013 IL 115171 (No. 115171, 11/21/13)

1. Evidence is generally admissible if it is relevant. Relevant evidence is any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The rule that evidence of the commission of other crimes by the accused is inadmissible for the purpose of showing a propensity to commit crimes is an aspect of the rule that the prosecution may not introduce evidence of a character trait of the accused. The concern is not that such evidence is lacking in probative value, but that it may over persuade the jury, which might convict the accused because it believes he is a bad person.

The concerns underlying the admission of other-crime evidence are not present when the uncharged crime was not committed by the defendant. There is no danger that the jury will convict the defendant because it believes he has a propensity to commit crimes. The admissibility of such evidence is analyzed under ordinary principles of relevance, not according to rules governing the admission of other-crime

evidence.

2. Defendant was charged with a murder that allegedly arose out of a conflict between two gangs. The feud began with the shooting of a member of defendant's gang. Then on the day prior to the murder, a rival gang member rode a scooter into the territory of defendant's gang. When Donegan, a member of defendant's gang, shot at the person on the scooter, he was struck by a car containing other rival gang members that was following the scooter. Donegan then recruited defendant to assist him in exacting revenge by committing a drive-by shooting, which led to the murder for which defendant was convicted.

The Appellate Court reversed the conviction, finding that evidence of the scooter shooting was improperly admitted as other-crime evidence where there was no evidence connecting defendant to that incident.

3. The Illinois Supreme Court reversed the Appellate Court. Because it is undisputed that defendant was not involved in the scooter shooting, the scooter shooting is not evidence of another crime for purposes of evaluating its admissibility. The scooter incident was relevant to show defendant's motive for the subsequent murder. The fact that defendant may have had a secondary motive, the rival gang's shooting of defendant's fellow gang member, did not mean that he was not also motivated to retaliate for the scooter incident.

The defendant was not prejudiced by a jury instruction that directed the jury to determine whether defendant was involved in conduct other than that charged in the indictment. There was evidence at trial that at the time of the murder defendant and Donegan drove a car stolen by use of a "jiggler" key. Since the evidence at trial clearly showed that defendant was not involved in the scooter shooting, the instruction must have referred to the stolen car.

The Supreme Court also rejected defendant's argument that evidence of the scooter shooting should have been excluded because the motive for the murder was not the scooter shooting, but rather the subsequent striking of Donegan with the car. This was not a random incident in which Donegan was struck by a car. The car followed the gang member on the scooter. There was a continuing gang war between the two gangs. These two events were linked and it would be illogical to separate them and give the jury only half the story.

Defendant was not prejudiced by the admission of evidence of the scooter shooting. Any concern about an implied inference of guilt by association would more likely come from the evidence of defendant's gang membership than from the scooter shooting in which defendant was clearly not involved.

The Supreme Court remanded for the Appellate Court's consideration of the remaining issues raised by defendant.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010)

In a prosecution for predatory criminal sexual assault, a child welfare supervisor who worked for a private social services agency testified to the characteristics of child-sexual-abuse-accommodation syndrome that are often observed in children who have been sexually abused. The Appellate Court addressed three issues related to the admissibility of that evidence.

1. **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923), requires that the methodology or scientific principle upon which an expert opinion is based be sufficiently established to have gained general acceptance in its particular field. **Frye** is the test for admissibility of scientific evidence in Illinois. A court may determine the general acceptance of a methodology or principle by holding a **Frye** hearing, or by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject. Relying exclusively on prior judicial decisions to establish general scientific acceptance can be a hollow ritual, however, if the underlying issue of scientific acceptance has not been adequately litigated. A reviewing court can conduct a **Frye** hearing as well as a trial court because under the **Frye** standard, a court does not determine the validity of a particular scientific technique, only whether there is a general consensus in the relevant scientific community regarding the reliability of the technique.

A **Frye** hearing on the admissibility of evidence of child-sexual-abuse-accommodation syndrome was not necessary. In **People v. Nelson**, 203 Ill.App.3d 1038, 561 N.E.2d 439 (5th Dist. 1990), the court considered numerous scholarly articles on the syndrome and concluded that it was generally accepted in the psychological community that children who have been sexually abused behave differently than those who have not been abused. As this is exactly the underlying basis of the syndrome, the **Nelson** decision supported the determination that evidence pertaining to the syndrome was generally accepted.

2. The adequacy of the qualifications of an expert witness is a matter within the sound discretion of the trial court. Expertise is not measured by a given level of academic qualification, but by whether the proposed expert has knowledge and experience beyond that of the average citizen that would assist the jury in evaluating the evidence. It does not matter whether the expert acquired specialized knowledge through education, training, experience, or a combination of each.

The trial court did not abuse its discretion in allowing a child welfare supervisor to testify as an expert regarding child-sexual-abuse-accommodation syndrome, even though she was not a psychologist or expert in the field of psychology. The witness worked with staff members who worked with sexually-abused children. She had a bachelor's degree in law enforcement, a master's degree in human and family resources, and was studying for a doctorate in education. She had worked with victims and offenders as a sexual abuse therapist, and dealt with emotionally disturbed, neglected, and abused adolescents as a child care worker. She was familiar with child-sexual-abuse-accommodation syndrome through reading articles on the subject and her work with children.

3. Evidence is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Evidence is considered relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence.

Testimony regarding child-sexual-abuse-accommodation syndrome was relevant. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually-abusive relationship. The defense attacked the credibility of the child witness by introducing evidence of her delayed reporting and inconsistencies in her testimony. The syndrome evidence aided the trier of fact in weighing that evidence.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Barnes, 2013 IL App (1st) 112873 (No. 1-11-2873, 12/18/13)

1. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action either more or less probable than it would be without the evidence. However, even relevant evidence should be excluded where the prejudice outweighs any probative value. Prejudice is defined as an undue tendency to suggest that a decision be made on an improper basis such as emotion.

The trial court's ruling on evidentiary issues is reviewed for abuse of discretion. An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the same position.

Defendant was charged with heinous battery and aggravated battery of a child after a four-year-old child in his care suffered severe burns when he was exposed to hot water. The court concluded that the trial court abused its discretion by allowing the assistant State's Attorney to use the child as an exhibit by pulling down his pants, picking him up, and showing the jury the scars on his side and legs.

Although permanent disfigurement is an element of heinous battery, using the child as an exhibit was cumulative where the State had already established permanent disfigurement through photographs and expert testimony. The court also found that due to the risk of inflaming the jury's passions, the prejudicial effect of using the child as an exhibit outweighed any probative value.

2. Evidence of other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes. Even where other crimes evidence is admissible for a proper purpose, it should be excluded if the prejudice substantially outweighs the probative value.

Before presenting evidence of other crimes, the State must meet the threshold requirement of showing that a crime took place and that defendant participated in it. It is unnecessary to prove beyond a reasonable doubt that the defendant participated in the crime, but the State is required to present more than a mere suspicion of defendant's involvement.

The court acknowledged a split of authority in the First District concerning whether evidence of a crime which is intrinsic to the charged offense may be admitted under general relevancy principles, even if there is no evidence that the defendant committed the other crime. In **People v. Pikes**, 2013 IL 115171, the Supreme Court found it unnecessary to address this question, but noted that other crimes analysis is appropriate only if the defendant is alleged to have committed the separate offenses.

Here, the court concluded that whether analyzed as other crimes evidence or under general relevancy principles, the trial court erred by admitting evidence that the four-year-old victim suffered a liver contusion at some point. Defendant was charged with injuring the child by exposing him to hot water. The State's expert testified that the child's blood work indicated that he had suffered a liver contusion at some point within the 24 to 36-hour-period before he was examined at the emergency room. The State's expert also admitted that the liver contusion may have had an explanation other than child abuse and that there were no signs of bruising on the child's abdomen. Defendant did not have sole custody of the child in the 24 to 36-hour-period preceding the examination.

In finding an abuse of discretion, the court concluded that the probative value of the evidence was tenuous and that there was only mere suspicion that defendant was responsible for the injury. In addition, the evidence was highly prejudicial because the jury would be more likely to convict the defendant of the charged crimes if it believed that he was also responsible for a separate injury.

3. The court concluded that the combination of errors caused manifest prejudice to the defense. The alleged justification for using the child as an exhibit was to establish the permanent disfigurement element of heinous battery. However, defendant did not dispute the cause or extent of the child's injuries, and the only issue was whether the defendant acted intentionally. Under these circumstances, it was unnecessary to display the child to the jury.

In addition, the evidence of defendant's intent was closely balanced. The jury chose to acquit of heinous battery, and there was testimony that defendant had cared for the child on several prior occasions without incident. Under these circumstances, the combined prejudice of displaying the four-year-old's physical scars and admitting evidence of an injury which could have been inflicted by someone other than the defendant could well have affected the verdict.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Diomedes, 2014 IL App (2d) 121080 (No. 2-12-1080, 6/16/14)

1. In order to admit a document as substantive evidence, the proponent must authenticate its authorship. A document may be authenticated through circumstantial evidence. In other words, the authentication requirement is satisfied where the document's contents, in conjunction with other circumstances, reflect distinctive characteristics which connect it to the author. Illinois Rule of Evidence 901(b)(4).

2. At defendant's trial for disorderly conduct based on transmitting by email a threat of violence, the email in question was properly authenticated by circumstantial evidence. Thus, the email was properly admitted substantively.

The court noted that the email raised several matters that were also contained in notes on a folder which was confiscated from defendant. Under the circumstances, it would have been reasonable for the trial court to find that the same person wrote both the email and the notes on the folder. The court also noted that in a voluntary written statement, defendant stated that he had written the email.

Under these circumstances, the email was sufficiently authenticated to be admitted. The court rejected defendant's argument that to authenticate an email, the State was required to present evidence to

"connect" defendant to the IP address from which the email was sent.

(Defendant was represented by Assistant Defender Kathleen Weck, Chicago.)

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)

1. Statements made to a testifying witness by a third party describing events of which the witness has no firsthand knowledge are inadmissible as substantive evidence pursuant to the prior-inconsistent-statement exception to the hearsay rule provided by 725 ILCS 5/115-10.1(c)(2). Therefore, a statement made by Fillyaw to a prosecution witness admitting that he had kicked in a door and shot three people was inadmissible under the personal-knowledge limitation of §115-10.1(c)(2).

2. Admission of a nontestifying co-defendant's admission inculpating the defendant in the offense violates not only a defendant's federal constitutional right to confrontation, but also Illinois hearsay rules. Therefore, Fillyaw's statement implicating Parker in the commission of the offense was inadmissible against Parker. Although the jury was instructed to give separate consideration to each defendant, that any evidence limited to one defendant should not be considered as to the other, and that a statement made by one defendant may not be considered as to the other, it was given no contemporaneous instruction to disregard the statement when considering Parker's guilt. These instructions were insufficient to remedy the state law error; only complete redaction of all references to Parker would suffice.

The admission of this evidence was plain error. Because the error implicated defendant's due process and confrontation clause rights, it necessarily affects substantial rights and satisfies the second prong of the plain-error analysis. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

3. The mental health history of a witness may be relevant if it relates to the credibility of the witness. Witness Deshae R.'s psychiatric diagnosis, treatment with psychotropic medications, and experience with hallucinations may be relevant to her credibility as a witness. Therefore the circuit court was directed to conduct a further *in camera* review of her mental health records on remand, and tender to the defense attorneys the relevant portions of those documents.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Garcia, 2012 IL App (2d) 100656 (No. 2-10-0656, 6/20/12)

1. It is within the trial court's discretion to determine whether evidence is relevant and admissible and the trial court's decision on the issue will not be reversed absent an abuse of discretion.

The police found cocaine and cannabis in defendant's car after a traffic stop. The trial court did not abuse its discretion in excluding evidence that defendant's passenger pleaded guilty to a lesser charge of cocaine possession. The State's theory was that defendant and his passenger jointly possessed the drugs and the passenger's admission did not establish his exclusive possession of the drugs or rule out joint possession with defendant.

2. Citing Ill. R. Evid. 804(b)(3), the Appellate Court also concluded that evidence of the plea could not be admitted as a statement against penal interest, because that hearsay exception applies only when the declarant is unavailable as defined by Ill. R. Evid. 804(a). Defendant failed to demonstrate any of the bases for deeming a witness unavailable under §804(a).

The court affirmed defendant's conviction.

McLauren, J., dissented.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

While not conclusive or dispositive on the issue of possession, the guilty plea was relevant. It would have bolstered defendant's credibility when he said that the drugs were his passenger's "in that it would have taken much of the sting out of the idea that defendant was just looking for the most convenient person to

blame. Furthermore, it weighs heavily against the simplest theory of events: defendant's truck, defendant's drugs, [the passenger's] bad luck." The case was credibility driven. Evidence of the passenger's guilty plea would have required the jury to actually consider the issue of joint possession and could have materially affected the verdict. It would not have been unduly prejudicial to the State because it claimed that the possession was joint.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Garcia-Cordova, 2011 IL App (2d) 070550-B (No. 2-07-0550, rev. op. 12/20/11)

1. Under **Crawford v. Washington**, testimonial hearsay by a non-testifying declarant is inadmissible unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Where the declarant appears for cross-examination at trial, however, the Confrontation Clause places no constraints on the use of prior testimonial hearsay.

2. A witness is available for cross-examination where she attempts to answer questions, but states that she either does not remember or does not know the answers. Gaps in a witness's memory do not render her unavailable for cross-examination.

The court also rejected the argument that under **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2011), a complainant appears for cross-examination only if his or her testimony is accusatory. Similarly, the court rejected the argument that a complainant who does not recall making a statement to police must be confronted with that statement by the prosecution. The court also stated that where a witness appears at trial and submits to cross-examination, no confrontation issue arises even if the witness fails to testify concerning his or her out-of-court statement that is admitted into evidence.

Because the seven-year-old declarant testified under oath, made an in-court identification of the defendant, and recalled speaking with investigators concerning the incident, she was "available" for cross-examination although she testified that she could not remember or did not know the answers to several questions asked on direct examination. The court also noted that for tactical reasons defense counsel chose not to cross-examine the declarant; however, the witness could have been cross-examined about the answers she gave and her lack of memory.

3. Even if the admission of the declarant's hearsay statements violated **Crawford**, the error was harmless because the testimony was cumulative of properly admitted evidence.

4. The trial court did not err by denying a motion *in limine* to exclude portions of defendant's statements to police which indicated that he had been sexually abused as a child. Evidence is admissible if it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. Evidence is relevant if it tends to make the existence of a fact that is of consequence to the proceeding either more or less probable than would otherwise be the case. The trial court has discretion to determine whether evidence is relevant and admissible.

The court concluded that defendant's history of having been sexually abused as a child was relevant in two respects: (1) in evaluating the credibility of defendant's statements to police, and (2) concerning the context in which those statements were made. The court noted testimony that defendant's demeanor changed after he admitted having been sexually abused as a child, and that he then made the written and oral statements that were admitted at trial.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 (2d Dist. 2010)

1. Evidence is admissible if it: (1) fairly tends to prove or disprove the offense charged; and (2) is relevant in that it tends to make the question of guilt more or less probable. Evidence should be excluded if it is too remote in time or too speculative to shed light on a fact to be found.

At defendant's trial for robbery and aggravated battery, the State introduced evidence that 11 days following the offense in which complainant was robbed by two men, the police observed defendant and

another man in dark clothing. Defendant first hid in a shadow, then ran when one of the officers identified himself as a policeman. The officer saw defendant grab at his waistband, trip, and fall. A handgun fell out of his pants. Defendant clenched his hands at his chest when the police attempted to handcuff him, causing the police to hit defendant in the face and rib cage with fists to effect his arrest. The court instructed the jury to consider that evidence for the limited purpose of explaining the circumstances of the arrest.

The Appellate Court concluded that the court abused its discretion in admitting evidence of defendant's possession of the handgun. The probative value of evidence that defendant possessed a gun 11 days after the offense did not outweigh the prejudicial effect of this evidence where the charged offense did not involve any element of possession or use of a weapon.

2. Presentation of irrelevant, prejudicial evidence of the gun was not justified based on the hypothetical possibility that defendant would claim that he was coerced into making incriminating statements by police brutality. Evidence of the gun was not necessary to rebut a theory of coercion because defendant's refusal to put his hands behind his back was sufficient to explain the officers' use of force in effecting the arrest. Although defendant had not informed the court that he would not pursue a theory of coercion and police brutality, a defendant is not required to forgo, in advance, a potential defense to preclude the State from introducing irrelevant, prejudicial evidence. Even if defendant had advanced a theory of coercion, evidence of the gun was not relevant.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Lopez, 2014 IL App (1st) 102938-B (No. 1-10-2938, 6/30/14)

1. The admissibility of evidence of a prior crime in which the defendant was not a participant is determined under ordinary principles of relevance, and not by standards governing other crimes evidence. **People v. Pikes**, 2013 IL 115171. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The admissibility of evidence is left to the trial court's discretion.

2. The trial court abused its discretion by admitting evidence that three weeks before the murder with which defendant was charged, some of the co-defendants in the charged offense beat a man and vandalized property in the same parking lot where the charged crime occurred. The court noted that the only evidence tying the prior incident to the charged crime was that three of the co-defendants in the charged crime participated in the earlier crime. There was no evidence that defendant knew about the earlier incident or that the charged crime was in any way motivated by the earlier event.

The court stressed that the key issue in the charged offense was whether the State proved beyond a reasonable doubt that defendant was one of the perpetrators in the beating death of the decedent. Evidence about an unrelated incident several weeks earlier had no probative value on that issue, at least in the absence of evidence indicating that there was some link between the offenses.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Starks, 2014 IL App (1st) 121169 (No. 1-12-1169, 6/4/14)

At defendant's trial for first degree murder, a police officer testified that while she and other officers were investigating an unrelated case at an apartment building, they observed defendant exit the back of the building and run through an alley while wearing a t-shirt and no shoes. When the officer stopped defendant and learned his name, she realized that he was the subject of an investigative alert.

A second officer testified that as part of the unrelated investigation, he entered an apartment where the door was ajar. He observed three handguns on the kitchen counter. One of the handguns was subsequently determined to have been the weapon used in the shooting with which defendant was charged.

DNA analysis revealed that the weapon used in the shooting contained the mixed DNA profiles of

at least three people and that defendant could not be excluded as the primary contributor of the DNA. The shooting had occurred two months before the weapon was seized from the apartment.

1. The Appellate Court held that the trial judge erred by admitting evidence of weapons that were found in the apartment but which were not shown to have any connection to the offense. Evidence is generally admissible if it is relevant, but even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence is relevant if it has any tendency to make any fact of consequence to the action more or less probable than it would be without the evidence.

A weapon found in the defendant's possession is generally inadmissible unless it has some connection to the crime charged. For a weapon to be admitted, there must be evidence to connect it to both the defendant and the crime. Evidence that the weapon is suitable for commission of the crime satisfies the second element.

Here, it was error to admit the weapons because there was no evidence to connect them to the defendant. Not only was there no evidence to show that defendant possessed the weapons, there was no evidence to connect him to the apartment where the weapons were found. Defendant was stopped because, while police were investigating an unrelated offense, they saw him running barefoot through the alley. He was not seen leaving the apartment where the weapons were found, and there was no evidence to connect him to either the apartment or the two weapons that were not suitable for committing the offense. Under these circumstances, those weapons were irrelevant and should not have been admitted.

2. Because the evidence was closely balanced, admission of the weapons constituted error under the first prong of the plain-error doctrine. Even viewed most favorably to the State, the DNA evidence concerning the weapon merely established that defendant could not be excluded as one of three DNA contributors. The weapon which contained DNA was found some two months after the offense. The evidence against defendant consisted primarily of the testimony of three eyewitnesses who provided inconsistent accounts and only one of whom identified defendant in both the photo array and the physical lineup.

In addition, the State emphasized the erroneously admitted evidence in closing argument. Finally, the trial court's remarks at sentencing demonstrated the prejudice resulting from the erroneously admitted evidence. Under these circumstances, the introduction of weapons which had no connection to the defendant or to the offense constituted plain error.

3. The court noted that numerous studies have indicated that there is significant potential for error in eyewitness identifications and that jurors have misconceptions about the reliability of eyewitness testimony. In addition, whether trial courts should admit expert testimony on the reliability of eyewitness identification is a rapidly evolving area of the law.

Although the trial court has broad discretion in determining the admissibility of expert testimony, the record showed that the judge rejected the motion without considering the relevance of the evidence in light of the facts of this case. Because the conviction was being reversed on other grounds, the court directed the trial court to give serious consideration to defendant's request to present expert testimony on eyewitness identification.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Wilson, 2012 IL App (1st) 092910 (No. 1-09-2910, 2/9/12)

1. The constitutional right to confront witnesses includes the right to inquire into a witness's bias, interest, or motive to testify falsely. On cross-examination, the defense is entitled to wide latitude to attempt to establish bias or motive. To be admissible, evidence used to establish bias or motive must give rise to an inference that the witness has something to lose or gain by testifying. Such evidence must not be remote or uncertain.

2. At defendant's trial for aggravated unlawful use of a weapon and unlawful use of a weapon, the trial court erred by precluding the defendant from introducing records of an Independent Police Review Authority investigation of the arresting officers' conduct during the events leading to the charges against the

defendant. The defense theory was that after a police officer shot the unarmed defendant and planted a gun near him, officers mishandled the gun to account for the fact that it did not contain defendant's fingerprints. In his motion *in limine*, defendant presented evidence that the IPRA investigation concerned whether the first officer improperly fired at defendant and whether two other officers improperly handled the gun found next to the defendant.

The Appellate Court concluded that the IPRA investigation gave rise to an inference that the witnesses had something to lose or gain by testifying, because the investigation involved the same incident for which the defendant was charged and the outcome of both the investigation and the trial depended in large part on the testifying officers' portrayal of the events. "For obvious reasons, if an officer subjected to an IPRA investigation provides a statement to an investigator, the same officer could be motivated to testify consistently at a trial regarding the same incident to maintain his or her credibility."

The court concluded that evidence of the IPRA investigation was not remote or uncertain and directly affected the defendant's case. Therefore, the evidence should have been admitted on the issue of the motive and bias of the arresting officers.

3. The court concluded that the "abuse of discretion" standard of review applied to the above question. The court viewed the trial court's ruling as denying the motion *in limine* concerning the IPRA investigation, but allowing the defense to cross-examine on all relevant manners including interest or bias based on evidence other than the IPRA records. Rulings on motions *in limine* are generally left to the trial court's discretion, as are matters involving the admission of evidence. Furthermore, the trial court has discretion to limit the scope of cross-examination.

Defendant's convictions were reversed and the cause remanded for resentencing.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

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Examples

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Relevant Evidence

People v. Villarreal, 198 Ill.2d 209, 761 N.E.2d 1175 (2001) Gang membership evidence is admissible only where there is sufficient proof that the membership was related to the crime. Once a relationship is shown between gang activity and the crime, gang evidence may be admitted if relevant to an issue in dispute, provided the probative value is not substantially outweighed by the prejudicial effect. One purpose for which gang evidence is admissible is to provide a motive for the defendant's actions.

Where the State argued that the stabbing was not in self-defense, as defendant claimed, but was instead the result of gang-based violence, evidence of "various gang-related boasts and taunts . . . as well as the flashing of gang signs, substantiated [the State's] theory and helped to explain what occurred." Thus, the evidence was properly admitted. See also, **People v. Joya**, 319 Ill.App.3d 370, 744 N.E.2d 891 (1st Dist. 2001) (where there was "absolutely no testimony" of any gang involvement, "any inference that . . . mutual gang membership supported the State's theory that they acted in concert was cumulative and unnecessary" in view of overwhelming direct evidence); People v. Davenport & Clemons, 301 Ill.App.3d 143, 702 N.E.2d 335 (1st Dist. 1998) (gang-related evidence must relate to the crime charged in order to be admitted; while some of the gang testimony was relevant to explain the crime and establish motive, testimony regarding the background, history and criminal activity of rival gangs was "peripheral" to the offense and therefore more "troublesome"); People v. Mathews, 299 Ill.App.3d 914, 702 N.E.2d 291 (1st Dist. 1998) (in light of

defendant's statement that he was a member of the Blackstones and an eyewitness's testimony that hostile gang symbols were exchanged before the shooting, there was a sufficient connection between the gang membership activity and the crime to admit evidence that several of defendant's acquaintances were Blackstones; unless defendant objects, however, the jury must be instructed, both when the evidence is admitted and at the close of trial, that gang-related testimony may only be considered for limited purposes).

People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645 (1966) Trial court committed reversible error at forgery trial by refusing to allow the defense to offer evidence that another traveler's check from the same stolen series had been signed and cashed after defendant was in custody.

People v. Fierer, 124 Ill.2d 176, 529 N.E.2d 972 (1988) At the defendant's jury trial for the murder of his wife, the trial court did not err by admitting a newspaper clipping found in defendant's bedroom. The clipping dealt with a divorce-related homicide.

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) Where a third party had confessed to the crimes with which defendant was charged, details of the third party's confessions to similar crimes should have been admitted both to show modus operandi and to corroborate the third party's claim that he had acted alone in committing the instant crime. The statements about the offenses with which defendant was charged were against the declarant's penal interest, and therefore were not inadmissible hearsay. See also, People v. Wilson, 149 Ill.App.3d 293, 500 N.E.2d 128 (3d Dist. 1986) (the defense is entitled to present evidence tending to show that someone else committed the crime if such evidence is not too remote or too speculative; evidence offered by the defendant was not remote since it showed an argument on the day of or the day before the murders, and was not speculative).

People v. Whiters, 146 Ill.2d 437, 588 N.E.2d 1172 (1992) At a trial for voluntary manslaughter, the trial court erred by excluding evidence that on the day before the offense, the decedent said he had beaten a certain women the previous night. The testimony was relevant to show defendant's reasonable belief in the need for self-defense.

People v. Nitz, 143 Ill.2d 82, 572 N.E.2d 895 (1991) At a trial for murder at which the State's theory was that the victim was killed because he was a homosexual, testimony showing that the defendant hated homosexuals and organized a motorcycle club to patrol an area frequented by homosexuals was relevant on the question of motive.

People v. Thompkins, 121 Ill.2d 401, 521 N.E.2d 38 (1988) At a trial for murder, a State witness's testimony that she had been the common law wife of the victim and that they had a one-year-old child was proper. The witness served as "a life and death witness for the purpose of establishing the identification of the decedent"; the isolated reference to the victim's family appeared to be incidental and not calculated to cause the jury to believe it was material to the question of guilt or innocence. See also, People v. Jimmerson, 127 Ill.2d 12, 535 N.E.2d 889 (1989) (evidence of the personal traits and characteristics of two murder victims was not presented in a manner that was calculated to cause jury to believe that it could be legitimately considered in determining guilt or innocence; the "great bulk" of the information "either was relevant and admissible" or "elicited from the witnesses in an incidental, nonprejudicial manner").

People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267 (1985) "An agreement reached between an accomplice witness and the State to secure the witness' testimony is relevant because it goes to the credibility of the witness and the weight to be given his testimony."

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) Evidence of defendant's arrest several years before

the murder for which he was on trial was relevant to show motive.

People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983) The trial court properly admitted evidence that an officer stopped defendant 24 hours before the crime in the vicinity of the crime, and that defendant was carrying a knife. Such testimony was relevant to place the defendant in the vicinity of the crime within 24 hours before it was committed, and was particularly relevant because defendant was an out-of-state resident who was residing in Iowa.

People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 (1983) State's evidence describing gruesome details about the victim's injuries was proper because it tended to establish the location and nature of the injuries.

People v. Albanese, 104 Ill.2d 504, 473 N.E.2d 1246 (1984) Evidence that defendant solicited a third party to murder his brother and sister-in-law was proper
because it "represented the ultimate step in defendant's plan to fabricate exculpatory evidence and, as such, constituted evidence of defendant's consciousness of guilt."

People v. Hoddenbach, 116 Ill.App.3d 57, 452 N.E.2d 32 (1st Dist. 1983) The exclusion of testimony about prior threats by the decedent was error where the defendant's claim of self-defense was based in part on the threats.

People v. Bruce, 299 Ill.App.3d 61, 701 N.E.2d 63 (1st Dist. 1998) 1. Generally, a weapon that could have been used to commit an offense is competent and may be admitted. If a person accused of a crime is arrested in possession of a weapon suitable to commit the crime, the weapon is admissible even if the State cannot establish that it was used in the offense.

2. Although the accomplice claimed that the murder weapon had a brown handle, there was also testimony that the weapon had a black handle. In view of this conflicting evidence, the weapon was properly admitted pursuant to the doctrine of conditional relevance. Under that doctrine, if the relevance of a piece of evidence depends on the truth of some other fact, the evidence is admissible if there is sufficient evidence in the record to support a finding by a reasonable juror that the factual condition has been fulfilled. Compare People v. Jackson, 299 Ill.App.3d 323, 702 N.E.2d 590 (5th Dist. 1998) (it was plain error to admit a handgun where the State failed to show that the weapon was suitable for commission of the offense, was similar to the weapon, or even that the complainant had been shot with a handgun).

People v. Banks, 192 Ill.App.3d 986, 549 N.E.2d 766 (1st Dist. 1989) Where defendant claimed that his confession was the result of police torture, evidence that the same officers had tortured another suspect was relevant.

People v. James, 200 Ill.App.3d 380, 558 N.E.2d 732 (4th Dist. 1990) At the defendant's trial for attempt aggravated criminal sexual assault, the State was allowed to introduce testimony that about three months before the incident, defendant saw the victim and said, "I'm going to get me some of that."

The Appellate Court held that the above testimony was proper; threats by the accused against the victim are admissible as showing malice and intent. Furthermore, the circumstances of the threats, their repetition and the lapse of time affect weight but not admissibility.

People v. Criss, 307 Ill.App.3d 888, 719 N.E.2d 776 (1st Dist. 1999) 1. Where an entrapment defense was raised, the trial judge erred by excluding evidence that defendant had no prior criminal record. Predisposition to commit an offense is an important consideration in proving entrapment, and a prior criminal record (or lack thereof) is relevant to predisposition.

2. The trial judge did not abuse his discretion by admitting a tape-recorded conversation where an

"unintelligible" gap at a critical point in a conversation, was not so substantial as to render the recording untrustworthy as a whole. However, the judge erred by failing to instruct the jury that transcripts were merely the prosecution's representation of the conversation and were provided only as an aid in listening to the tapes.

People v. Mays, 188 Ill.App.3d 974, 544 N.E.2d 1264 (5th Dist. 1989) Evidence of attempt by State witness to commit suicide while in the county jail should have been admitted because it was relevant to the witness's credibility.

People v. Booker, 274 Ill.App.3d 168, 653 N.E.2d 952 (1st Dist. 1995) At his trial for murder, defendant admitted killing the deceased but claimed he did so in self-defense. The Appellate Court reversed the conviction because the trial court refused to allow the defense to present evidence that he feared the deceased, had seen the decedent act violently, and knew that the decedent had previously been charged with murder. See also, People v. Cross, 272 Ill.App.3d 354, 650 N.E.2d 1047 (1st Dist. 1995) (trial judge erred by refusing to allow defendant to testify that he carried the gun because he feared for his life; because a defendant is entitled to use deadly force that he or she reasonably believes to be necessary to prevent death or great bodily harm, defendant's subjective state of mind is necessarily at issue whenever self-defense is raised; a defendant's direct testimony of his or her state of mind is relevant).

People v. Carter, 244 Ill.App.3d 792, 614 N.E.2d 452 (1st Dist. 1993) It was proper to allow five-year-old complainant in sexual assault case to testify with the aid of an anatomically correct doll. At a pretrial competency hearing, the witness had trouble correctly identifying body parts without using the doll. Use of the doll was also more probative than prejudicial because the witness was of tender years, the doll was used only to identify body parts, the judge had to keep asking the witness to speak up, and an interpreter was necessary because the witness had difficulty speaking English.

People v. Carmona-Olvara, 363 Ill.App.3d 162, 842 N.E.2d 313 (1st Dist. 2005) A defendant is entitled to call an interpreter to give an alterative interpretation of a statement made in a foreign language. Where the arresting officer was the only witness to testify concerning the meaning of defendant's statement in Spanish, there was a real possibility that the interpretation was affected by bias or partiality.

People v. Montes, 263 Ill.App.3d 680, 635 N.E.2d 910 (1st Dist. 1994) A new trial was ordered because the lower court erroneously excluded defendant's testimony about his own state of mind and refused to allow testimony concerning the interrogating officer's ability to speak Spanish.

1. Because an essential element of self-defense is that the defendant subjectively believed that his use of force was necessary, statements probative of the defendant's state of mind are clearly relevant when self-defense is raised. Defendant's testimony concerning a previous beating, which led him to buy the knife used here, should have been admitted.

2. The trial judge also abused his discretion by refusing to allow the defendant to cross-examine the interrogating officer about his ability to speak Spanish or testify about difficulties defendant had understanding the officer. The officer claimed that defendant gave a statement in Spanish that did not claim self-defense; however, the officer admitted that he did not write Spanish very well. Because the officer and defendant disagreed as to the content of defendant's pretrial statement, the jury was required to determine the weight of defendant's claim that the officer's inability to understand Spanish caused him to misinterpret the statement. The proposed evidence was clearly relevant to this question, and therefore should have been admitted.

People v. Family Video Movie Club, Inc., 318 Ill.App.3d 991, 744 N.E.2d 322 (5th Dist. 2001) 1. To determine whether a work is obscene, the trier of fact must determine that: (a) the average person, applying contemporary community standards, would find that the work as a whole appeals to a prurient interest, (b)

the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable law, and (c) the work as a whole lacks serious literary, artist, political or scientific value. Although the State need not introduce evidence concerning contemporary community standards, the defense is entitled to introduce the best evidence it can on this issue.

2. Where a video rental store was alleged to have violated an obscenity ordinance by renting particular tapes, the trial court erred by refusing to admit: (a) a survey conducted by store personnel in which patrons indicated their support of or opposition to the store's rental of adult videos, and (b) a survey conducted by a law clerk to determine whether similar videos were available at other stores in the region. Although exclusion of the survey conducted by store personnel was harmless error in view of the obvious "flaws in the methodology," exclusion of the survey conducted by the law clerk was not harmless error. Although mere availability of similar materials in a particular area does not necessarily demonstrate that such materials are acceptable to average members of the community, "the availability of the same or comparable materials . . . may indicate that the challenged materials enjoy a 'reasonable degree of community acceptance.'"

People v. Dennis, 373 Ill.App.3d 30, 866 N.E.2d 1264 (2d Dist. 2007) Where defendant alleged self-defense, the trial court erred by denying a motion to admit evidence of the victim's propensity for violence and reputation for violence.

Cumulative Digest Case Summaries **§19-2(b)(1)**

People v. Hanson, 238 Ill.2d 74, 939 N.E.2d 238 (2010)

The Supreme Court affirmed defendant's convictions and death sentence:

1. The trial court did not err by admitting testimony by the sister of one of the decedents concerning a conversation which she had with the decedent about six weeks before the latter's death. In that conversation, the decedent said that defendant had threatened to kill her if she told their father that defendant had obtained credit in their parents' names.

The State admitted that the statements were hearsay, but argued that defendant had forfeited his right to challenge the evidence under the "forfeiture by wrongdoing" doctrine. Under that doctrine, statements are admissible against a party who, with the intent to prevent the witness from testifying, procures the absence of the declarant from trial. The State contended that defendant murdered the decedent with the intent of keeping her from going to the police or testifying against him.

Defendant did not dispute the finding that he acted with intent to make the decedent unavailable, but argued that the doctrine of forfeiture by wrongdoing does not permit nontestimonial hearsay to be admitted. In the alternative, defendant argued that if nontestimonial hearsay can be admitted under the forfeiture by wrongdoing doctrine, the trial court must first consider whether the statements are sufficiently reliable to be considered.

The court concluded that the forfeiture by wrongdoing doctrine is not merely a basis by which the defendant's constitutional right to confrontation may be extinguished. Instead, the doctrine also constitutes an exception to the hearsay rule which allows the admission of both testimonial and nontestimonial hearsay.

Furthermore, the reliability of the statements need not be considered in determining whether statements are admissible under the forfeiture by wrongdoing doctrine. The court stressed that by intentionally preventing the declarant from testifying, the defendant forfeited his ability to challenge the reliability of the statements. "Requiring additional *indicia* of reliability would . . . undermine the equitable considerations at the center of the doctrine."

2. The trial court did not err by admitting a detective's testimony that while talking to the defendant, he stated that defendant's sister believed defendant had committed the murders.

A. Defendant did not waive the issue by cross-examining the witness about the statement after defense counsel's objection to admissibility was overruled. "When a circuit court makes an adverse

evidentiary decision, defense counsel cannot be forced to choose between waiving an issue for appeal and allowing damaging testimony to go unanswered on cross-examination. Facing such a choice undermines counsel's ability to fully and vigorously pursue a client's interest."

B. Whether evidence is relevant and should be admitted is left to the discretion of the trial court, whose decision will not be overturned unless it is arbitrary, fanciful or unreasonable. Here, the trial court did not abuse its discretion by admitting the evidence.

1) The court rejected the argument that the testimony was improper opinion evidence. Neither the detective nor the sister testified about the sister's present opinion of defendant's guilt or innocence. Instead, the evidence concerned a conversation which occurred immediately after the offenses, when the sister reported to police that defendant might have been responsible.

2) The evidence was relevant in that it explained why the investigation had focused on the defendant, and answered defendant's earlier question to the officer about why he was being questioned.

In addition, the sister's belief was relevant to explain defendant's actions after talking to the police officer, including his unannounced return to Illinois from California and drive to Wisconsin, where he was arrested. The fact that defendant knew that his sister had shared her suspicions with the police made it more likely that he was attempting to flee.

3) The evidence was not hearsay. An out-of-court statement is admissible if offered for some purpose other than to establish the truth of the matter asserted. The evidence was not offered to prove that defendant was guilty, or even to prove that the sister thought he was guilty. Instead, it was intended to provide context for the investigation and explain defendant's state of mind when he returned to Illinois.

4) The evidence should not be excluded because the danger of unfair prejudice outweighed any probative value. The court noted that the sister was not an authority figure whose opinion was likely to be especially persuasive to the jury, the jury was not likely to believe that the sister was "uniquely knowledgeable" about defendant's role in the offense, and at no point did any witness testify that he or she believed defendant to be guilty.

(Defendant was represented by Assistant Defender Steve Clark, Supreme Court Unit.)

People v. Pikes, 2013 IL 115171 (No. 115171, 11/21/13)

1. Evidence is generally admissible if it is relevant. Relevant evidence is any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The rule that evidence of the commission of other crimes by the accused is inadmissible for the purpose of showing a propensity to commit crimes is an aspect of the rule that the prosecution may not introduce evidence of a character trait of the accused. The concern is not that such evidence is lacking in probative value, but that it may over persuade the jury, which might convict the accused because it believes he is a bad person.

The concerns underlying the admission of other-crime evidence are not present when the uncharged crime was not committed by the defendant. There is no danger that the jury will convict the defendant because it believes he has a propensity to commit crimes. The admissibility of such evidence is analyzed under ordinary principles of relevance, not according to rules governing the admission of other-crime evidence.

2. Defendant was charged with a murder that allegedly arose out of a conflict between two gangs. The feud began with the shooting of a member of defendant's gang. Then on the day prior to the murder, a rival gang member rode a scooter into the territory of defendant's gang. When Donegan, a member of defendant's gang, shot at the person on the scooter, he was struck by a car containing other rival gang members that was following the scooter. Donegan then recruited defendant to assist him in exacting revenge by committing a drive-by shooting, which led to the murder for which defendant was convicted.

The Appellate Court reversed the conviction, finding that evidence of the scooter shooting was

improperly admitted as other-crime evidence where there was no evidence connecting defendant to that incident.

3. The Illinois Supreme Court reversed the Appellate Court. Because it is undisputed that defendant was not involved in the scooter shooting, the scooter shooting is not evidence of another crime for purposes of evaluating its admissibility. The scooter incident was relevant to show defendant's motive for the subsequent murder. The fact that defendant may have had a secondary motive, the rival gang's shooting of defendant's fellow gang member, did not mean that he was not also motivated to retaliate for the scooter incident.

The defendant was not prejudiced by a jury instruction that directed the jury to determine whether defendant was involved in conduct other than that charged in the indictment. There was evidence at trial that at the time of the murder defendant and Donegan drove a car stolen by use of a "jiggler" key. Since the evidence at trial clearly showed that defendant was not involved in the scooter shooting, the instruction must have referred to the stolen car.

The Supreme Court also rejected defendant's argument that evidence of the scooter shooting should have been excluded because the motive for the murder was not the scooter shooting, but rather the subsequent striking of Donegan with the car. This was not a random incident in which Donegan was struck by a car. The car followed the gang member on the scooter. There was a continuing gang war between the two gangs. These two events were linked and it would be illogical to separate them and give the jury only half the story.

Defendant was not prejudiced by the admission of evidence of the scooter shooting. Any concern about an implied inference of guilt by association would more likely come from the evidence of defendant's gang membership than from the scooter shooting in which defendant was clearly not involved.

The Supreme Court remanded for the Appellate Court's consideration of the remaining issues raised by defendant.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010)

In a prosecution for predatory criminal sexual assault, a child welfare supervisor who worked for a private social services agency testified to the characteristics of child-sexual-abuse-accommodation syndrome that are often observed in children who have been sexually abused. The Appellate Court addressed three issues related to the admissibility of that evidence.

1. **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923), requires that the methodology or scientific principle upon which an expert opinion is based be sufficiently established to have gained general acceptance in its particular field. **Frye** is the test for admissibility of scientific evidence in Illinois. A court may determine the general acceptance of a methodology or principle by holding a **Frye** hearing, or by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject. Relying exclusively on prior judicial decisions to establish general scientific acceptance can be a hollow ritual, however, if the underlying issue of scientific acceptance has not been adequately litigated. A reviewing court can conduct a **Frye** hearing as well as a trial court because under the **Frye** standard, a court does not determine the validity of a particular scientific technique, only whether there is a general consensus in the relevant scientific community regarding the reliability of the technique.

A **Frye** hearing on the admissibility of evidence of child-sexual-abuse-accommodation syndrome was not necessary. In **People v. Nelson**, 203 Ill.App.3d 1038, 561 N.E.2d 439 (5th Dist. 1990), the court considered numerous scholarly articles on the syndrome and concluded that it was generally accepted in the psychological community that children who have been sexually abused behave differently than those who have not been abused. As this is exactly the underlying basis of the syndrome, the **Nelson** decision supported the determination that evidence pertaining to the syndrome was generally accepted.

2. The adequacy of the qualifications of an expert witness is a matter within the sound discretion of the trial court. Expertise is not measured by a given level of academic qualification, but by whether the

proposed expert has knowledge and experience beyond that of the average citizen that would assist the jury in evaluating the evidence. It does not matter whether the expert acquired specialized knowledge through education, training, experience, or a combination of each.

The trial court did not abuse its discretion in allowing a child welfare supervisor to testify as an expert regarding child-sexual-abuse-accommodation syndrome, even though she was not a psychologist or expert in the field of psychology. The witness worked with staff members who worked with sexually-abused children. She had a bachelor's degree in law enforcement, a master's degree in human and family resources, and was studying for a doctorate in education. She had worked with victims and offenders as a sexual abuse therapist, and dealt with emotionally disturbed, neglected, and abused adolescents as a child care worker. She was familiar with child-sexual-abuse-accommodation syndrome through reading articles on the subject and her work with children.

3. Evidence is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Evidence is considered relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence.

Testimony regarding child-sexual-abuse-accommodation syndrome was relevant. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually-abusive relationship. The defense attacked the credibility of the child witness by introducing evidence of her delayed reporting and inconsistencies in her testimony. The syndrome evidence aided the trier of fact in weighing that evidence.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Betance-Lopez, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)

Generally, the trial court may admit a written transcript of a recording to assist the trier of fact. However, it is the recording itself, and not the transcript, that constitutes evidence.

The court concluded that the general rule is "impractical, or even impossible," where the recording contains statements in a foreign language. In such a case, it is not possible for the trier of fact to rely on the recording to the exclusion of an English translation. Thus, where the recording contained questions and answers in Spanish which were then translated by one of the officers conducting the interrogation, the trial court did not err by admitting a subsequently prepared English transcript as substantive evidence.

The court rejected the argument that because the recording contained the officer's English translation of statements which defendant made in Spanish, the trial court should not have relied on the subsequently-prepared transcript. The court noted that the translator who prepared the transcript had the luxury of listening to the recording, multiple times if necessary, to ensure that the translation was accurate. In addition, defendant conceded that there was a proper evidentiary foundation for the transcript. Under these circumstances, the trial court did not err by admitting the transcript.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

People v. Bryant, 391 Ill.App.3d 228, 907 N.E.2d 862 (5th Dist. 2009)

The trial court did not abuse its discretion by admitting redacted recordings of videotapes showing the interrogations of the defendants by police, although the defendants refused to make any statements.[1] Because the trial court viewed the tapes, sustained objections to specific portions on relevancy grounds, and ordered those portions redacted, it did not abuse its discretion by admitting evidence which had at least some probative value

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[1]The State argued that the recordings were relevant to demonstrate that defendants had multiple opportunities to explain to police "what had happened," and that the defendants' "body language" during the interrogation was also relevant.

that was "not outweighed by any prejudicial" effect. (See also **COUNSEL**, §13-4(a),(c)).

People v. Degorski, 2013 IL App (1st) 100580 (No. 1-10-0580, 10/17/13)

1. Occupation (reputable or disreputable) is an ordinary part of the background information elicited from any witness, and is properly considered in determining the weight to be given to the testimony of the witness.

It was not an abuse of discretion for the court to allow the former assistant State's Attorney who obtained a confession from the defendant to testify that he was now a judge, particularly where the State complied with the court's direction that it not give that fact undue emphasis, and the State did not argue that the jury should give the testimony of the witness greater weight because he was a judge. While a judge's occupation may lend an air of credibility to his testimony, the trier of fact is still free to disbelieve the witness.

2. The defense did not invite the former assistant State's Attorney's testimony that he found defendant's confession reliable. Defense counsel asked the witness only a general question about whether he sought to obtain statements that were uncontaminated by outside information. The answer was not a direct response to the question and was volunteered. The defendant could not complain about the witness's subsequent testimony that he believed the defendant when he confessed because that testimony was elicited when defense counsel continued to question the witness about his opinion of defendant's confession.

3. Much like police officers, assistant State's Attorneys are authority figures whose testimony may be prejudicial if they inform jurors that they should believe the prosecution's case. But there is a distinction between an assistant State's Attorney testifying to a prior opinion of belief in a defendant's statement at the time it was made, and offering a present opinion of defendant's guilt at trial. Present opinion testimony is improper; previous opinion testimony is permissible.

The testimony of a former assistant State's Attorney that he believed defendant's confession at the time of its making was not a present opinion of defendant's guilt and was permissible.

(Defendant was represented by Assistant Defender Charles Hoffman, Chicago.)

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)

1. Statements made to a testifying witness by a third party describing events of which the witness has no firsthand knowledge are inadmissible as substantive evidence pursuant to the prior-inconsistent-statement exception to the hearsay rule provided by 725 ILCS 5/115-10.1(c)(2). Therefore, a statement made by Fillyaw to a prosecution witness admitting that he had kicked in a door and shot three people was inadmissible under the personal-knowledge limitation of §115-10.1(c)(2).

2. Admission of a nontestifying co-defendant's admission inculpating the defendant in the offense violates not only a defendant's federal constitutional right to confrontation, but also Illinois hearsay rules. Therefore, Fillyaw's statement implicating Parker in the commission of the offense was inadmissible against Parker. Although the jury was instructed to give separate consideration to each defendant, that any evidence limited to one defendant should not be considered as to the other, and that a statement made by one defendant may not be considered as to the other, it was given no contemporaneous instruction to disregard the statement when considering Parker's guilt. These instructions were insufficient to remedy the state law error; only complete redaction of all references to Parker would suffice.

The admission of this evidence was plain error. Because the error implicated defendant's due process and confrontation clause rights, it necessarily affects substantial rights and satisfies the second prong of the plain-error analysis. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

3. The mental health history of a witness may be relevant if it relates to the credibility of the witness. Witness Deshae R.'s psychiatric diagnosis, treatment with psychotropic medications, and experience with hallucinations may be relevant to her credibility as a witness. Therefore the circuit court was directed to

conduct a further *in camera* review of her mental health records on remand, and tender to the defense attorneys the relevant portions of those documents.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Garcia-Cordova, 2011 IL App (2d) 070550-B (No. 2-07-0550, rev. op. 12/20/11)

1. Under **Crawford v. Washington**, testimonial hearsay by a non-testifying declarant is inadmissible unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Where the declarant appears for cross-examination at trial, however, the Confrontation Clause places no constraints on the use of prior testimonial hearsay.

2. A witness is available for cross-examination where she attempts to answer questions, but states that she either does not remember or does not know the answers. Gaps in a witness's memory do not render her unavailable for cross-examination.

The court also rejected the argument that under **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2011), a complainant appears for cross-examination only if his or her testimony is accusatory. Similarly, the court rejected the argument that a complainant who does not recall making a statement to police must be confronted with that statement by the prosecution. The court also stated that where a witness appears at trial and submits to cross-examination, no confrontation issue arises even if the witness fails to testify concerning his or her out-of-court statement that is admitted into evidence.

Because the seven-year-old declarant testified under oath, made an in-court identification of the defendant, and recalled speaking with investigators concerning the incident, she was "available" for cross-examination although she testified that she could not remember or did not know the answers to several questions asked on direct examination. The court also noted that for tactical reasons defense counsel chose not to cross-examine the declarant; however, the witness could have been cross-examined about the answers she gave and her lack of memory.

3. Even if the admission of the declarant's hearsay statements violated **Crawford**, the error was harmless because the testimony was cumulative of properly admitted evidence.

4. The trial court did not err by denying a motion *in limine* to exclude portions of defendant's statements to police which indicated that he had been sexually abused as a child. Evidence is admissible if it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. Evidence is relevant if it tends to make the existence of a fact that is of consequence to the proceeding either more or less probable than would otherwise be the case. The trial court has discretion to determine whether evidence is relevant and admissible.

The court concluded that defendant's history of having been sexually abused as a child was relevant in two respects: (1) in evaluating the credibility of defendant's statements to police, and (2) concerning the context in which those statements were made. The court noted testimony that defendant's demeanor changed after he admitted having been sexually abused as a child, and that he then made the written and oral statements that were admitted at trial.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Jaimes, 2014 IL App (2d) 121368 (No. 2-12-1368, 11/6/14)

1. Gang-related evidence need not be excluded where it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. The trial court's decision regarding the admission of gang-related evidence will not be disturbed unless there was an abuse of discretion.

2. Here, gang-related evidence was admissible because the State's theory was that the offense occurred as a result of an altercation between rival gangs. In addition, evidence that defendant identified himself as a member of a gang was admissible although the jury was informed that the admission was made to an employee at a juvenile detention facility and thus learned that defendant was involved in the juvenile

justice system. The court noted that the employee did not testify to the reason defendant was being detained and that the evidence merely satisfied the requirement that the State establish a proper foundation for the testimony.

The court noted, however, that it was unnecessary for the State to introduce testimony by a second correctional officer concerning a separate admission by defendant that he was a gang member. Although the gang-related evidence introduced in this case was not excessive or unduly prejudicial, by presenting the duplicative testimony of a second witness the State came "close to crossing that forbidden threshold." The court stated that in the future, the State should be "more circumspect" in its use of such cumulative evidence.

Defendant's conviction for first degree murder and attempt first degree murder were affirmed.

People v. Maldonado, 398 Ill.App.3d 401, 922 N.E.2d 1211 (1st Dist. 2010)

1. To preserve an issue for appeal, the defendant must: (1) object at trial or raise the issue in a motion *in limine*, and (2) present the issue in a post-trial motion. Here, defendant preserved an issue concerning the admissibility of gang-related evidence when he replied to the State's motion *in limine* to admit the evidence and raised the issue in the post-trial motion.

Even had the defendant not preserved the issue, it would have been reviewable as plain error because the evidence was closely balanced and the improperly admitted evidence could have affected the outcome of the trial. (See **WAIVER – PLAIN ERROR – HARMLESS ERROR**, §§56-1(b)(2), 56-2(a)(3)).

2. Evidence of gang-related activity is admissible only where there is sufficient proof that such activity is related to the crime charged. Here, the trial court admitted the evidence for the limited purpose of impeaching two of the State's witnesses who had recanted their pretrial statements. Although the State acknowledged that it lacked evidence to show that the crime was gang-related, it presented additional gang evidence that had nothing to do with the impeachment of the witnesses. In addition, it used that evidence in closing argument to suggest a possible gang motive for the offense.

Because the improperly-admitted evidence may have affected the verdict, a new trial was required.

3. The trial court erred by allowing the State to introduce evidence that a shotgun was recovered from defendant's residence, because the offense had been committed with a handgun and no connection was shown between the weapon and the defendant. In the court's view, the State introduced the evidence solely to suggest that the shotgun must have belonged to the defendant, and that "someone who possesses a shotgun is more likely to commit a murder than someone who does not."

4. Evidence that a witness made a prior consistent statement is generally inadmissible for the purpose of corroborating trial testimony, unless the opposing party contends that the witness recently fabricated his or her testimony and the prior statement was made before the alleged motive to fabricate arose. Here, the trial judge improperly admitted prior consistent statements which were made after the alleged motive to fabricate came into existence.

Defense counsel argued that when the witness was first interviewed by police, she truthfully said that she had no knowledge of the offense. Counsel alleged that after being detained at the police station for several hours, the witness falsely inculpated the defendant. Counsel also argued that the witness repeated the false accusation in her testimony before the grand jury and at trial.

Because the statements which were admitted to corroborate the witness's trial testimony - her statement at the police station and her grand jury testimony - were both made after the motive to falsify arose, they did not rebut counsel's allegations and should not have been admitted.

Defendant's conviction for first degree murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Roman, 2013 IL App (1st) 110882 (No. 1-11-0882, 11/6/13)

1. Evidence that defendant was a gang member or involved in gang-related activities is admissible to show a common purpose or design, or to provide a motive for an otherwise inexplicable act. However, due to the possibility of strong prejudice against street gangs, gang-related evidence is admissible only if there

is adequate proof that membership or activity in the gang is related to the crime charged. The trial court must take great care in admitting gang-related testimony.

2. The trial court erred at a trial for first degree murder by admitting testimony from eyewitnesses that defendant was a member of the Latin Kings. The Court rejected the State's argument that such evidence strengthened eyewitness identifications of the defendant as one of the perpetrators. Although two of the eyewitnesses stated that they knew defendant was a gang member, none of the eyewitnesses based their identifications of defendant on that fact. Instead, the witnesses stated that they recognized the perpetrators of the offense because they had seen them in the neighborhood for several years. Thus, gang membership was not related to the identifications.

Similarly, the trial court improperly admitted photographs of defendant's tattoos and testimony from a police officer that the tattoos showed that defendant was a member of the Latin Kings. Although the judge also admitted this evidence to corroborate eyewitnesses' identifications, none of the witnesses mentioned the tattoos or suggested that the tattoos were an aid in identifying defendant as one of the perpetrators. Thus, the evidence was not relevant to the identifications and had the effect of inflaming the jury.

Furthermore, the gang evidence was not admissible to support the State's theory that the murder was gang related. The State argued that the perpetrators killed the victim to avenge a perceived slight to the Latin Kings a few weeks earlier, when workers at the factory where the offense occurred gave shelter to a man who was being beaten. The court stressed that the State failed to present any evidence to show that the instant offense was intended as retaliation for a perceived slight. In addition, there was no evidence that either this incident or the prior one was gang related, as there was no testimony that the perpetrators flashed gang signs, yelled gang slogans, or otherwise indicated that they were members of a gang.

3. The court concluded that the error was not harmless beyond a reasonable doubt, noting that there was no physical evidence tying defendant to the offense and that the admission of gang evidence always carries a strong risk of prejudice.

4. Finally, the trial judge erred by denying defense counsel's request to remove a "Gang Unit" sticker from the State's courtroom cart, especially since the State had no objection. Given the strong risk of prejudice that is inherent whenever a jury is exposed to gang-related evidence, the presence of the sticker on the cart had the potential to negatively impact the defense. The court stated, "Whether the case involves gang affiliation or not, fairness dictates that the cart be identified with a sticker that does not transmit a potentially prejudicial message, especially when an innocuous alternative is so easy."

(Defendant was represented by Assistant Defendant, Kristen Mueller, Chicago.)

People v. Santiago, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011)

1. Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. A defendant is entitled to have his guilt or innocence determined based on the evidence against him without being prejudged according to what has happened to another. **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978).

The court held that this rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

2. Nor was it error to elicit evidence of the sentences that the co-defendants received. The jury was not informed of the sentences for the improper purpose of suggesting that defendant faced a comparable sentence if convicted, but to emphasize the doubtful explanation offered by the co-defendants for their decision to plead guilty.

3. It was also not error for the prosecutor to elicit evidence that defendant was not present when the

co-defendant pleaded guilty. This evidence was offered to provide a plausible explanation for the co-defendant's contrary testimony at trial, i.e., that defendant's absence at the plea hearing made it easier for the co-defendant to testify to defendant's guilt, and defendant's presence at trial made it difficult for the co-defendant to repeat that testimony.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

Top

§19-2(b)(2)
Irrelevant or Unduly Prejudicial Evidence

Old Chief v. U.S., 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) Where the relevancy of a prior conviction was limited to establishing defendant's legal status and there was a likelihood the jury would use the details of the prior crime to find that defendant probably committed the crime in question, "the only reasonable conclusion" is that the risk of unfair prejudice substantially outweighed the probative value of the evidence. Under such circumstances, the trial court abused its discretion by admitting the full record of the prior conviction instead of allowing the defendant to concede that the statutory requirements had been satisfied. See also, People v. DeHoyos, 64 Ill.2d 128, 355 N.E.2d 19 (1976) (admission of evidence concerning the prior conviction of a friend of the defendant was reversible error where the testimony included not only the fact of the conviction, but also the sentence imposed and that the friend served the entire sentence; prejudicial effect of such evidence outweighed its probative value); People v. Walker, 211 Ill.2d 317, 812 N.E.2d 339 (2004) (adopting the reasoning of **Old Chief**; where a prior felony conviction is introduced solely to prove the defendant's status as a convicted felon, the precise name and nature of the prior conviction present a risk of prejudice that outweighs the probative value; trial court erred by admitting the name and nature of the prior conviction rather than accepting a defense offer to stipulate); People v. Harris, 343 Ill.App.3d 1014, 798 N.E.2d 1259 (**Walker** is not limited to situations in which the evidence of guilt is not overwhelming).

People v. Bolden, 197 Ill.2d 166, 756 N.E.2d 812 (2001) Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. The trial court did not err by refusing to admit defense counsel's testimony that in other cases, officers conducting lineups had allowed him to be in the same room as the identifying witnesses.

The lawyer's testimony about lineups in other cases "had no bearing on the conduct of the detectives in this case or their reasons for not permitting counsel to be present during the lineup." In addition, there was no showing that the detectives in this case had been involved in the cases about which the attorney would testify.

People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920 (2000) The trial court abused its discretion by allowing the State to introduce a headless mannequin wearing the bloody and brain-splattered uniform of a deceased police officer, and by allowing the exhibit to be taken to the jury room.

1. Generally, an article of clothing is admissible if it tends to prove facts material to the issues and its probative value is not outweighed by the potential prejudice. Whether articles of clothing are admissible in a particular case rests within the trial court's discretion.

The State argued that the uniform was admissible to show that defendant knew he was firing at a

police officer and to show intent to kill (because defendant had intentionally fired above the officer's bulletproof vest). The court held that the probative value of the uniform on these points was outweighed by the prejudicial effect.

Although the fact that the complainant was a police officer would have been relevant to an attempt murder charge, it had no relevance to first degree murder charges. Furthermore, it made "no sense" to display the uniform on a headless mannequin if the State wanted to show that defendant intended to shoot at the officer's head. Third, the court found that there was ample evidence in the record, both through testimony and autopsy pictures, to document the placement and appearance of the decedent's wounds without introducing the uniform.

2. The evidence was extremely prejudicial. A uniform containing stains from the decedent's blood and brain matter is "uniquely 'charged with emotion.'" In addition, the jurors were exposed to the mannequin for an extended period of time, not only in the courtroom but also during deliberations, and were given rubber gloves to facilitate handling the exhibit in the jury room. Under these circumstances, the "nature and presentation of the uniform rendered the exhibit so disturbing that its prejudicial impact outweighed its probative value."

People v. Wheeler, 226 Ill.2d 92, 871 N.E.2d 728 (2007) Evidence is admissible where it fairly tends to prove or disprove the offense and tends to make guilt more or less probable. The trial court has discretion to reject evidence which has little probative value due to its remoteness, uncertainty or unfair prejudice.

Evidence that a crime was committed by someone other than the defendant is admissible, although such evidence can be excluded if it is too remote in time or too speculative to shed light on the case. Admitting such evidence constitutes an abuse of discretion where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court.

The trial court did not abuse its discretion by excluding evidence that a third party had a motive to commit the crime where the evidence was speculative.

People v. Butler, 58 Ill.2d 45, 317 N.E.2d 35 (1974) Evidence that defendant cohabited with a woman who was not his wife was irrelevant.

People v. Lampkin, 98 Ill.2d 418, 457 N.E.2d 50 (1983) Where defendant was convicted of the murder of two police officers, the trial court erred by admitting threatening statement allegedly made by defendant about six years earlier. A general threat not specifically directed towards any person has little probative value, but very likely to arouse prejudice or hostility. See also, People v. Robinson, 189 Ill.App.3d 323, 545 N.E.2d 268 (1st Dist. 1989) (a threat by the accused to kill or injure a person other than the deceased is prejudicial, irrelevant and inadmissible).

People v. Mitchell, 105 Ill.2d 1, 473 N.E.2d 1270 (1984) Testimony that defendant had bought an insurance policy on her 16-month-old daughter should not have been admitted at defendant's trial for attempt murder and aggravated battery against the daughter. Although "any evidence which tends to show that an accused had a motive for killing is relevant[,] . . . with reference to insurance policies, this Court has required proof of the existence of such a policy and its relationship to the defendant." Here, the State failed to prove "that the policy was in force at the time of these offenses, and there was no evidence that the policy played any role in the defendant's actions."

People v. Lucas, 151 Ill.2d 461, 603 N.E.2d 460 (1992) At defendant's trial for the murder of a superintendent at Pontiac Correctional Center, the State's theory was that members of a prison gang killed the superintendent in revenge for the death of a fellow gang member. The Supreme Court found that the trial judge erred by admitting evidence of gang threats against a guard who had been involved in the incident which led to the death of the gang member, where the threats occurred two weeks before this offense and

could not be traced to the defendant.

The trial court also erred by admitting evidence that gang members other than defendant attacked a correctional officer on the day before the superintendent's murder and had plotted to kill an inmate who had cooperated with prison officials; this evidence was erroneously admitted because it was never shown that defendant was involved in either the attack or the plot. See also, People v. Easley, 148 Ill.2d 281, 592 N.E.2d 1036 (1992) (it was error to allow the State to introduce evidence of a gang conspiracy, as evidence of defendant's motive for a murder, where there was no showing that defendant knew of the conspiracy).

People v. Hendricks, 137 Ill.2d 31, 560 N.E.2d 611 (1990) At defendant's trial for the murder of his wife and children, the State improperly manipulated evidence by presenting testimony in a non-chronological order to make it appear that defendant engaged in increasingly aggressive sexual conduct with women he employed to model back braces he sold. "When the . . . testimony is considered in its proper order, it presents no more than a haphazard series of encounters."

The Court also found that the record "suggests that the prosecution's purpose in presenting the testimony about the models was aimed at inflaming the jury's passions against the defendant." Furthermore, the prosecutor misrepresented the evidence, which had been admitted for the limited purpose of motive, "to portray the defendant as having an evil disposition." See also, People v. Kannapes, 208 Ill.App.3d 400, 567 N.E.2d 377 (1st Dist. 1990) (at trial for delivery of cocaine, both a photograph which showed the defendant wearing a tee-shirt which parodied a Coca-Cola advertisement and contained the legend "Enjoy Cocaine" and defendant's post-arrest request that a police officer return the photograph had negligible probative value and seriously prejudiced the defense; even had the evidence been relevant to show motive, intent, identification or absence of mistake, it should have been excluded because its probative value would have been substantially outweighed by its prejudicial effect).

People v. Lewis, 165 Ill.2d 305, 651 N.E.2d 72 (1995) At a murder trial, the trial court erred by admitting evidence that at the time of her death the decedent was five months pregnant with a female fetus. Evidence is relevant if it makes the existence of any fact of consequence "more probable than it would be without the evidence." However, even relevant evidence should be excluded if its prejudicial effect substantially outweighs its probative value.

The Court concluded that the victim's pregnancy "bore absolutely no relationship" to the question of guilt or innocence, but prejudiced the defendant by creating "an unnecessary risk of undermining the fairness and impartiality of the proceeding." However, because the prosecutor asked only one question and did not "dwell" on the pregnancy, and because the evidence was presented as part of the medical examiner's autopsy testimony, the evidence did not so "substantially compromise" a fair trial that it was prejudicial error.

People v. Hope, 116 Ill.2d 265, 508 N.E.2d 202 (1986) Evidence that a murder victim left a spouse and family "has no relationship to the guilt or innocence of the accused, but normally serves only to prejudice the defendant in the eyes of the jury." See also, People v. Brown & Harper, 253 Ill.App.3d 165, 624 N.E.2d 1378 (1st Dist. 1993) (testimony by widow of one of the decedents that the victim left a young child and that the witness had just undergone major surgery at the time of the offense and had been unable to go to the morgue to identify her husband's body had no proper purpose - the witness identified neither the victim's body nor his photograph at trial, and thus failed to establish his identity or the fact that he was deceased); People v. Starks, 116 Ill.App.3d 384, 451 N.E.2d 1298 (1st Dist. 1983) (the State may present "life and death" witnesses, but such testimony must be presented without "placing undue emphasis on the fact that the deceased has left a family behind").

People v. Raby, 40 Ill.2d 392, 240 N.E.2d 595 (1968) Proffered testimony which was cumulative on an issue that was not in dispute was immaterial and properly excluded. See also, People v. Molstad, 101 Ill.2d 128, 461 N.E.2d 398 (1984) (evidence is cumulative when it "adds nothing to what is already before the jury").

People v. Williams, 109 Ill.2d 327, 487 N.E.2d 613 (1985) The trial court erred in prohibiting defendant from introducing a tape recording of his statement after police officers testified as to the content of the statements. The part of the statements excluded from evidence — the defendant's demeanor and voice inflections — could have affected the jury's assessment as to the credibility of the statements.

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) At the defendant's trial for murder, it was error for the State to introduce the defendant's entire confession where a portion of it referred to defendant's intent to murder another person. The latter portion was not relevant in the instant case and should have been redacted.

People v. Mulero, 176 Ill.2d 444, 680 N.E.2d 1329 (1997) The fact that the defense filed a motion to suppress a confession had no relevancy to whether defendant lacked remorse for the crime.

People v. Agee, 307 Ill.App.3d 902, 719 N.E.2d 251 (1st Dist. 1999) 1. Evidence is relevant where it tends to prove or disprove a disputed fact or render a matter in issue more or less probable. Whether evidence is relevant is a matter for the sound discretion of the trial court.

2. Testimony about narcotic trafficking was irrelevant to defendant's alleged commission of the offense of unlawful use of a weapon, and implied to the jury that defendant had engaged in uncharged narcotics offenses. The testimony was not relevant to provide the "necessary context" for the officer's presence in the area and to refute defendant's theory that he had been framed - "the State fails to explain how [the officer's] testimony regarding narcotics activity . . . refutes defendant's theory that the officers framed him for unlawful use of a weapon."

People v. Howard, 305 Ill.App.3d 300, 712 N.E.2d 380 (2d Dist. 1999) Where defendant was charged with the murder of his girlfriend's daughter, the trial judge erred by admitting evidence that defendant abused the girlfriend for nearly five years following the offense, including evidence about the frequency of beatings, specific incidents of abuse, and that defendant used drugs. Evidence is relevant only if it tends to make more or less probable the existence of any fact that is of consequence to the determination of the action; because defendant's abusive behavior following the victim's death did not tend to make more or less probable any fact of consequence, the evidence was irrelevant.

People v. Maounis, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) At an armed robbery trial, the trial judge erred by allowing the State to elicit testimony that defendant did not spend Christmas with his family. The fact that defendant was not with his family at Christmas was irrelevant to any issue in the case.

People v. Barnes, 182 Ill.App.3d 75, 537 N.E.2d 949 (1st Dist. 1989) It was improper for the State to bring out certain aspects of defendant's lifestyle, such as that he had two children by different women and that he had employment-related misconduct.

People v. Myaden, 71 Ill.App.3d 442, 389 N.E.2d 901 (4th Dist. 1979) Evidence that an accomplice has been convicted or pleaded guilty, or that an accomplice had been found not guilty, was irrelevant in regard to defendant's guilt or innocence.

People v. Reimnitz, 72 Ill.App.3d 761, 391 N.E.2d 380 (1st Dist. 1979) Evidence that defendant engaged in homosexual act over seven months after he allegedly murdered his wife was improperly admitted, since its probative value was far outweighed by its inflammatory effect.

People v. Malkiewicz, 86 Ill.App.3d 417, 408 N.E.2d 47 (2d Dist. 1980) At defendant's trial for several sex offenses, it was error to admit testimony about the titles of four novels found in the defendant's car (the books

were entitled "***Death List," "Tempting Teenagers," "Trapped and Tied Babysitters," and "The Curious Nurse***"). Because the prosecution failed to show whether the books belonged to the defendant, whether he had read them, or the books' content, the books were not shown to have any relevance or materiality to the crime charged or to the defendant's state of mind. Furthermore, the books were not shown to be an instrumentality of the crime.

The court concluded that the book titles were introduced solely to suggest the defendant's propensity to commit crime. See also, People v. Pulliam 176 Ill.2d 261, 680 N.E.2d 343 (1997) (book entitled "The Force of Sex" was improperly admitted where there was no evidence of the book's contents or that defendant had read it).

People v. Maberry, 193 Ill.App.3d 250, 549 N.E.2d 974 (4th Dist. 1990) Evidence offered to show that someone other than the defendant may have committed the crime is relevant and admissible "only if and when a close connection can be demonstrated between the third person and the commission of the offense."

The trial judge did not abuse discretion in excluding evidence purporting to show that a third party (Leonard) may have committed the crimes (home invasion and sexual assault); although the third party was seen in the area on the relevant date, resembled the physical description of the perpetrator, and may have had a motive, the victim stated that he was not her attacker. In addition, the third party's description differed from the attacker in terms of voice, gait and husky build.

People v. Fuelner, 104 Ill.App.3d 340, 432 N.E.2d 986 (1st Dist. 1982) Testimony regarding the rape complainant's suicide attempt and five-week hospitalization in a psychiatric ward was improperly admitted into evidence; the testimony was irrelevant to defendant's guilt or innocence and prejudiced the jury against him.

People v. Barnes, 182 Ill.App.3d 75, 537 N.E.2d 949 (1st Dist. 1989) At the defendant's trial for unlawful use of weapons, it was error for the State to introduce evidence regarding a large sum of money ($4,000) on the defendant. This evidence was irrelevant to proving the offense charged, yet improperly suggested that it was obtained by illegal means.

People v. Johnson, 215 Ill.App.3d 713, 575 N.E.2d 1247 (1st Dist. 1991) In a jury trial for first degree murder, the probative value of evidence that a trace of semen was found in the victim's mouth and that defendant was bisexual was outweighed by the prejudicial effect; the semen was not linked to the defendant, and no sexual offenses were charged.

People v. Ehlert, 274 Ill.App.3d 1026, 654 N.E.2d 705 (1st Dist. 1995) Where defendant was charged with murder for the death of her newborn child, evidence that defendant had undergone two earlier abortions should have been excluded as unduly prejudicial.

People v. Mason, 274 Ill.App.3d 715, 653 N.E.2d 1371 (1st Dist. 1995) The trial court committed reversible error by admitting irrelevant gang-related testimony. Where the State's theory of the case was that the decedent was the victim of intra-gang retaliation, evidence of rivalries between gangs, methods of presentment, graffiti, tattoos and drug sales were irrelevant. Although the State was allowed to prove defendant's gang affiliation to establish a motive, the remaining testimony did not show motive and was not admissible for any other purpose.

People v. Goldsberry, 259 Ill.App.3d 11, 630 N.E.2d 1113 (1st Dist. 1994) Evidence suggesting a gang affiliation is admissible to show motive or common design where there is evidence to suggest, to at least some slight degree, that the offense was gang-related. Although the State's expert testified that drawings and lyrics in defendant's notebooks were consistent with membership in a gang, there was no evidence from

which it could be inferred that at the time of the shooting defendant was a gang member or that he was engaged in gang-related activity. To hold an offense gang-related merely because the defendant wrote about gangs in a notebook "stretches the rule beyond reason." See also, People v. Collins, 351 Ill.App.3d 175, 813 N.E.2d 285 (2d Dist. 2004)(prosecutor's "description of defendant as wearing beads and a blue bandana" appeared to be an attempt to imply that defendant was involved in a gang in a case in which gang membership was irrelevant); People v. Iniguez, 361 Ill.App.3d 807, 838 N.E.2d 65 (1st Dist. 2005) (trial judge abused his discretion by admitting extensive gang-related testimony, including testimony of a "gang specialist" who gave an "in-depth lesson on street gangs" in Chicago, where there was no evidence that defendant knew of a gang fight that occurred six months earlier and which was the "so-called" motivating fact for believing that the offense was gang-related; apparent purpose of the gang evidence was to "stir the emotions of the jury."

People v. Roman, 323 Ill.App.3d 988, 753 N.E.2d 1074 (1st Dist. 2001) As a matter of plain error, the trial judge erred by admitting testimony that a police officer who had been involved in a shootout with the defendant subsequently received an award for "bravery above and beyond the call of duty" in connection with the incident. Such testimony was not only hearsay, but was irrelevant because it did not tend to prove that defendant committed the charges or disprove defense claims.

People v. Holloman, 304 Ill.App.3d 177, 709 N.E.2d 969 (4th Dist. 1999) Although defendant waived any error concerning the trial court's admission of expert testimony about "drug dealer profiles," "such evidence must be seriously scrutinized and handled with care." The court acknowledged that in some cases expert testimony about the manner in which controlled substances are manufactured or packaged might be relevant, particularly if the issue is whether controlled substances were intended for personal use or for delivery. However, such evidence also presents a risk of extreme prejudice.

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) In a prosecution for drug offenses, the State erred by introducing evidence that the arresting officers were familiar with defendant before he was arrested. By introducing evidence that an officer whose duties included "narcotics surveillance" and "gang surveillance" knew defendant before the arrest, the prosecution created the "obvious inference . . . that [defendant] had been engaged in prior illicit drug or gang activity." Because there were no issues concerning identification, there was no "relevant purpose for repeated references to a narcotics and gang surveillance officer knowing [defendant] by name."

People v. Elliott, 308 Ill.App.3d 735, 721 N.E.2d 715 (2d Dist. 1999) At a trial for DUI, the trial court erred by admitting evidence that defendant was advised of the civil penalties stemming from a refusal to submit to a breath test. A motorist's knowledge of the potential consequences of a refusal to take a breath test is not circumstantial evidence of consciousness of guilt; any probative value of the civil penalties for refusing to submit to a breath test is outweighed by the prejudice.

People v. Eghan, 344 Ill.App.3d 301, 799 N.E.2d 1026 (2d Dist. 2003) At a trial for unlawful possession of cocaine, the trial court erred by admitting evidence that defendant refused to take a drug test after his arrest. Such evidence was improper and unduly prejudicial because it allowed the jury to infer guilt from defendant's exercise of his rights. In addition, it had limited probative value.

People v. Hoerer, 375 Ill.App.3d 148, 872 N.E.2d 572 (2d Dist. 2007) At a trial for unlawful delivery of a controlled substance and involuntary manslaughter, the trial judge erred by allowing the State to elicit testimony that a co-defendant raped a witness on the night in question. The evidence prejudiced defendant because the testimony was graphic "and would tend to color a juror's view of defendant." Furthermore, the probative value of the evidence was diminished because there was no dispute concerning the witness's

recollection of events after she had taken a drug - one of the reasons the trial court admitted the testimony. Finally, to the extent the evidence had any relevance, it could have been easily replaced by less prejudicial testimony.

Cumulative Digest Case Summaries **§19-2(b)(2)**

People v. Barnes, 2013 IL App (1st) 112873 (No. 1-11-2873, 12/18/13)

1. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action either more or less probable than it would be without the evidence. However, even relevant evidence should be excluded where the prejudice outweighs any probative value. Prejudice is defined as an undue tendency to suggest that a decision be made on an improper basis such as emotion.

The trial court's ruling on evidentiary issues is reviewed for abuse of discretion. An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the same position.

Defendant was charged with heinous battery and aggravated battery of a child after a four-year-old child in his care suffered severe burns when he was exposed to hot water. The court concluded that the trial court abused its discretion by allowing the assistant State's Attorney to use the child as an exhibit by pulling down his pants, picking him up, and showing the jury the scars on his side and legs.

Although permanent disfigurement is an element of heinous battery, using the child as an exhibit was cumulative where the State had already established permanent disfigurement through photographs and expert testimony. The court also found that due to the risk of inflaming the jury's passions, the prejudicial effect of using the child as an exhibit outweighed any probative value.

2. Evidence of other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes. Even where other crimes evidence is admissible for a proper purpose, it should be excluded if the prejudice substantially outweighs the probative value.

Before presenting evidence of other crimes, the State must meet the threshold requirement of showing that a crime took place and that defendant participated in it. It is unnecessary to prove beyond a reasonable doubt that the defendant participated in the crime, but the State is required to present more than a mere suspicion of defendant's involvement.

The court acknowledged a split of authority in the First District concerning whether evidence of a crime which is intrinsic to the charged offense may be admitted under general relevancy principles, even if there is no evidence that the defendant committed the other crime. In **People v. Pikes**, 2013 IL 115171, the Supreme Court found it unnecessary to address this question, but noted that other crimes analysis is appropriate only if the defendant is alleged to have committed the separate offenses.

Here, the court concluded that whether analyzed as other crimes evidence or under general relevancy principles, the trial court erred by admitting evidence that the four-year-old victim suffered a liver contusion at some point. Defendant was charged with injuring the child by exposing him to hot water. The State's expert testified that the child's blood work indicated that he had suffered a liver contusion at some point within the 24 to 36-hour-period before he was examined at the emergency room. The State's expert also admitted that the liver contusion may have had an explanation other than child abuse and that there were no signs of bruising on the child's abdomen. Defendant did not have sole custody of the child in the 24 to 36-hour-period preceding the examination.

In finding an abuse of discretion, the court concluded that the probative value of the evidence was tenuous and that there was only mere suspicion that defendant was responsible for the injury. In addition, the evidence was highly prejudicial because the jury would be more likely to convict the defendant of the charged crimes if it believed that he was also responsible for a separate injury.

3. The court concluded that the combination of errors caused manifest prejudice to the defense. The

alleged justification for using the child as an exhibit was to establish the permanent disfigurement element of heinous battery. However, defendant did not dispute the cause or extent of the child's injuries, and the only issue was whether the defendant acted intentionally. Under these circumstances, it was unnecessary to display the child to the jury.

In addition, the evidence of defendant's intent was closely balanced. The jury chose to acquit of heinous battery, and there was testimony that defendant had cared for the child on several prior occasions without incident. Under these circumstances, the combined prejudice of displaying the four-year-old's physical scars and admitting evidence of an injury which could have been inflicted by someone other than the defendant could well have affected the verdict.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Decaluwe, 405 Ill.App.3d 256, 938 N.E.2d 181 (1st Dist. 2010)

Evidence is relevant if it has the tendency to make the existence of a fact that is important to the determination of an action more or less probable than it would be without the evidence. Evidence may be rejected on the grounds of relevancy if the evidence is remote, uncertain or speculative. Admissibility may also depend on whether the probative value of the evidence outweighs its prejudicial effect. In this context, "prejudice" means an undue tendency to suggest a decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt or horror.

The defendant was charged with armed violence, aggravated kidnaping and attempt aggravated criminal sexual assault, in that he demanded that the 14-year-old complainant take nude photographs of him. Five-year-old photographs of the defendant's naked torso taken by defendant's wife and of defendant wearing shorts were not relevant and only invited speculation about the character of the defendant, especially given the nature of the charges. (Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 (2d Dist. 2010)

1. Evidence is admissible if it: (1) fairly tends to prove or disprove the offense charged; and (2) is relevant in that it tends to make the question of guilt more or less probable. Evidence should be excluded if it is too remote in time or too speculative to shed light on a fact to be found.

At defendant's trial for robbery and aggravated battery, the State introduced evidence that 11 days following the offense in which complainant was robbed by two men, the police observed defendant and another man in dark clothing. Defendant first hid in a shadow, then ran when one of the officers identified himself as a policeman. The officer saw defendant grab at his waistband, trip, and fall. A handgun fell out of his pants. Defendant clenched his hands at his chest when the police attempted to handcuff him, causing the police to hit defendant in the face and rib cage with fists to effect his arrest. The court instructed the jury to consider that evidence for the limited purpose of explaining the circumstances of the arrest.

The Appellate Court concluded that the court abused its discretion in admitting evidence of defendant's possession of the handgun. The probative value of evidence that defendant possessed a gun 11 days after the offense did not outweigh the prejudicial effect of this evidence where the charged offense did not involve any element of possession or use of a weapon.

2. Presentation of irrelevant, prejudicial evidence of the gun was not justified based on the hypothetical possibility that defendant would claim that he was coerced into making incriminating statements by police brutality. Evidence of the gun was not necessary to rebut a theory of coercion because defendant's refusal to put his hands behind his back was sufficient to explain the officers' use of force in effecting the arrest. Although defendant had not informed the court that he would not pursue a theory of coercion and police brutality, a defendant is not required to forgo, in advance, a potential defense to preclude the State from introducing irrelevant, prejudicial evidence. Even if defendant had advanced a theory of coercion, evidence of the gun was not relevant.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Lopez, 2014 IL App (1st) 102938-B (No. 1-10-2938, 6/30/14)

1. The admissibility of evidence of a prior crime in which the defendant was not a participant is determined under ordinary principles of relevance, and not by standards governing other crimes evidence. **People v. Pikes**, 2013 IL 115171. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The admissibility of evidence is left to the trial court's discretion.

2. The trial court abused its discretion by admitting evidence that three weeks before the murder with which defendant was charged, some of the co-defendants in the charged offense beat a man and vandalized property in the same parking lot where the charged crime occurred. The court noted that the only evidence tying the prior incident to the charged crime was that three of the co-defendants in the charged crime participated in the earlier crime. There was no evidence that defendant knew about the earlier incident or that the charged crime was in any way motivated by the earlier event.

The court stressed that the key issue in the charged offense was whether the State proved beyond a reasonable doubt that defendant was one of the perpetrators in the beating death of the decedent. Evidence about an unrelated incident several weeks earlier had no probative value on that issue, at least in the absence of evidence indicating that there was some link between the offenses.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Pike, 2016 IL App (1st) 122626 (No. 1-12-2626, 1/27/16)

Evidence is admissible only if it is relevant to an issue in dispute. Relevant evidence is defined as evidence that makes the existence of any consequential fact more probable or less probable than it would be without the evidence. Ill. R. Evid. 401.

The State's expert compared a DNA profile found on a firearm connected to the offense with defendant's DNA profile and concluded that he could not be excluded as a contributor. But the expert's statistical analysis showed that approximately 50% of unrelated individuals also could not be excluded as contributors to the DNA profile found on the firearm. In other words, one out of every two randomly selected individuals could not be excluded. Defendant did not object to this testimony.

The Appellate Court held that the expert's testimony was irrelevant and should not have been admitted. Since the statistical evidence showed that 50% of the population could not be excluded as potential contributors, that probability did not make defendant's identification any more or less probable. It was thus irrelevant.

But the court further held that the admission of this testimony was not plain error. The evidence was not closely balanced and the error was not serious error and thus neither prong of the plain error doctrine was satisfied. Defendant's conviction was affirmed.

The dissent believed the evidence was closely balanced and thus would have reversed defendant's conviction.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)

People v. Roman, 2013 IL App (1st) 110882 (No. 1-11-0882, 11/6/13)

1. Evidence that defendant was a gang member or involved in gang-related activities is admissible to show a common purpose or design, or to provide a motive for an otherwise inexplicable act. However, due to the possibility of strong prejudice against street gangs, gang-related evidence is admissible only if there is adequate proof that membership or activity in the gang is related to the crime charged. The trial court must take great care in admitting gang-related testimony.

2. The trial court erred at a trial for first degree murder by admitting testimony from eyewitnesses that defendant was a member of the Latin Kings. The Court rejected the State's argument that such evidence strengthened eyewitness identifications of the defendant as one of the perpetrators. Although two of the eyewitnesses stated that they knew defendant was a gang member, none of the eyewitnesses based their identifications of defendant on that fact. Instead, the witnesses stated that they recognized the perpetrators of the offense because they had seen them in the neighborhood for several years. Thus, gang membership was not related to the identifications.

Similarly, the trial court improperly admitted photographs of defendant's tattoos and testimony from a police officer that the tattoos showed that defendant was a member of the Latin Kings. Although the judge also admitted this evidence to corroborate eyewitnesses' identifications, none of the witnesses mentioned the tattoos or suggested that the tattoos were an aid in identifying defendant as one of the perpetrators. Thus, the evidence was not relevant to the identifications and had the effect of inflaming the jury.

Furthermore, the gang evidence was not admissible to support the State's theory that the murder was gang related. The State argued that the perpetrators killed the victim to avenge a perceived slight to the Latin Kings a few weeks earlier, when workers at the factory where the offense occurred gave shelter to a man who was being beaten. The court stressed that the State failed to present any evidence to show that the instant offense was intended as retaliation for a perceived slight. In addition, there was no evidence that either this incident or the prior one was gang related, as there was no testimony that the perpetrators flashed gang signs, yelled gang slogans, or otherwise indicated that they were members of a gang.

3. The court concluded that the error was not harmless beyond a reasonable doubt, noting that there was no physical evidence tying defendant to the offense and that the admission of gang evidence always carries a strong risk of prejudice.

4. Finally, the trial judge erred by denying defense counsel's request to remove a "Gang Unit" sticker from the State's courtroom cart, especially since the State had no objection. Given the strong risk of prejudice that is inherent whenever a jury is exposed to gang-related evidence, the presence of the sticker on the cart had the potential to negatively impact the defense. The court stated, "Whether the case involves gang affiliation or not, fairness dictates that the cart be identified with a sticker that does not transmit a potentially prejudicial message, especially when an innocuous alternative is so easy."

(Defendant was represented by Assistant Defendant, Kristen Mueller, Chicago.)

People v. Santiago, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011)

1. Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. A defendant is entitled to have his guilt or innocence determined based on the evidence against him without being prejudged according to what has happened to another. **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978).

The court held that this rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

2. Nor was it error to elicit evidence of the sentences that the co-defendants received. The jury was not informed of the sentences for the improper purpose of suggesting that defendant faced a comparable sentence if convicted, but to emphasize the doubtful explanation offered by the co-defendants for their decision to plead guilty.

3. It was also not error for the prosecutor to elicit evidence that defendant was not present when the co-defendant pleaded guilty. This evidence was offered to provide a plausible explanation for the co-defendant's contrary testimony at trial, i.e., that defendant's absence at the plea hearing made it easier for

the co-defendant to testify to defendant's guilt, and defendant's presence at trial made it difficult for the co-defendant to repeat that testimony.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Starks, 2014 IL App (1st) 121169 (No. 1-12-1169, 6/4/14)

At defendant's trial for first degree murder, a police officer testified that while she and other officers were investigating an unrelated case at an apartment building, they observed defendant exit the back of the building and run through an alley while wearing a t-shirt and no shoes. When the officer stopped defendant and learned his name, she realized that he was the subject of an investigative alert.

A second officer testified that as part of the unrelated investigation, he entered an apartment where the door was ajar. He observed three handguns on the kitchen counter. One of the handguns was subsequently determined to have been the weapon used in the shooting with which defendant was charged.

DNA analysis revealed that the weapon used in the shooting contained the mixed DNA profiles of at least three people and that defendant could not be excluded as the primary contributor of the DNA. The shooting had occurred two months before the weapon was seized from the apartment.

1. The Appellate Court held that the trial judge erred by admitting evidence of weapons that were found in the apartment but which were not shown to have any connection to the offense. Evidence is generally admissible if it is relevant, but even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence is relevant if it has any tendency to make any fact of consequence to the action more or less probable than it would be without the evidence.

A weapon found in the defendant's possession is generally inadmissible unless it has some connection to the crime charged. For a weapon to be admitted, there must be evidence to connect it to both the defendant and the crime. Evidence that the weapon is suitable for commission of the crime satisfies the second element.

Here, it was error to admit the weapons because there was no evidence to connect them to the defendant. Not only was there no evidence to show that defendant possessed the weapons, there was no evidence to connect him to the apartment where the weapons were found. Defendant was stopped because, while police were investigating an unrelated offense, they saw him running barefoot through the alley. He was not seen leaving the apartment where the weapons were found, and there was no evidence to connect him to either the apartment or the two weapons that were not suitable for committing the offense. Under these circumstances, those weapons were irrelevant and should not have been admitted.

2. Because the evidence was closely balanced, admission of the weapons constituted error under the first prong of the plain-error doctrine. Even viewed most favorably to the State, the DNA evidence concerning the weapon merely established that defendant could not be excluded as one of three DNA contributors. The weapon which contained DNA was found some two months after the offense. The evidence against defendant consisted primarily of the testimony of three eyewitnesses who provided inconsistent accounts and only one of whom identified defendant in both the photo array and the physical lineup.

In addition, the State emphasized the erroneously admitted evidence in closing argument. Finally, the trial court's remarks at sentencing demonstrated the prejudice resulting from the erroneously admitted evidence. Under these circumstances, the introduction of weapons which had no connection to the defendant or to the offense constituted plain error.

3. The court noted that numerous studies have indicated that there is significant potential for error in eyewitness identifications and that jurors have misconceptions about the reliability of eyewitness testimony. In addition, whether trial courts should admit expert testimony on the reliability of eyewitness identification is a rapidly evolving area of the law.

Although the trial court has broad discretion in determining the admissibility of expert testimony,

the record showed that the judge rejected the motion without considering the relevance of the evidence in light of the facts of this case. Because the conviction was being reversed on other grounds, the court directed the trial court to give serious consideration to defendant's request to present expert testimony on eyewitness identification.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

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§19-3
Limited and Curative Admissibility

People v. Monroe, 66 Ill.2d 317, 362 N.E.2d 295 (1977) Evidence that is admissible for one purpose cannot be excluded because it would not be admissible for another purpose. However, the party against whom it is admitted may request appropriate instructions limiting the purpose for which it may be considered.

People v. Bradford, 106 Ill.2d 492, 478 N.E.2d 1341 (1985) To reduce the risk that a jury might consider impeachment as substantive evidence, an instruction concerning the limited use of the evidence should be given. See also, People v. Mitchell, 27 Ill.App.3d 117, 327 N.E.2d 158 (1st Dist. 1975) (reversible error for trial judge to refuse defendant's tendered instruction on the limited use of prior inconsistent statements).

People v. Payne, 98 Ill.2d 45, 456 N.E.2d 44 (1983) Where during cross-examination of an arresting officer, defense counsel asked whether the defendants and the apartment were searched, the State was allowed to introduce suppressed evidence to rebut the false impression that nothing had been found in the search.

People v. Garza, 92 Ill.App.3d 723, 415 N.E.2d 1328 (3d Dist. 1981) When evidence such as a prior inconsistent statement is introduced for a limited purpose, the trial judge normally has no duty to issue a limiting instruction *sua sponte*. Such a duty may exist when a prior statement is "extraordinarily long and repetitious such that the conviction becomes based upon unsworn statements" and where the prosecutor urges the jury to consider an unsworn statement as substantive evidence.

People v. Robinson, 121 Ill.App.3d 1003, 460 N.E.2d 392 (1st Dist. 1984) Trial judge did not err in failing to give a limiting instruction *sua sponte*.

People v. Godina, 223 Ill.App.3d 205, 584 N.E.2d 523 (3d Dist. 1991) A prosecutor may not offer evidence for a limited purpose and then make impermissible use of the evidence during closing argument. Where evidence that defendant had left town after the offense was admitted to show why no gunpowder tests were performed on his hands, the prosecutor erred by arguing to the jury that defendant's flight showed a consciousness of guilt.

People v. Liner, 356 Ill.App.3d 284, 826 N.E.2d 1274 (5th Dist. 2005) Where the defense established that a State's witness did not like the defendant, the State was not invited to elicit, under the doctrine of curative admissibility, that the basis for the dislike was that defendant had sold the witness fake drugs. The error was compounded when the prosecutor argued that defendant owned a Cadillac and had nice clothes because of his drug trade.

People v. Degorski, 2013 IL App (1st) 100580 (No. 1-10-0580, 10/17/13)

1. Occupation (reputable or disreputable) is an ordinary part of the background information elicited from any witness, and is properly considered in determining the weight to be given to the testimony of the witness.

It was not an abuse of discretion for the court to allow the former assistant State's Attorney who obtained a confession from the defendant to testify that he was now a judge, particularly where the State complied with the court's direction that it not give that fact undue emphasis, and the State did not argue that the jury should give the testimony of the witness greater weight because he was a judge. While a judge's occupation may lend an air of credibility to his testimony, the trier of fact is still free to disbelieve the witness.

2. The defense did not invite the former assistant State's Attorney's testimony that he found defendant's confession reliable. Defense counsel asked the witness only a general question about whether he sought to obtain statements that were uncontaminated by outside information. The answer was not a direct response to the question and was volunteered. The defendant could not complain about the witness's subsequent testimony that he believed the defendant when he confessed because that testimony was elicited when defense counsel continued to question the witness about his opinion of defendant's confession.

3. Much like police officers, assistant State's Attorneys are authority figures whose testimony may be prejudicial if they inform jurors that they should believe the prosecution's case. But there is a distinction between an assistant State's Attorney testifying to a prior opinion of belief in a defendant's statement at the time it was made, and offering a present opinion of defendant's guilt at trial. Present opinion testimony is improper; previous opinion testimony is permissible.

The testimony of a former assistant State's Attorney that he believed defendant's confession at the time of its making was not a present opinion of defendant's guilt and was permissible.

(Defendant was represented by Assistant Defender Charles Hoffman, Chicago.)

People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 (2d Dist. 2010)

1. Evidence is admissible if it: (1) fairly tends to prove or disprove the offense charged; and (2) is relevant in that it tends to make the question of guilt more or less probable. Evidence should be excluded if it is too remote in time or too speculative to shed light on a fact to be found.

At defendant's trial for robbery and aggravated battery, the State introduced evidence that 11 days following the offense in which complainant was robbed by two men, the police observed defendant and another man in dark clothing. Defendant first hid in a shadow, then ran when one of the officers identified himself as a policeman. The officer saw defendant grab at his waistband, trip, and fall. A handgun fell out of his pants. Defendant clenched his hands at his chest when the police attempted to handcuff him, causing the police to hit defendant in the face and rib cage with fists to effect his arrest. The court instructed the jury to consider that evidence for the limited purpose of explaining the circumstances of the arrest.

The Appellate Court concluded that the court abused its discretion in admitting evidence of defendant's possession of the handgun. The probative value of evidence that defendant possessed a gun 11 days after the offense did not outweigh the prejudicial effect of this evidence where the charged offense did not involve any element of possession or use of a weapon.

2. Presentation of irrelevant, prejudicial evidence of the gun was not justified based on the hypothetical possibility that defendant would claim that he was coerced into making incriminating statements by police brutality. Evidence of the gun was not necessary to rebut a theory of coercion because defendant's refusal to put his hands behind his back was sufficient to explain the officers' use of force in effecting the arrest. Although defendant had not informed the court that he would not pursue a theory of coercion and police brutality, a defendant is not required to forgo, in advance, a potential defense to preclude the State from introducing irrelevant, prejudicial evidence. Even if defendant had advanced a theory of coercion, evidence of the gun was not relevant.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Mandarino, 2013 IL App (1st) 111772 (No. 1-11-1772, 6/28/13)

Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary.

The Appellate Court concluded that defendant forfeited the issue where he did not argue at trial or in the post-trial motion that the testimony was inadmissible lay opinion. Furthermore, even if lay opinion was improperly admitted, the plain error rule did not apply where the evidence was not closely balanced.

In the alternative, the lay opinion was admissible on two theories - to rebut character evidence and under the doctrine of curative admissibility.

1. The court concluded that the defense introduced character testimony by eliciting evidence of defendant's exceptional performance and service records. Character evidence is generally inadmissible in a criminal trial unless introduced by the defendant, in which case the State is permitted to respond by offering its own character evidence. (Illinois Rule of Evidence 404). Here, the State rebutted the defense evidence of the accused's good character by showing that in light of the incident leading to the instant charges, the witness no longer viewed defendant as an excellent officer.

2. The evidence was also admissible under the curative admissibility doctrine, which allows the State to respond on redirect examination where the defendant has opened the door to a particular subject, even if the response elicits what would otherwise be inadmissible evidence. The purpose of the curative admissibility doctrine is to shield a party from unduly prejudicial inferences raised by the other side. Whether to allow curative evidence lies in the sound discretion of the trial court.

The court concluded that admitting the lay opinion of the witness, a deputy chief, "allowed the State to cure any impression . . . that [the witness] still regarded [defendant] to be an outstanding officer."

People v. Santiago, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011)

1. Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. A defendant is entitled to have his guilt or innocence determined based on the evidence against him without being prejudged according to what has happened to another. **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978).

The court held that this rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

2. Nor was it error to elicit evidence of the sentences that the co-defendants received. The jury was not informed of the sentences for the improper purpose of suggesting that defendant faced a comparable sentence if convicted, but to emphasize the doubtful explanation offered by the co-defendants for their decision to plead guilty.

3. It was also not error for the prosecutor to elicit evidence that defendant was not present when the co-defendant pleaded guilty. This evidence was offered to provide a plausible explanation for the co-defendant's contrary testimony at trial, i.e., that defendant's absence at the plea hearing made it easier for the co-defendant to testify to defendant's guilt, and defendant's presence at trial made it difficult for the co-defendant to repeat that testimony.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Villa, 403 Ill.App.3d 309, 932 N.E.2d 90 (2d Dist. 2010)

1. In Illinois, rules of evidence are derived both from case law and statutory authority. The legislature does not offend the separation of powers doctrine by enacting new rules of evidence, or by altering existing rules that were originally adopted by Illinois Supreme Court decisions.

By contrast, the legislature may not modify a Supreme Court Rule, which is promulgated under the Supreme Court's constitutional authority over the court system.

2. A defendant may "open the door" to what would otherwise be inadmissible evidence by testifying in a manner which can be reasonably construed as an attempt to mislead the jury. Here, defendant "opened the door" to evidence of his prior juvenile adjudication.

Defendant claimed that he gave police a false statement because he was afraid, and because he had "never been in a situation like that before." Defendant also stated, "I've never been in prison or nothing like that." Because 18 months earlier defendant had given the same two officers a statement about a different offense, "it is not unreasonable to construe [his] attempt to portray himself as unseasoned" as an attempt to mislead the jury.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

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§19-4
Direct and Circumstantial Evidence

People v. Rhodes, 85 Ill.2d 241, 422 N.E.2d 605 (1981) Circumstantial evidence is the proof of certain facts and circumstances from which the jury may infer other connected facts, which usually and reasonably follow according to common experience.

Fingerprint evidence is circumstantial evidence which attempts to connect the defendant to the offense alleged.

People v. Panus, 76 Ill.2d 263, 391 N.E.2d 376 (1979) Testimony that defendant admitted taking property from the victim's premises was direct evidence of guilt of burglary.

People v. Stokes, 95 Ill.App.3d 62, 419 N.E.2d 1181 (1st Dist. 1981) Direct evidence is proof of a fact without the necessity of inference or presumption, or evidence of a fact perceived by means of a witness's senses.

People v. Spataro, 67 Ill.App.3d 69, 384 N.E.2d 553 (3d Dist. 1979) Defendant's statements explaining how the incident occurred constituted direct evidence.

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§19-5
Demonstrative and Physical (Real) Evidence

People v. Woods, 214 Ill.2d 455, 828 N.E.2d 247 (2005) 1. When the State seeks to introduce an object into evidence, it must lay an adequate foundation by either identifying the object or establishing a chain of

custody. Where physical evidence is not readily identifiable or may be susceptible to tampering, the prosecution must show a chain of custody that is sufficiently complete to make it improbable that the evidence has been subjected to tampering or substitution.

To establish a *prima facie* showing concerning the chain of custody for controlled substances, the State must present evidence that reasonable measures were taken to protect the evidence. Once the State establishes a *prima facie* case, the burden shifts to the defendant to produce evidence of actual tampering or substitution. If such evidence is produced, the burden shifts to the State to rebut the claim. The defendant need not introduce evidence of actual tampering or substitution unless the State has established a *prima facie* case.

2. A defendant may waive the necessity of proving chain of custody by agreeing to a stipulation with respect to the evidence. The primary rule for interpreting stipulations is to ascertain and give effect to the intent of the parties. Generally, a defendant is precluded from attacking or contradicting facts to which he or she stipulated.

In addition, the defendant waives a challenge to the chain of custody where he fails to object at trial and raise the issue in a post-trial motion. Although the defendant is not required to raise a trial-level challenge to the sufficiency of the evidence, the court concluded that objections to the chain of custody involve the foundation for the admission of evidence, not the sufficiency of the evidence.

3. The plain error rule may apply where there is a complete breakdown in the chain of custody, including where the inventory numbers or descriptions of the recovered and tested items do not match. The plain error rule did not apply where: (1) the arresting officer testified that: (a) he recovered three zip-lock packets containing tin foil packets, (b) the packets were inventoried under a specified inventory number, and (c) "standard Chicago Police Department procedures" were followed with regard to inventorying the items, and (2) the parties stipulated that a forensic chemist: (a) received evidence under the same inventory number, (b) found the same number of packets in a sealed condition, and (c) performed tests which were positive for the presence of heroin.

4. In addition, defendant affirmatively waived any challenge by agreeing to a stipulation intended to eliminate any dispute with respect to the chain of custody. The court found that the State would not have agreed to stipulate to the forensic chemist's testimony, and thereby forfeit that testimony, unless the stipulation was intended to remove possible chain of custody issues. The court also noted that at trial defense counsel concentrated on whether the State had proven that defendant possessed the controlled substance, and did not claim that the evidence had been compromised.

People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920 (2000) The trial court abused its discretion by allowing the State to introduce a headless mannequin wearing the bloody and brain-splattered uniform of a deceased police officer, and by allowing the exhibit to be taken to the jury room. A uniform containing stains from the decedent's blood and brain matter is "uniquely 'charged with emotion.'" In addition, the jurors were exposed to the mannequin for an extended period of time both in the courtroom and during deliberations and were given rubber gloves to facilitate handling the exhibit in the jury room. Compare, People v. Henenberg, 55 Ill.2d 5, 302 N.E.2d 27 (1973) (demonstration involving the use of a model of a human skull was proper as a useful adjunct to pathologist's testimony as to the cause of death); People v. Mitchell, 78 Ill.App.3d 458, 397 N.E.2d 156 (1st Dist. 1979) (plastic torso).

People v. Pulliam, 176 Ill.2d 261, 680 N.E.2d 343 (1997) Generally, physical evidence may be admitted if there is proof to connect it to the defendant and the crime. However, evidence is inadmissible where its probative value is limited due to remoteness, uncertainty or unfair prejudice.

Where there was no testimony that defendant owned or had read a book found in his apartment after the offense, and no indication of its contents, there was no sound basis to believe it was relevant to the crimes. In addition, the fact that the defendant's apartment was unsecured for two days before the book was found "further diminished the book's relevance to defendant's role in the crimes." See also, People v. Miller,

173 Ill.2d 167, 670 N.E.2d 721 (1996) (testimony about women's clothing found in the apartment of a murder defendant was improperly admitted where the garments were not linked to any of the victims).

People v. Panus, 76 Ill.2d 263, 391 N.E.2d 376 (1979) The Supreme Court upheld the admission of a ground tiller into evidence although it was not identified by a serial number and had no peculiar characteristics. The trial judge may admit an item in to evidence when it is positively identified by a witness (the victim in this case) and is relevant.

The failure to identify an item by serial number is not fatal to its admission, but such a perceived weakness may be argued to the trier of fact. Likewise, an item's lack of peculiar characteristics is not fatal when the circumstances sufficiently connect the item with the crime and the defendant.

People v. Leeman, 66 Ill.2d 170, 361 N.E.2d 573 (1977) A plastic bag of LSD was properly admitted into evidence where police officers and a chemist identified the bag.

People v. Newbury, 53 Ill.2d 228, 290 N.E.2d 592 (1972) Evidence is not admissible if its relevance depends on an unproved assumption. Torn photo of accused found in effects of victim, offered to show disagreement about their planned marriage, was not admissible without a showing that it had been recently and deliberately torn by victim.

People v. Fierer, 124 Ill.2d 176, 529 N.E.2d 972 (1988) Generally, weapons are admissible if they are connected to the defendant and the crime. However, the State is not required to prove that the weapon found was the one actually used. Where there is evidence that a particular type of weapon was used in the crime and a similar weapon was found, the jury may reasonably infer that it was the one used to commit the offense.

However, when a completely different weapon or instrumentality is discovered, "[a]t some point the chain of inferences becomes so attenuated that the probative value of the evidence is outweighed by its prejudicial effect." Where the victim was killed by stab wounds, it was error for the State to introduce bottles of potassium cyanide and secobarbital which were found in defendant's car on the day of the killing.

People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296 (1994) 1. A fair sentencing hearing was denied by the prosecution's use of an eight-foot poster to display defendant's prior criminal record and criminal acts for which no convictions had occurred. Although the trial court may allow demonstrative aids that assist the jury in understanding testimonial evidence, a demonstrative exhibit may not merely summarize clearly understandable testimony. Because defendant's criminal history had been presented through certified copies of his convictions and by simple testimony, there was no legitimate need for a chart that "unfairly memorialized and unduly emphasized the evidence in aggravation."

The chart was especially prejudicial because in closing argument the prosecutor claimed to be outraged because defendant's criminal past was "eight feet tall." See also, People v. Kinion, 105 Ill.App.3d 1069, 435 N.E.2d 533 (3d Dist. 1982) (improper to allow chart to summarize diagnosis that defendant was sane).

2. In addition, a police officer who had been a principal State witness at trial should not have been allowed to tape the placards containing defendant's criminal history to the chart. Although the officer did not testify at the sentencing hearing, use of a police officer both as a witness and to assist the prosecution creates an unfair risk of prejudicing the jury.

People v. Lundy, 334 Ill.App.3d 819, 779 N.E.2d 404 (1st Dist. 2002) 1. Evidence of a proper chain of custody is required where physical evidence is not readily identifiable or is susceptible to tampering. The chain of custody is adequate where it shows an improbability that evidence has been changed or tampered with.

In the absence of evidence that evidence has been compromised, the State need not exclude every possibility of tampering. Instead, it need show only that it took reasonable steps to protect the evidence and that it is unlikely the evidence has been altered.

Where the State establishes a probability that the evidence was not compromised, any deficiency in the chain of custody goes to weight rather than admissibility, unless the defendant shows actual evidence of tampering or substitution.

2. The State failed to establish a sufficient chain of custody for suspected controlled substances where it showed only that the substances seized by the arresting officer were filed under the same inventory number as substances delivered to the crime lab. Without more detailed descriptions of the exact number of bags or the nature of the shiny object, the inventory number was the only link between the substance seized from the defendant and that tested by the lab. The court also noted several inconsistencies between the officer's description of the evidence he seized and the items tested by the lab, and the failure of the stipulation to describe the "packages" at all. See also, People v. Moore, 335 Ill.App.3d 616, 781 N.E.2d 493 (1st Dist. 2002) (the State failed to establish a sufficient chain of custody to establish that defendant committed delivery of a controlled substance; a stipulation was inadequate where defense counsel repeated the State's proposed stipulation but omitted any reference to chain of custody, and immediately thereafter moved for a directed verdict because the chain of custody was inadequate; the State presented no evidence of the procedures employed to protect the evidence, and failed to show that the inventory number of the substance tested by the lab was the same as the number under which the evidence was inventoried; chain of custody issues may be treated either as trial error or as a failure to prove the defendant's guilt beyond a reasonable doubt); People v. Howard, 387 Ill.App.3d 997, 902 N.E.2d 720 (2d Dist. 2009) (Illinois law allows the use of unique identifiers, such as police inventory numbers, to show that the same evidence was seized and tested; the foundation was insufficient where inventory number were not used but officers who processed the substance after the arrest testified that they marked the evidence bag with their initials, badge numbers, the date, and other unspecified information).

3. Defendant did not waive the argument by failing to argue that the narcotics recovered by the arresting officer were contaminated, tampered with or substituted. Because the State failed to sustain its burden of proof concerning the chain of custody, defendant's burden to show actual evidence of tampering or substitution was never triggered.

People v. Rhoades, 74 Ill.App.3d 247, 392 N.E.2d 923 (4th Dist. 1979) In establishing chain of custody, the State is not required to exclude all possibility of tampering. In the absence of any tangible suggestion of tampering, alteration or substitution, it is sufficient to prove a reasonable probability that the articles have not been changed in any important respect. The defendant's reliance on the absence of proof of exclusive control at all amounts to mere speculation of alteration, which is insufficient to undermine the foundation laid for the admission of the evidence. See also, People v. Valentin, 66 Ill.App.3d 488, 384 N.E.2d 67 (1st Dist. 1978) (physical evidence was admissible, though the testifying officer could not identify it, where there was proof of chain of custody; State demonstrated reasonable probability that the exhibit had not been changed in any important respect: police placed the item in a sealed, initialed envelope which was locked in a safe, and after opening the sealed envelope and examining the contents the chemist placed the item and envelope into a larger, heat sealed envelope that was identified at trial).

People v. Whirl, 351 Ill.App.3d 464, 814 N.E.2d 872 (2d Dist. 2004) The State failed to provide a sufficient chain of custody to sustain a conviction for possession of a controlled substance where the evidence showed that defendant spit out one packet during a search of his mouth, but the officer testified that he recovered two "packs." In addition, the recovering officer gave the items to unidentified officers from another police department, and the stipulation concerning the crime lab analyst did not indicate when the analyst received the baggies or the name of the officer who delivered them. Despite the presence of photographs showing the baggies as they appeared on the night they were recovered, the court concluded that the chain of custody was

"missing too many links" concerning the location in which the second baggie was found, the length of time the second baggie was unaccounted for, the identity of person who handled the evidence between the time it was turned over to the transport officers and the time it was delivered to the crime lab, and the date on which the crime lab received the evidence.

People v. Terry, 211 Ill.App.3d 968, 570 N.E.2d 786 (1st Dist. 1991) At a bench trial for possession of a controlled substance, it was error to introduce alleged cocaine where disparities in the number and weight of the bags seized and the color of the powder suggested that the police had commingled evidence from unrelated arrests.

People v. Gibson, 287 Ill.App.3d 878, 679 N.E.2d 419 (1st Dist. 1997) Where evidence is not readily identifiable or is susceptible to alteration, the State must show "a chain of custody of sufficient completeness to render it improbable that the [evidence] has been tampered with, exchanged or contaminated." Where the testimony of a veteran narcotics officer showed that all of the substance recovered weighed approximately 2 grams, the stipulation offered at trial was that the same evidence weighed 9.3 grams, and there was no evidence showing the evidence's handling and safekeeping, the State failed to demonstrate a reasonable probability that the evidence had not been altered or substituted.

People v. Mendoza, 62 Ill.App.3d 774, 379 N.E.2d 380 (4th Dist. 1978) Proof of chain of custody was not required when two store security officers identified the items stolen from the store.

People v. Tolefree, 9 Ill.App.3d 475, 292 N.E.2d 452 (1st Dist. 1972) In a burglary prosecution, precise identification of property taken is not required when the character of the property is such that exact identification is difficult.

People v. Slaughter, 149 Ill.App.3d 183, 500 N.E.2d 662 (1st Dist. 1986) There was not a sufficient chain of custody for cannabis allegedly possessed by defendant. Two hand-rolled cigarettes were removed from defendant's wallet and placed in an envelope that was in turn placed in a safe. Two days later a person who identified himself as an employee of the work release center gave an envelope containing two hand-rolled cigarettes to the presiding judge, who in turn gave them to the prosecutor. Neither the judge nor the prosecutor were acquainted with or knew the name of the above person, the guard who removed the cigarettes from defendant's wallet did not identify the envelope or mark and seal it, and the record was inconclusive with respect to whether access to the safe was restricted.

People v. Rogers, 42 Ill.App.3d 499, 356 N.E.2d 413 (3d Dist. 1976) The introduction of bloodstained clothing was error where there was no proper foundation. Although the clothing was allegedly taken from the victim at a hospital, there was no testimony to that effect and no evidence to establish any chain of custody. Although the items were examined by an expert, he did not testify whether the blood type on the clothes was the same type as the victim's.

Smith v. Ohio Oil Co., 10 Ill.App.2d 67, 134 N.E.2d 526 (4th Dist. 1956) Physical or real evidence refers to some object which had a direct part in the incident in question. Demonstrative evidence refers to evidence that has no probative value in itself and played no part in the incident, but is used as a visual aid to the trier of fact in understanding the testimony of witnesses. Such evidence includes models, charts, and drawings.

People v. Rose, 77 Ill.App.3d 330, 395 N.E.2d 1081 (1st Dist. 1979) The admissibility of courtroom demonstrations is within the discretion of the trial court. The court did not err in refusing to allow the defendant to demonstrate how nylon stockings distort facial features, because defendant failed to establish that the demonstration would be conducted under conditions and circumstances substantially similar to those

existing at the time of the offense. See also, People v. Soto, 35 Ill.App.3d 166, 341 N.E.2d 107 (1st Dist. 1975) (trial judge did not abuse discretion by prohibiting demonstration concerning identification where there was insufficient foundation of similarity of conditions).

People v. Frisco, 4 Ill.App.3d 1034, 283 N.E.2d 277 (1st Dist. 1972) The use of a model is proper to show a particular situation, to explain the testimony of a witness and to enable the jury to apply the testimony more intelligently to the facts.

People v. Yelliott, 156 Ill.App.3d 601, 509 N.E.2d 111 (4th Dist. 1987) A gun is "relevant evidence" only if it is connected to the crime. There was no such connection where the gun was not shown to have been in defendant's possession or used in the crime, and the uncontradicted evidence was that the gun had not been used. See also, People v. Jackson, 195 Ill.App.3d 104, 551 N.E.2d 1025 (1st Dist. 1990) (error to introduce handgun where only eyewitness to offense testified that the weapon was not the one used); People v. Fields, 258 Ill.App.3d 912, 631 N.E.2d 303 (1st Dist. 1994) (error to admit screwdriver found on defendant's person where the complainant testified unequivocally that she had been robbed with a knife; the screwdriver was not connected to the crime).

People v. Wade, 51 Ill.App.3d 721, 366 N.E.2d 528 (5th Dist. 1977) It was reversible error for the State to elicit testimony about a gun found on the defendant at the time of his arrest, and then stipulate that ballistics would show that the gun was not the murder weapon.

People v. Liapis, 3 Ill.App.3d 864, 279 N.E.2d 368 (1st Dist. 1972) At arson trial, testimony concerning an oil can was improper since there was no showing of a connection between the can or its contents and the fire.

People v. Davenport & Clemons, 301 Ill.App.3d 143, 702 N.E.2d 335 (1st Dist. 1998) The court criticized the State for requiring defendant to physically exhibit his tattoos in open court. "The State certainly had less inflammatory means of presenting the tattoos to the jury, such as by photographs."

People v. Smith, 321 Ill.App.3d 669, 749 N.E.2d 986 (1st Dist. 2001) 1. A videotape containing both sound and video components is admissible where the proponent satisfies the foundation requirements for both a motion picture and a sound recording. A sufficient foundation to admit a motion picture occurs where a witness with personal knowledge of the filmed object testifies that the film is an accurate portrayal of what it purports to show. A sufficient foundation to admit a sound recording occurs where a party to the conversation testifies to the accuracy of the recording and there is no claim that changes or deletions have occurred. Where no party to the conversation testifies concerning the accuracy of the recording, a sufficient foundation is established by evidence of the: (1) capability of the device for recording, (2) competency of the operator, (3) proper operation of the device, (4) preservation of the recording with no changes, additions or deletions, and (5) identification of the persons whose speech is recorded.

2. The State laid a sufficient foundation to introduce a motion picture - a detective testified that he was familiar with the defendant and the principal from seeing them in the neighborhood. However, there was no foundation to admit the audio portion of the videotape; no party to the conversation testified, and there was no evidence concerning the device's capability to record or proper operation, the competency of the operator, or that the recording had been preserved without changes. Thus, the trial court erred by admitting the audio portion and an accompanying transcript.

3. The court rejected the State's argument that admission of the videotape was harmless because defendant gave a "reported statement in which he admitted his guilt." Error cannot be held harmless where there is a reasonable possibility that incompetent evidence contributed to the conviction.

People v. Vaden, 336 Ill.App.3d 893, 784 N.E.2d 410 (3d Dist. 2003) 1. Generally, a sufficient foundation

for the admission of a videotape is established when a witness with personal knowledge of the filmed object testifies that the film is an accurate portrayal of what it purports to show. In addition, under the "silent witness" theory, photographic evidence may be admitted, without the testimony of a witness, if there is sufficient proof that the process which produced the photograph or videotape is reliable.

The court concluded that the tape in this case was properly authenticated on two theories - by the testimony of the officers that it accurately depicted what they observed, and under "silent witness" theory. Concerning the second theory, the court noted that the officer who set up the video equipment testified that it was working properly, that he had set up the equipment on numerous previous occasions, and that no one interfered with the equipment during the incident. There was also testimony that the videotape was placed in a sealed evidence bag until trial, and that it had not been tampered with or altered.

2. Where there is no party to a conversation to testify to the accuracy of a sound recording, a sufficient foundation for admissibility is shown by evidence concerning the capability of the recording device, the competency of the operator, the proper operation of the device, the preservation of the recording with no changes, and identification of the speakers. The court concluded that where the officer who set up the equipment testified as to its capability, and said that he had installed such equipment at least 100 times, the tape recorder operated properly, the tape was removed after the conversation and placed in a sealed bag, and a second officer monitored the conversation and testified that the recording accurately represented the conversation, the foundation was clearly adequate to justify admission of the tape.

People v. Hunt, 381 Ill.App.3d 790, 886 N.E.2d 409 (1st Dist. 2008) A partly inaudible sound recording is inadmissible if the inaudible portions are so substantial as to render the recording untrustworthy as a whole. Whether a partially audible recording should be admitted is a matter of the trial court's discretion.

The trial court did not abuse its discretion by finding that tapes were so inaudible as to be useless.

Cumulative Digest Case Summaries **§19-5**

People v. Alsup, 241 Ill.2d 266, 948 N.E.2d 24 (2011)

Before the State can introduce results of chemical testing of a purported controlled substance, it must provide a foundation for its admission by showing the police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist. Once the State establishes this *prima facie* case, the burden shifts to the defense to show actual evidence of tampering, alteration, or substitution. The State need not produce every person in the chain of custody to testify, nor must the State exclude every possibility of tampering or contamination. Deficiencies in the chain of custody go to the weight, not the admissibility, of the evidence.

Because the chain of custody establishes the foundation for the admission of the testing as relevant and admissible, a challenge to the chain of custody is not a challenge to the sufficiency of the evidence, and is not exempt from forfeiture. When a challenge to the chain of custody is not preserved for review, it may be considered only under the plain-error doctrine. The plain-error doctrine applies only if there is a complete breakdown in the chain of custody, amounting to a complete failure of proof, where there is no link between the substance tested and the substance recovered by the police. **People v. Woods**, 214 Ill.2d 455, 828 N.E.2d 247 (2005), did not create a *per se* rule that plain error occurs where there is a mismatch between the inventory numbers of descriptions of the items recovered and items received. **Woods** merely hypothesized that such mismatches could be reviewable as plain error where there is a dearth of other evidence of the chain of custody.

The State met its burden of a *prima facie* case that the items recovered and tested were the same, and the defense did not satisfy its burden of rebutting this case with evidence of actual tampering, alteration and substitution. A police officer testified that he recovered five tinfoil packets of suspected heroin and ten baggies of suspected cocaine and used reasonable protective measures to ensure the safekeeping of the

evidence from the time that he seized it until it was placed in an evidence vault in a heat-sealed package. The parties stipulated that the forensic chemist received a heat-sealed package with the same inventory number as testified to by the officer, and that the chemist would testify to the maintenance of a proper chain of custody "at all times." Even though the stipulation also specified that the chemist received and tested nine items of suspected heroin, this discrepancy only went to the weight, not the admissibility, of the evidence as there was no complete breakdown in the chain of custody.

Also with regard to the five-versus-nine discrepancy, the court concluded that any issue as to the chain of custody was entirely removed from consideration by the stipulation because the defense action in agreeing to the stipulation deprived the State of the opportunity to correct or explain the discrepancy.

(Defendant was represented by Assistant Defender Michael Bennett, Chicago.)

People v. Betance-Lopez, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)

Generally, the trial court may admit a written transcript of a recording to assist the trier of fact. However, it is the recording itself, and not the transcript, that constitutes evidence.

The court concluded that the general rule is "impractical, or even impossible," where the recording contains statements in a foreign language. In such a case, it is not possible for the trier of fact to rely on the recording to the exclusion of an English translation. Thus, where the recording contained questions and answers in Spanish which were then translated by one of the officers conducting the interrogation, the trial court did not err by admitting a subsequently prepared English transcript as substantive evidence.

The court rejected the argument that because the recording contained the officer's English translation of statements which defendant made in Spanish, the trial court should not have relied on the subsequently-prepared transcript. The court noted that the translator who prepared the transcript had the luxury of listening to the recording, multiple times if necessary, to ensure that the translation was accurate. In addition, defendant conceded that there was a proper evidentiary foundation for the transcript. Under these circumstances, the trial court did not err by admitting the transcript.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

People v. Blankenship, 406 Ill.App.3d 578, 943 N.E.2d 111 (2d Dist. 2010)

1. Before real or physical evidence may be admitted, the State must provide a foundation showing that the item in question was involved in the offense and is in substantially unchanged condition. Where an item is readily identifiable, has unique characteristics, and is not easily subject to change, an adequate foundation consists of testimony that it is the item that was recovered and is in substantially the same condition.

By contrast, where the item is not readily identifiable and may be susceptible to tampering, the State must establish a chain of custody. Suspected controlled substances are not readily identifiable and may be susceptible to tampering, and thus require a chain of custody.

A chain of custody is sufficient where it is sufficiently complete to make it unlikely that the evidence has been subjected to tampering or substitution. Unless the defendant produces evidence of actual tampering, substitution, or contamination, the State is not required to produce testimony from every person in the chain or to exclude every possibility of tampering. However, the State must show that reasonable measures were taken to protect the evidence and that it is unlikely that the evidence has been altered.

2. Where the State fails to produce testimony from every person in the chain of custody, it may establish a sufficient foundation by showing that a "unique identifier" was placed on the evidence and that the code on the container sent out matched the code on the container which the next custodian received. The State failed to show an adequate chain of custody here; although a "case number" was placed on the container of suspected cocaine seized from the defendant and a similar code was on the container received by the crime lab, there was no testimony as to what the number signified or that it was unique to the defendant. Because more than one person was arrested during the incident, the case number may have been a general designation for the search warrant or the incident as a whole, and not a unique identifier for

evidence seized from the defendant.

3. A second method by which the State might establish a *prima facie* chain of custody without calling every person in the chain is by showing that the condition of the evidence when delivered to one custodian matched the description of the evidence when it was transmitted by an earlier custodian. Here, the State satisfied this method - the officer who processed the suspected cocaine seized from the defendant testified that the exhibit introduced at trial was in the same or substantially the same condition as when he last saw it, except that the Illinois State Police Lab had opened the bottom of the package and divided the substance into two parts. That testimony was consistent with the lab analyst's testimony concerning her treatment of the exhibit as part of the testing process. In addition, the analyst testified that the weight of the sample she received was consistent with the weight of the sample transmitted by the officer.

4. Because the State made a *prima facie* showing of a chain of custody, defendant had the burden of producing evidence of actual tampering, substitution, or contamination. Defendant failed to offer such evidence by supplementing the record with police reports showing that suspected cocaine was seized from more than one person during the incident. Because the police reports were not introduced at trial, they could not be considered on appeal. In the absence of the reports, the record showed that more than one person was arrested in the incident, but not that suspected controlled substances were seized from anyone other than the defendant.

(Defendant was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Dennis, 2011 IL App (5th) 090346 (No. 5-09-0346, 8/31/11)

There are two ways in which a foundation to admit a visual recording may be provided. A traditional foundation occurs where a witness can authenticate the content of the recording by testifying that the recording accurately represents what he or she personally saw or heard when the event portrayed by the recording occurred. When a foundation is provided in this way, additional authentication such as a chain of custody is unnecessary.

Alternatively, the court can admit a recording as substantive evidence based on a foundation which establishes the recording's authenticity by other means. Under the "silent witness" theory, a recording may be admitted without the testimony of an eyewitness to the event if there is sufficient proof that the process which produced the recording was reliable. Under this method, the proponent of the evidence must show the capability of the device for recording, the competency of the operator, the proper operation of the device, the preservation of the recording without changes, additions or deletions, and the identification of the persons, locale or objects depicted sufficiently to make a clear showing that the recording is relevant. This method of showing foundation implicitly includes preservation of a chain of custody and an explanation of any copying which shows that during the process there were no changes, additions, or deletions.

Without fully explaining its holding, the court concluded that the State provided a sufficient foundation, under the "silent witness" theory, to admit a surveillance tape and three still photographs created from the tape. After an armed robbery was reported, a crime scene investigator went to the scene. He then asked the owner of the security company which had installed the security system to come to the store. The investigator and the security company owner watched the videotape at the store. At the request of the investigator, the security company owner burned two copies of the tape on CD's. The investigator took one of the CD's to his office and labeled it to show the date and the name of the person who had created it.

The court noted the failure of the defense to claim that the recording was not authentic or accurate, and held that in the absence of actual evidence of tampering the State is required to show only a probability that no tampering, substitution, or contamination occurred.

Defendant's conviction for armed robbery was affirmed.

(Defendant was represented by Panel Attorney Pamela Lacey, Benton.)

People v. Flores, 406 Ill. App.3d 566, 941 N.E.2d 375 (2d Dist. 2010)

1. Videotape and photographic evidence may be admitted at trial for one of two purposes. First, a

tape or photograph may be admitted as demonstrative evidence, to illustrate a witness's testimony. A foundation for the demonstrative use of a videotape is established by the testimony of a witness with personal knowledge of the photographed object that at the time relevant to the issue, the videotape is a fair and accurate representation of the object. When a tape is used as demonstrative evidence, the fact that it has been edited goes to weight rather than admissibility.

Where a videotape is admitted as substantive evidence, by contrast, an adequate foundation requires a showing that the original videotape has been preserved without change, addition or deletion. If a copy of the tape is introduced, there must be an explanation of the copying process which satisfies the court that there were no changes, additions or deletions in the exhibit that was admitted at trial. Due to the ease with which digital images can be manipulated with modern editing software, the State may be required to show a chain of custody which shows that the image has not been altered.

2. At defendant's trial for driving with a suspended or revoked license, a witness testified that a video which he took was an accurate portrayal of the defendant's actions at the time of the offense. However, the witness also admitted that the exhibit was a copy of the original tape and that he had erased images which concerned personal matters unrelated to the offense. Because the exhibit was not the original tape but an edited copy, and because the witness "seemed to go out of his way to obscure the process by which he produced" the exhibit and made "reconstructing the process . . . a matter of guesswork," the exhibit was admissible only as demonstrative evidence. Because the trial court abused its discretion by relying on the tape as subjective evidence, the conviction for driving with a revoked or suspended license was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Maldonado, 398 Ill.App.3d 401, 922 N.E.2d 1211 (1st Dist. 2010)

1. To preserve an issue for appeal, the defendant must: (1) object at trial or raise the issue in a motion *in limine*, and (2) present the issue in a post-trial motion. Here, defendant preserved an issue concerning the admissibility of gang-related evidence when he replied to the State's motion *in limine* to admit the evidence and raised the issue in the post-trial motion.

Even had the defendant not preserved the issue, it would have been reviewable as plain error because the evidence was closely balanced and the improperly admitted evidence could have affected the outcome of the trial. (See **WAIVER – PLAIN ERROR – HARMLESS ERROR**, §§56-1(b)(2), 56-2(a)(3)).

2. Evidence of gang-related activity is admissible only where there is sufficient proof that such activity is related to the crime charged. Here, the trial court admitted the evidence for the limited purpose of impeaching two of the State's witnesses who had recanted their pretrial statements. Although the State acknowledged that it lacked evidence to show that the crime was gang-related, it presented additional gang evidence that had nothing to do with the impeachment of the witnesses. In addition, it used that evidence in closing argument to suggest a possible gang motive for the offense.

Because the improperly-admitted evidence may have affected the verdict, a new trial was required.

3. The trial court erred by allowing the State to introduce evidence that a shotgun was recovered from defendant's residence, because the offense had been committed with a handgun and no connection was shown between the weapon and the defendant. In the court's view, the State introduced the evidence solely to suggest that the shotgun must have belonged to the defendant, and that "someone who possesses a shotgun is more likely to commit a murder than someone who does not."

4. Evidence that a witness made a prior consistent statement is generally inadmissible for the purpose of corroborating trial testimony, unless the opposing party contends that the witness recently fabricated his or her testimony and the prior statement was made before the alleged motive to fabricate arose. Here, the trial judge improperly admitted prior consistent statements which were made after the alleged motive to fabricate came into existence.

Defense counsel argued that when the witness was first interviewed by police, she truthfully said that she had no knowledge of the offense. Counsel alleged that after being detained at the police station for

several hours, the witness falsely inculpated the defendant. Counsel also argued that the witness repeated the false accusation in her testimony before the grand jury and at trial.

Because the statements which were admitted to corroborate the witness's trial testimony - her statement at the police station and her grand jury testimony - were both made after the motive to falsify arose, they did not rebut counsel's allegations and should not have been admitted.

Defendant's conviction for first degree murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Montes, 2013 IL App (2d) 111132 (No. 2-11-1132, 6/28/13)

1. An adequate foundation for the admission of a sound recording as demonstrative evidence exists if a witness to the recorded conversation testifies that the recording accurately portrays the conversation in question. Admission of the recording substantively requires that a proper foundation be laid demonstrating the accuracy and reliability of the process that produced the recording. Each case must be evaluated on its own. The factors examined to determine whether the foundation is adequate vary depending on the facts of each case.

A prosecution witness testified that the recording was an accurate recording of the conversations and events that he witnessed and recorded. An FBI agent testified that she gave the witness the recording device. The witness testified that he turned on the device. The fact that the recording exists is evidence that the device was functional and that the witness knew how to operate it. The agent met with the witness after the events and took the recording from him.

This evidence was sufficient foundation for the admission of the recording even though there is no evidence to whom the agent gave the recording and who transferred the recording onto a CD. A strict chain of custody is not necessary as long as there are other factors demonstrating the authenticity of the recording. Here the witness testified that he gave the recording to the agent, the agent testified that she received it from witness and took it to be downloaded, and the witness testified that he listened to the downloaded recording and it was accurate. Any gaps in the chain of custody go to the weight, not the admissibility, of the evidence.

2. A court may permit jurors to use a written transcript of recorded conversations to assist them while they listen to the recording.

The trial court did not abuse its discretion in allowing the jury to follow along on a transcript of a recording prepared by the FBI while the recording was played at trial, where the court instructed the jury that the transcript was only a guide. The recording itself was admitted into evidence. The court collected the transcript after the jurors heard the recording, and denied the jury's request for the transcript during deliberations. A witness who was present at the recorded conversation identified the speakers, who were not identified on the transcript. While the witness testified that at one point the transcript did not accurately reflect what was recorded, the witness explained the alleged inaccuracy to the jury, and the jury was free to accept or reject the explanation.

People v. Taylor, 398 Ill.App.3d 74, 922 N.E.2d 1235 (2d Dist. 2010)

1. There are two ways in which a foundation for the admission of an audio or visual recording can be proven, depending on whether the witness can: (1) authenticate the contents of the recording based upon personal observation of the event portrayed by the recording, or (2) authenticate the operation of the device and process that produced the recording. Where the authenticating witness observed the event and testifies that the recording accurately represents what he or she personally saw or heard, a sufficient foundation has been established. Additional authentication, such as a chain of custody, is unnecessary.

By contrast, where the witness did not observe the event and cannot authenticate the recording as true and accurate, the recording may be admitted as primary, substantive evidence based on a foundation establishing that the process of the recording creates an accurate record (i.e., a "silent-witness" foundation).

2. Where the State sought to admit a VHS tape which had been created from data stored on the hard drive of a surveillance device, it was required to lay a foundation which showed both the reliability of the

device which recorded the original digital image and the reliability of the process by which the digital image was converted to an analog format and placed on the tape.

Unless a colorable attack is made concerning the recording's authenticity and accuracy, the proponent of the evidence is generally required to show a probability that tampering, substitution or contamination did not occur. Factors relevant to the reliability and relevancy of a recording include the capability of the recording device, competency of the operator, proper operation of the device, preservation of the recording without changes, and identification of any speakers. A chain of custody will generally be required to show that the State took reasonable protective measures and that no alteration likely occurred. Finally, evidence of any copying process must show that there were no changes, additions or deletions to the recording.

The court acknowledged that a chain of custody is unnecessary where an item of evidence is "relatively impervious to change." However, given the availability of modern editing capabilities, a digital recording is clearly not impervious to change.

3. Here, the State failed to establish even the probability that the recording, which purportedly showed the defendant in an office from which money was stolen, had not been subjected to tampering. The tape contained several "jumps" which were not explained by the testimony concerning the operation of the device, and there were unresolved issues concerning the capability and proper operation of the recording devices.

Furthermore, the State presented no evidence to exclude the possibility that the tape had been edited. There was no evidence of the process used to transform the data from the hard drive to the VHS tape, the identity of the person who performed the transfer, or the process by which the conversion from digital to analog format occurred.

Defendant's conviction for theft of property of less than $300 was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

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§19-6
Re-opening Evidence, Rebuttal, Surrebuttal

People v. Cross, 40 Ill.2d 85, 237 N.E.2d 437 (1968) It is within the sound discretion of the trial court whether a case may be reopened. There was no abuse of discretion in allowing State to reopen its case to prove corporate ownership at a burglary trial; only a formal matter was involved, and the defense was not surprised. See also, People v. Harris, 74 Ill.2d 472, 386 N.E.2d 60 (1979) (it is within the sound discretion of the trial court to permit the recall of witnesses).

People v. Daugherty, 43 Ill.2d 251, 253 N.E.2d 389 (1969) Rebuttal evidence is that which explains, repels, contradicts or disproves the evidence of the opposing party. See also, People v. Rios, 145 Ill.App.3d 571, 495 N.E.2d 1103 (1st Dist. 1986) (the decision to admit rebuttal testimony is within the sound discretion of the trial judge).

People v. Waller, 67 Ill.2d 381, 367 N.E.2d 1283 (1977) The trial court did not err by allowing certain testimony as rebuttal although it would have been admissible in the State's case in chief. The order of proof is subject to the broad discretion of the trial court, which did not abuse its discretion.

People v. Jose, 241 Ill.App.3d 104, 608 N.E.2d 667 (5th Dist. 1993) The trial court did not abuse its discretion by refusing to reconsider its ruling on a motion to suppress or reopen the evidence. The State did

not seek to reopen the evidence until after it received an adverse ruling, the evidence had been available at all times, and the State offered no explanation for its actions other than "oversight" or lack of diligence. "We do not think the State can, through neglect or lack of diligence, fail to produce evidence which it contends supports its case and then, after receiving an adverse ruling, seek to introduce that evidence and have the court reconsider its ruling."

People v. Zambrano, 188 Ill.App.3d 432, 544 N.E.2d 964 (1st Dist. 1989) The trial judge did not abuse discretion by refusing to allow defendant to reopen his case and call a certain witness - defendant had not exercised due diligence by contacting the witness earlier, and the testimony would not have changed the outcome.

People v. Gardner, 47 Ill.App.3d 529, 362 N.E.2d 14 (5th Dist. 1977) Rebuttal evidence is that which explains, repels, contradicts or disproves evidence presented by the defendant. A rebuttal witness may be called to contradict the defendant's testimony as to a material issue, but not as to a collateral or immaterial matter. See also, People v. Allen, 27 Ill.App.3d 1054, 327 N.E.2d 387 (1st Dist. 1975) (same); People v. McGhee, 20 Ill.App.3d 915, 314 N.E.2d 313 (1st Dist. 1974) (rebuttal testimony concerning defendants' conduct while in lockup was improper because it was collateral to substantive issues; defendant was prejudiced because trial judge's remark indicated he relied on the testimony).

People v. Perez, 209 Ill.App.3d 457, 568 N.E.2d 250 (1st Dist. 1991) The trial judge erred by refusing to allow defendant to call a surrebuttal witness to impeach an informant. Because the State introduced new evidence in rebuttal, defendant was entitled to present a witness who would have rebutted the new evidence. See also, People v. White, 14 Ill.App.3d 1079, 303 N.E.2d 36 (3d Dist. 1973) (the failure to grant defendant the opportunity for surrebuttal was reversible error).

People v. Williams, 180 Ill.App.3d 294, 535 N.E.2d 993 (1st Dist. 1989) The trial judge did not abuse discretion by denying defendant's request to testify in surrebuttal. In rebuttal, State witnesses contradicted the defendant's testimony. The defendant then wished to testify in surrebuttal to deny what the rebuttal witnesses had said. Since the defendant would not have testified as to any new matter, surrebuttal was not warranted.

People v. Goff, 299 Ill.App.3d 944, 702 N.E.2d 299 (1st Dist. 1998) The trial judge erred by refusing to reopen evidence to hear the testimony of an eyewitness who had been listed as a potential witness by both parties and who would have testified that: (1) the defendant did not commit the crimes, and (2) he did not see the State's primary witness at the scene. Although it is within the trial court's discretion to determine whether to grant a motion to reopen the proofs, the court should exclude defense testimony only in the most extreme circumstances. "Society's interest in the efficient administration of justice has to be balanced with a defendant's constitutional right to a fair opportunity to defend."

Where the testimony was material and might well have affected the outcome of the case, the witness was in court and ready to testify, and the prosecution would not have been unfairly surprised, exclusion of the exculpatory testimony could not be justified.

Cumulative Digest Case Summaries **§19-6**

People v. Ward, ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 108690, 6/16/11)

If a defendant is tried on certain enumerated sex offenses, the State may introduce evidence that the defendant also committed another of the specified sex offenses. Such evidence may be admitted for any relevant purpose, including defendant's propensity to commit the charged offense. 725 ILCS 5/115-7.3(b).

The statute also permits admission of "evidence to rebut that proof or an inference from that proof." A balancing test is applied to determine if a court should admit evidence pursuant to the statute, weighing the probative value of the evidence against the undue prejudice it may produce against the defendant. 725 ILCS 5/115-7.3(c).

Enhancement of the jury's truth-finding function is also a consideration in judging the admissibility of evidence pursuant to §115-7.3. To perform its function of assessing the credibility of witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from the evidence, the jury must have access to as much relevant, admissible evidence as possible. Without that evidence, the reliability of the jury's conclusions are called into question.

At defendant's trial, the circuit court admitted evidence of defendant's commission of a separate sex offense as propensity evidence pursuant to §115-7.3, but barred the admission of evidence that defendant had been acquitted of that offense. Applying the balancing test of §115-7.3(c), the Illinois Supreme Court concluded that it was error to bar the acquittal evidence.

The probative value of the acquittal evidence was its ability to provide a more complete context for the testimony of the other-crime complainant. The similarities between the two crimes greatly enhanced the probative value of the other-crime evidence. Excluding evidence that defendant had been acquitted of the other crime limited the jury's ability to assess the testimony of the other-crime complainant and may have enhanced her credibility because the jury did not hear all of the evidence leading to defendant's prior acquittal that could have affected the jurors' consideration of her credibility. The complete absence of any reference to the outcome in that case severely restricted defendant's ability to provide context for her allegations. The highly inflammatory nature of those allegations and the grave danger of excessive sympathy for the alleged victim added to defendant's need to counter the impact of that evidence with the acquittal evidence.

There was also a readily-apparent potential for unfair prejudice to the defendant from the other-crime complainant's detailed testimony, followed by her statement that she had previously testified in another case. Given the graphic nature of her depiction of the attack, the jury would naturally assume that the State had pressed charges against the defendant, and the jury would be left to speculate whether those charges were ongoing or had been resolved. Evidence that defendant had been acquitted of that assault would put to rest that speculation.

The jury would likely react to the testimony of the other-crime complainant with sympathy for her and hatred for the defendant. That evidence also seriously undercut defendant's consent defense. Due to the overly-persuasive probative value of propensity evidence, the need to avoid unfair prejudice by providing a full context for that evidence is evident. Fairness therefore required disclosure of the acquittal.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Gonzalez-Carrera, 2014 IL App (2d) 130968 (No. 2-13-0968, 9/2/14)

1. Generally, the court has discretion to allow a litigant to reopen its case. The court's ruling on a motion to reopen the evidence will be reversed only if there is a clear showing of abuse of discretion. Factors to be considered in determining whether to reopen a case include whether the failure to introduce the evidence was inadvertent, whether the opposing party is surprised or unfairly prejudiced, the importance of the new evidence, and whether cogent reasons justified denying the motion to reopen. The trial court may permit the proofs to be reopened after it has ruled on a motion to suppress, but also retains discretion to deny a motion to reopen that is filed after a ruling has been issued.

2. The trial court did not abuse its discretion by denying leave to the State to reopen the proofs where, after the trial court had ruled on the motion to suppress, the State sought to reopen the evidence to present an entirely new theory on the validity of a traffic stop. Generally, motions to reopen the evidence concern the theory which was previously argued, not a completely new theory of the case.

Furthermore, the State's attempt to reopen the evidence suggested that the officer in question had been "less than truthful" when he testified that he made the stop because there was a hole in the tail light

cover on defendant's vehicle. In its motion to reopen the proofs, the State claimed that the officer knew at the time of the stop that defendant had just engaged in a drug transaction, but had been instructed by the Department of Homeland Security not to reveal that defendant was the subject of a drug investigation. The court stated:

> Honesty and candor between law enforcement officers and prosecutors is essential to the fair administration of justice. If an ongoing investigation is in jeopardy of being derailed because of an ongoing prosecution, there are legal options available to postpone the disclosure, so long as the defendant's rights are not compromised. In short, lying under oath is never an option.

The order granting defendant's motion to suppress was affirmed.

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§19-7
Objections and Offers of Proof

§19-7(a)
Objections

People v. Henry, 3 Ill.2d 609, 122 N.E.2d 159 (1954) A trial judge is not required to exclude improper evidence when there is no objection.

People v. Williams, 139 Ill.2d 1, 563 N.E.2d 431 (1990) The failure to object to hearsay testimony allows such evidence to be considered by the trier of fact and given its natural probative effect.

People v. Carlson, 79 Ill.2d 564, 404 N.E.2d 233 (1980) The failure to object to the admission of evidence normally operates as a waiver of the right to raise the question on appeal. "If a timely objection is made at trial . . . the court can, by sustaining the objection or instructing the jury to disregard the answer or remark, usually correct the error."

People v. Young, 128 Ill.2d 1, 538 N.E.2d 461 (1989) In order to preserve for appeal an issue regarding the admission of evidence, a defendant is required to object during trial and raise the issue again in his post-trial motion.

People v. Boclair, 129 Ill.2d 458, 544 N.E.2d 715 (1989) A defendant was not required to move to suppress a statement which he contended was improperly admitted and which was neither an admission nor a confession. "A motion in limine or an objection at trial would have preserved the issue, provided that it was also raised in a post-trial motion."

People v. Burage, 23 Ill.2d 280, 178 N.E.2d 389 (1961) An objection should be made when the evidence is being offered or as soon as the ground for the objection becomes apparent.

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) An objection made on a specific ground waives all grounds not specified. See also, People v. Enis, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) (same).

People v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227 (1984) Where defendant objected to a line of questioning on two grounds, he could not argue a third ground on appeal. See also, People v. Soskins, 128

Ill.App.3d 564, 470 N.E.2d 643 (2d Dist. 1984) (defendant could not claim on appeal that certain impeachment was not relevant where he did not object on relevancy grounds at trial).

People v. Killebrew, 55 Ill.2d 337, 303 N.E.2d 377 (1973) Objection for lack of foundation waived contention on appeal that photographs were suggestive and prejudicial.

Johnson v. Bennett, 395 Ill. 389, 69 N.E.2d 899 (1946) A general objection, such as "I object," only questions the relevancy of the evidence. See also, Forrest v. Industrial Commission, 77 Ill.2d 86, 395 N.E.2d 576 (1979) (the word "incompetent," as applied to evidence, means no more than that it is inadmissible, and does not state a ground of objection).

People v. Waller, 67 Ill.2d 381, 367 N.E.2d 1283 (1977) When the trial court admits evidence but reserves a ruling on its admissibility, the objecting party must insist on a subsequent ruling to avoid waiving the objection. See also, People v. Neal, 142 Ill.2d 140, 568 N.E.2d 808 (1990) ("[a]s we have recently noted, and hope to soon impress upon practitioners within this State, a movant has the responsibility to obtain a ruling on his motion if he wishes to raise a question pertaining thereto on appeal").

People v. Flatt, 82 Ill.2d 250, 514 N.E.2d 509 (1980) *In limine* motions relate to evidentiary matters and may be used to seek a ruling before the issue arises in front of a jury. See also, People v. Goodwin, 69 Ill.App.3d 347, 387 N.E.2d 433 (3d Dist. 1979) (a party need not file a motion *in limine* as a condition precedent to objecting during trial).

People v. Whitehead, 116 Ill.2d 425, 508 N.E.2d 687 (1987) No issue was presented concerning the propriety of the trial court's denial of an in limine motion to bar the State from using certain statements in cross-examination, where the witnesses in question did not testify.

People v. Escobar, 168 Ill.App.3d 30, 522 N.E.2d 191 (1st Dist. 1988) A trial judge generally has discretion to reserve ruling on evidentiary matters until they are presented at trial. The trial court did not abuse its discretion in denying defendant's in limine motion to preclude any reference to a polygraph test, as it was within the judge's discretion "to deny the motion and rule on the matter only if presented at trial." But see, **People v. Patrick & Phillips**, 233 Ill.2d 62, 908 N.E.2d 1 (2009) (in most circumstances, it is an abuse of discretion to reserve ruling on a motion to exclude defendant's prior convictions as impeachment until after the defendant testifies).

People v. Dunum, 182 Ill.App.3d 92, 537 N.E.2d 898 (1st Dist. 1989) Trial courts "are expected to guard against unduly restricting a defendant's case in granting a motion **in limine** brought by the State." Here, however, granting the State's **in limine** motion was not an abuse of discretion because the material in question was inadmissible.

People v. Strater, 72 Ill.App.3d 486, 390 N.E.2d 979 (4th Dist. 1979) A party cannot object to improper evidence which he himself admitted to evidence. But see, People v. Rose, 77 Ill.App.3d 330, 395 N.E.2d 1081 (1st Dist. 1979) (party may properly object to an answer elicited during its own examination of a witness when the answer is not responsive).

People v. Garner, 91 Ill.App.2d 7, 234 N.E.2d 39 (2d Dist. 1968) Objections to the admission of evidence must be specific enough to inform the court and the opponent of the ground or reason for the objection.

People v. Dandridge, 98 Ill.App.3d 1021, 424 N.E.2d 1262 (5th Dist. 1981) Defense counsel's objection to

the prosecutor's use of hearsay testimony as substantive evidence during closing argument was properly overruled; counsel did not object or seek to limit the use of the testimony when it was introduced, but objected for the first time during closing argument.

Cumulative Digest Case Summaries **§19-7(a)**

People v. Harris, 2014 IL App (2d) 120990 (No. 2-12-0990, 5/22/14)

1. To preserve an issue for appellate review, defendant must object at trial and include the issue in a post-trial motion. Under Illinois Rule of Evidence 103(a)(1), to properly object to the admission of evidence, a party must state the specific ground for the objection unless the specific ground is apparent from the record.

Here, the record showed that the specific grounds for defendant's objection (to the admission of a logbook showing that a Breathalyzer machine had been certified as accurate) was apparent from the context of the proceedings. When the State first attempted to enter the logbook into evidence, defense counsel objected on hearsay grounds. (A logbook is hearsay and thus would be admissible only where the State lays a proper foundation for its admission as an exception to the hearsay rule.) The court sustained the hearsay objection and the State attempted to lay a proper foundation.

Counsel again objected on the grounds that the logbook was not a business record. The court overruled this objection. Counsel continued to object to testimony about the logbook and the accuracy of the Breathalyzer, objections which the trial court characterized as a "continuing objection to the admissibility" of the logbook. In the post-trial motion, counsel preserved all objections made during trial, and during the hearing on the motion, counsel stated that the State did not lay a proper foundation.

Although counsel may not have specifically stated during trial or in the post-trial motion that she was objecting to the lack of a proper foundation, that ground was apparent from the context of the proceedings. And both the State and the trial court understood the nature of the objection. Defendant thus did not forfeit the issue.

2. Instrument logs certifying the accuracy of a Breathalyzer machine are hearsay, but may be admitted under the business-records exception to hearsay if the State lays a proper foundation. This foundation is laid by showing that the writing or record was made in the regular course of business at the time of the event or transaction, or a reasonable time thereafter. 720 ILCS 5/115-5(a). Illinois Rule of Evidence 803(6) similarly requires that a business entry be made at or near the time of the event or transaction.

Here the State presented evidence that the entry in the instrument logbook (showing that a Breathalyzer machine had been certified as accurate) was made in the regular course of business, but no evidence that it was made at the time of the event or within a reasonable time thereafter. The State thus failed to lay the necessary foundation. Without the logbook, there was no evidence about the accuracy of the Breathalyzer machine, which in turn meant the results of the Breathalyzer test could not be relied upon to find defendant guilty of driving under the influence of alcohol. The court reversed his conviction and remanded for a new trial.

(Defendant was represented by Supervisor Josette Skelnik, Elgin.)

People v. Sims, 2014 IL App (4th) 130568 (No. 4-13-0568, 5/6/14)

The lack of a foundational objection does not relieve the State from its duty to satisfy the reasonable doubt standard, because testimony might be so weak in its foundation that it is incapable of satisfying the reasonable doubt standard. Generally, however, the lack of a foundational objection means that the evidence becomes part of the record and may be given whatever weight it is worth.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

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§19-7(b)
Offers of Proof

People v. Andrews, 146 Ill.2d 413, 588 N.E.2d 1126 (1992) An issue concerning the admissibility of evidence is preserved for review only if there is an adequate offer of proof. An offer of proof is intended to disclose to the trial judge and opposing counsel the nature of the evidence, and to enable a reviewing court to determine whether its exclusion was proper. "[C]ounsel must explicitly state what the excluded testimony would reveal"; an offer is inadequate if it merely summarizes testimony in a conclusory manner, contains the "unsupported speculation of counsel as to what the witness would say," or "merely alludes to what might be divulged by the testimony." See also, People v. Richmond, 201 Ill.App.3d 130, 559 N.E.2d 302 (4th Dist. 1990) (a refusal to allow an offer of proof is not error if the suggested testimony is irrelevant).

People v. Sanchez, 131 Ill.2d 417, 546 N.E.2d 574 (1989) An offer of proof serves two functions: (1) to inform the trial judge and the opposing party of the nature and substance of the evidence expected to be introduced, and (2) to preserve the issue for appeal. The party making an offer of proof has the burden to show the relevance, materiality and competency of the tendered evidence.

People v. Thompkins, 181 Ill.2d 1, 690 N.E.2d 984 (1998) The trial judge erred by refusing to allow defendant to make offers of proof, by leaving the bench during an offer of proof that was allowed, and by ordering defendant's attempted offers of proof stricken from the record. The trial court is required to permit counsel to make offers of proof; by refusing to hear defendant's offers of proof, the trial court denied itself information required to make an informed exercise of discretion and denied the Supreme Court a proper record on which to review rulings.

People v. Lynch, 104 Ill.2d 194, 470 N.E.2d 1018 (1984) If a question shows the purpose and materiality of the evidence, is in proper form and clearly admits of a favorable answer, the proponent need not make a formal offer of what the answer would be, unless the trial court asks for one. See also, People v. Robinson, 56 Ill.App.3d 832, 371 N.E.2d 1170 (5th Dist. 1977) (where a witness's testimony or the basis for it is unclear, a detailed and specific offer of proof is required).

People v. Quinn, 332 Ill.App.3d 40, 772 N.E.2d 872 (1st Dist. 2002) Defendant did not waive the right to question whether the State should have been required to disclose the "exact surveillance location" in a controlled substance case. Although defendant failed to make an offer of proof, an offer is not required where: (1) it is apparent that the trial court clearly understood the nature and character of the evidence, or (2) the purpose and materiality of the evidence was clearly shown.

People v. Husted, 97 Ill.App.3d 160, 422 N.E.2d 962 (2d Dist. 1981) An offer of proof is not required when the evidence sought to be admitted is obviously material and relevant.
People v. Miller, 55 Ill.App.3d 136, 370 N.E.2d 639 (3d Dist. 1971) When the trial judge sustains the State's objection to the admission of certain evidence, the defendant cannot properly allege on appeal a theory of admissibility which is different from the theory argued at trial.

People v. Camel, 10 Ill.App.3d 1022, 295 N.E.2d 270 (4th Dist. 1973) (aff'd 59 Ill.2d 422, 322 N.E.2d 36 (1974)) The right to make an offer of proof is almost absolute, subject only to the court's discretion to reasonably restrict repetitious efforts to offer the same or substantially the same type of proof as has been previously offered and denied.

People v. Brown, 27 Ill.App.3d 569, 327 N.E.2d 51 (2d Dist. 1975) Offer of proof was sufficient since it demonstrated the nature of the evidence defense counsel was attempting to elicit.

People v. Mosley, 68 Ill.App.3d 721, 386 N.E.2d 545 (1st Dist. 1979) Offer of proof concerning the victim's alleged use of drugs was too vague where it failed to indicate how the defendant would show that the victim was under the influence of drugs at the time of the crime.

People v. McMullin, 138 Ill.App.3d 872, 486 N.E.2d 412 (2d Dist. 1985) Offer of proof was insufficient where defense counsel showed the subject of the excluded testimony (defendant's state of mind), but the offer of proof did not "show what the substance of that testimony would have been (i.e., what defendant would have said his state of mind was)."

People v. Cobb, 186 Ill.App.3d 898, 542 N.E.2d 1171 (2d Dist. 1989) Defense counsel's informal offer of proof, which merely summarized the witness's testimony in a conclusory manner, was insufficient because it failed to show exactly what the substance of the testimony would be. See also, People v. Duarte, 79 Ill.App.3d 110, 398 N.E.2d 332 (1st Dist. 1979) (offer of proof by way of attorney's recitation of the testimony he expects to elicit should be used only when the witness is unavailable and the offer is sufficiently specific; because the expectations of the attorney and the testimony of the witness may be entirely different, the witness should be examined).

Cumulative Digest Case Summaries **§19-7(b)**

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

To preserve an appellate claim concerning the denial of a request to admit evidence, a party is required to make a detailed and specific offer of proof if the record would otherwise be unclear.

In defendant's trial for aggravated criminal sexual assault, complainant testified that defendant forced her to have vaginal intercourse, while defendant claimed there had been no intercourse. The treating physician, a State's witness, testified that complainant had some cervical redness consistent with sexual intercourse.

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant by presenting evidence that she had intercourse with someone else within 72 hours, which was about the amount of time, defense counsel asserted, that sperm lasts in the vagina.

The court held that defendant failed to provide an adequate offer of proof to create an appealable issue. The sole support for the proffered evidence was counsel's speculation that complainant's cervical inflammation occurred three days before the alleged assault because sperm could persist for 72 hours. Counsel offered no medical testimony to support his bare assertion about the longevity of sperm or about the general persistence of cervical inflamation.

The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge.

Since defendant did not provide a sufficient offer of proof, his claim was not subject to appellate review.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Cerda, 2014 IL App (1st) 120484 (No. 1-12-0484, 3/7/14)

1. In sex offense prosecutions, the Rape Shield Statute bars the admission of evidence about the prior sexual activity or reputation of the victim. There are two exceptions to this bar: (1) when consent is an issue and defendant seeks to introduce prior sexual activity between himself and the victim; or (2) when such evidence is constitutionally required to be admitted. 725 ILCS 5/115-7(a).

Since consent was not an issue in this case, defendant argued that the second exception applied, and that he was denied his constitutional right to present a defense where the court barred evidence that the victim's initial outcry occurred shortly after she informed her mother about her first sexual experience with a boy her own age. Defendant argued that this evidence showed that the victim had a motive to fabricate her accusations against him.

2. The State argued that the trial court properly barred the evidence since defendant failed to make an adequate offer of proof. The Rape Shield Statute provides that no evidence covered by the statute is admissible unless defendant makes an offer of proof at an *in camera* hearing. The purpose of the hearing is to determine whether defendant has evidence to impeach the witness if she denies prior sexual activity with defendant. 725 ILCS 5/115-7(b).

The court held that the hearing's purpose only applies to the first exception, and thus the statute is ambiguous as to whether it requires an offer of proof when the second exception is at issue. Beyond the statutory requirement, however, when a trial court bars evidence, no appealable issue exists in the absence of an offer of proof. The purpose of an offer of proof is to: (1) disclose the evidence to the trial court so that it may take appropriate action; and (2) provide the appellate court with an adequate record to determine whether there was error. By failing to make an adequate offer of proof, a defendant forfeits any claims on appeal that the trial court barred him from presenting evidence necessary to prove his case.

3. Here, defense counsel made an offer of proof by reading from a police report stating that the victim "told her mom days before about having had sex for the first time with a boy her own age." The court held that this offer of proof provided no evidence that the victim's mother was angry about the consensual sexual experience and defendant only argued "weakly" that the mother "could have been" angry. As a result, the offer of proof did not support defendant's proposed argument that the victim's accusations were motivated by a desire to deflect her mother's anger about the sexual encounter. The trial court thus did not abuse its discretion in excluding the evidence.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010)

1. Evidence is relevant when it renders a matter of consequence more or less probable or tends to prove a fact in controversy.

There was no error in the admission of evidence of pornography found on defendant's computer depicting violence against women, bondage, sadism, and rape, where a significant portion depicted vaginal or anal penetration by a finger or foreign object. This evidence tended to prove defendant's identity as the perpetrator of the sexual assaults, as the perpetrator emulated the acts and scenarios depicted in the pornography, showed a particular interest in that type of activity, and said it gave him pleasure. It was irrelevant that there was no evidence that defendant viewed the pornography contemporaneously to the sexual assaults.

2. An issue regarding the admissibility of evidence is preserved for review only is there is an adequate offer of proof. A formal offer of proof is the traditional method of making an offer of proof. It consists of eliciting the testimony of the witness sought to be introduced outside the presence of the jury. An alternative method is an informal offer of proof made by counsel informing the court with particularity: (1) what the testimony will be; (2) by whom it will be presented; and (3) its purpose. An informal offer of proof is insufficient if it merely summarizes the testimony in a conclusory manner or offers unsupported

speculation regarding what the testimony will be.

Any error in the exclusion of testimony of an expert was waived where counsel made no formal offer of proof after the court deemed counsel's informal offer insufficient to inform the court of the nature of the evidence sought to be introduced.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Shenault, 2014 IL App (2d) 130211 (No. 2-13-0211, 12/23/14)

1. Ordinarily, an offer of proof is necessary to preserve a claim of error arising from the exclusion of evidence. An offer of proof informs the trial judge and opposing counsel of the nature of the offered evidence and provides the reviewing court with a record on which it can determine whether exclusion of the evidence was erroneous and prejudicial.

Defendant was charged with resisting or obstructing a peace officer by driving away from a traffic stop without authorization. Defendant claimed that she heard the officer say that "you" are free to go, and believed that his remark referred to her. The trial court sustained hearsay objections when the defense sought to elicit the officer's remarks from other witnesses.

The court concluded that in the absence of an offer of proof, it could not determine whether the testimony which defendant sought to elicit would have had any appreciable value to corroborate defendant's testimony or whether exclusion of the testimony caused prejudice.

2. The court also found that the failure to make an offer of proof cannot be evaluated under the plain error rule. The first step in applying the plain error doctrine is determining whether reversible error occurred. Where the issue is whether evidence was improperly excluded, the failure to make a proper offer of proof prevents the court from making such a determination.

(Defendant was represented by Assistant Defender Richard Harris, Elgin.)

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§19-8
Evidence of Character

§19-8(a)
Generally

People v. Willy, 301 Ill. 307, 133 N.E. 859 (1921) Evidence of character is confined to proof of general reputation at or prior to the alleged offense, and should be limited to a time not very remote from the date of the alleged offense. The personal opinions of witnesses and evidence of specific acts are improper.

Reputation testimony may not be based upon specific acts of either bad or good conduct.

People v. Moretti, 6 Ill.2d 494, 129 N.E.2d 709 (1955) Reputation witnesses must be shown to have adequate knowledge of the person in question. Evidence of reputation must be based on contact with the subject's neighbors and associates, rather than on the personal opinion of the witness.

People v. Hermens, 5 Ill.2d 277, 125 N.E.2d 500 (1955) A witness who testifies concerning a person's good reputation may not be cross-examined about his knowledge of particular acts of misconduct by that person.

People v. Dorn, 46 Ill.App.3d 820, 361 N.E.2d 353 (3d Dist. 1977) General reputation is not established by

the personal knowledge of the witness, but by what people in the community, as a whole, think of the person. For that reason, it is improper to cross-examine a character witness as to the witness's own knowledge of particular acts of misconduct on the part of the person whose character is in question. Instead, cross-examination is limited to disparaging rumors and conversations which the witness has heard in the community.

People v. Keller, 267 Ill.App.3d 602, 641 N.E.2d 891 (1st Dist. 1994) Noting a conflict in authority, the court concluded that habit and custom evidence is admissible if a sufficient foundation is established. The Court declined to decide whether habit and custom evidence is admissible where direct testimony about the offense is available.

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§19-8(b)
Defendant's Character

People v. Lewis, 25 Ill.2d 442, 185 N.E.2d 254 (1962) The defendant may present evidence of his good character as inconsistent with the commission of the crime charged. The State may not present evidence of the defendant's bad character until defendant puts his character in issue by presenting evidence of good character. See also, People v. Lucas, 151 Ill.2d 460, 603 N.E.2d 460 (1992) (error to admit evidence of defendant's gang association where defendant did not place his good character in issue).

People v. Redmond, 50 Ill.2d 313, 278 N.E.2d 766 (1972) The defendant may not introduce evidence of a character trait which has no bearing on the commission of the crime charged. See also, People v. Griffith, 56 Ill.App.3d 747, 372 N.E.2d 404 (2d Dist. 1978) (defendant's reputation for truth and veracity was not admissible at his trial for reckless homicide); People v. House, 197 Ill.App.3d 1017, 557 N.E.2d 270 (1st Dist. 1990) (reckless homicide); People v. Colclasure, 200 Ill.App.3d 1038, 558 N.E.2d 705 (5th Dist. 1990) (murder).

People v. Shockey, 30 Ill.2d 147, 195 N.E.2d 703 (1964) Evidence of defendant's reputation for honesty and integrity was admissible at his trial for theft. See also, People v. Wells, 80 Ill.App.2d 187, 224 N.E.2d 288 (5th Dist. 1967) (evidence of defendant's reputation for peacefulness is admissible in disorderly conduct case); People v. Thornton, 61 Ill.App.3d 530, 378 N.E.2d 198 (5th Dist. 1978) (evidence of defendant's reputation for nonviolence is admissible at his trial for armed robbery). Compare, People v. Crosser, 117 Ill.App.3d 24, 452 N.E.2d 857 (2d Dist. 1983) (defendant's reputation for truth and veracity was not relevant at his trial for aggravated battery).

People v. Perez, 209 Ill.App.3d 457, 568 N.E.2d 250 (1st Dist. 1991) Where entrapment is raised, "a searching inquiry into the defendant's conduct and pre-disposition is . . . appropriate" because defendant's character is directly in issue. By not allowing defendant to call character witnesses, the trial court "hampered his ability to present a defense of lack of predisposition."

People v. Harris, 224 Ill.App.3d 649, 587 N.E.2d 47 (3d Dist. 1992) Where self-defense is raised, prior convictions for crimes of violence are admissible only if the defendant introduces evidence of his good character to show that he is a peaceful person. Because defendant did not put his peaceful character into evidence, the State's use of his prior convictions was error.

The Court rejected the State's argument that defendant put his peaceful character in issue by claiming that he would not have hit the complainant had the complainant not swung first, or by rebutting the State's evidence that defendant's bar was a "rough and somewhat dangerous establishment." Furthermore, a

defendant does not place his character in issue by responding to a question on cross-examination - the State cannot elicit testimony concerning character and then claim the right to offer rebuttal evidence.

People v. Armstead, 322 Ill.App.3d 1, 748 N.E.2d 691 (1st Dist. 2001) The State erred by repeatedly cross-examining defendant about his cohabitation with a long-time girlfriend before his arrest and his marriage to a different woman shortly after his arrest. Because the "evidence is close and the State's case is weak," and because the repetitive questioning concerning defendant's alleged bad character could have affected the result of the trial, a new trial was required. See also, People v. Maounis, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) (fact that defendant did not spend Christmas with his family was irrelevant to any issue).

People v. Carruthers, 18 Ill.App.3d 255, 309 N.E.2d 659 (1st Dist. 1974) Evidence of character must be confined to proof of general reputation at or before the commission of the offense - it is improper to admit evidence which covers an accused's reputation after the offense or what was said after the offense with reference to the accused's character either before or after the offense. But see, People v. Bascomb, 74 Ill.App.3d 392, 392 N.E.2d 1130 (4th Dist. 1979) (conversations which occurred after the alleged crime were inadmissible because they did not reveal an awareness of defendant's reputation at the critical times - at or prior to the alleged crime; however, character evidence should have been admitted where there was a sufficient basis for apart from those conversations).

People v. Chandler, 88 Ill.App.3d 644, 411 N.E.2d 283 (1st Dist. 1980) The character of the defendant may only be proved by evidence of general reputation; a witness's personal opinion of that reputation is not admissible.

People v. West, 246 Ill.App.3d 1070, 617 N.E.2d 147 (1st Dist. 1993) The prosecutor improperly questioned a character witness regarding her knowledge of particular acts of misconduct on the part of the defendant where he brought out evidence that the witness had previously accused defendant of assaulting her.

People v. Flax, 147 Ill.App.3d 943, 498 N.E.2d 667 (1st Dist. 1986) Defendant's good character may not be shown by evidence that he has never been arrested, charged or convicted of a crime. Also, such evidence is not admissible to prove that defendant was not the aggressor.

People v. Falls, 387 Ill.App.3d 533, 902 N.E.2d 120 (1st Dist. 2008) Once defendant's truthfulness had been attacked by the prosecutor in cross-examination, the trial judge erred by preventing defendant from introducing testimony of her reputation in the community for truthfulness. An attack on defendant's truthfulness entitles her to present witnesses who will testify to her reputation for truthfulness. See also, People v. Barnes, 182 Ill.App.3d 75, 537 N.E.2d 949 (1st Dist. 1989) (although it is generally improper for a defendant to introduce specific acts to show his good character, such evidence should have been allowed after the State erroneously introduced specific acts of bad character against him).

Cumulative Digest Case Summaries **§19-8(b)**

People v. Cervantes, 2014 IL App (3d) 120745 (No. 3-12-0745, 12/3/14)

When a defendant raises a theory of self-defense, the victim's violent character is relevant to the issue of which party was the initial aggressor. But evidence of defendant's violent character is admissible only when the defendant puts his own character at issue by introducing evidence that he is peaceful. **People v. Devine**, 199 Ill. App. 3d 1032 (3rd. Dist. 1990); **People v. Harris**, 224 Ill. App. 3d 649 (3rd. Dist. 1992).

In his jury trial for first degree murder, defendant raised self-defense and argued that the victim was

the initial aggressor. To support his defense, he introduced evidence that the victim had a violent character. In rebuttal, the State was allowed to introduce three prior convictions of defendant for crimes of violence.

The Appellate Court held that the introduction of the prior crimes evidence was improper. The defense strategy focused on the victim's violent character but did not attempt to prove defendant's peaceful character. Accordingly, defendant's prior convictions were not admissible. The court specifically rejected the State's argument that when a defendant remains silent about his own character he is suggesting that he is peaceful. This argument ignores, and is contrary to, the presumption of innocence and the right to remain silent.

The erroneous admission of other crimes evidence creates a high risk of prejudice and ordinarily calls for reversal. Here the prejudice caused by the improper introduction of three prior convictions for violent crimes was magnified when the trial court gave an improper jury instruction that allowed the jury to consider as substantive evidence three other prior convictions that were properly admitted only to impeach defendant. Consequently, the Appellate Court reversed defendant's conviction and remanded for a new trial.

The dissenting justice would have held that **Devine** and **Harris** were wrongly decided and that the prior convictions were admissible. A defendant who raises an initial aggressor self-defense argument, but remains silent about his character at trial, necessarily suggests that he is peaceful. It would be "illogical and unfair" to allow defendant to introduce evidence of the victim's past violent acts but prevent the State from introducing similar evidence about the defendant.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Mandarino, 2013 IL App (1st) 111772 (No. 1-11-1772, 6/28/13)

Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary.

The Appellate Court concluded that defendant forfeited the issue where he did not argue at trial or in the post-trial motion that the testimony was inadmissible lay opinion. Furthermore, even if lay opinion was improperly admitted, the plain error rule did not apply where the evidence was not closely balanced.

In the alternative, the lay opinion was admissible on two theories - to rebut character evidence and under the doctrine of curative admissibility.

1. The court concluded that the defense introduced character testimony by eliciting evidence of defendant's exceptional performance and service records. Character evidence is generally inadmissible in a criminal trial unless introduced by the defendant, in which case the State is permitted to respond by offering its own character evidence. (Illinois Rule of Evidence 404). Here, the State rebutted the defense evidence of the accused's good character by showing that in light of the incident leading to the instant charges, the witness no longer viewed defendant as an excellent officer.

2. The evidence was also admissible under the curative admissibility doctrine, which allows the State to respond on redirect examination where the defendant has opened the door to a particular subject, even if the response elicits what would otherwise be inadmissible evidence. The purpose of the curative admissibility doctrine is to shield a party from unduly prejudicial inferences raised by the other side. Whether to allow curative evidence lies in the sound discretion of the trial court.

The court concluded that admitting the lay opinion of the witness, a deputy chief, "allowed the State to cure any impression . . . that [the witness] still regarded [defendant] to be an outstanding officer."

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§19-8(c)
Witness's Character

People v. Nash, 36 Ill.2d 275, 222 N.E.2d 473 (1966) Whenever a person (including the defendant) testifies, that person's credibility is in issue. Thus, the opposing party may present evidence of that person's bad reputation for truth and veracity.

People v. West, 158 Ill.2d 155, 632 N.E.2d 1004 (1994) The Supreme Court rejected the argument that where a witness is too young to have developed a reputation for truthfulness, credibility may be challenged by opinion evidence and specific acts of untruthfulness. The Court held that the only proper method for impeaching a witness's reputation for truthfulness is by introducing reputation evidence.

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) The trial judge did not err by denying a defense request to have a critical State's witness submit to a psychological and psychiatric evaluation. Because the witness's mental health treatment records were provided to the judge in camera, defendant was allowed to use eight documents as impeachment, and the witness testified concerning his history of substance abuse, mental illness, and memory problems, the refusal to order a psychological and psychiatric examination did not constitute an abuse of discretion or cause manifest prejudice.

People v. Griffith, 56 Ill.App.3d 747, 372 N.E.2d 404 (2d Dist. 1978) When a defendant testifies, the State may impeach him by evidence of his bad reputation for truthfulness. After the State presents such evidence, the defendant may present evidence of his good reputation for truthfulness.

People v. House, 197 Ill.App.3d 1017, 557 N.E.2d 270 (1st Dist. 1990) Defendant could not introduce evidence regarding his reputation for truth and veracity merely because the State presented evidence inconsistent with defendant's testimony and the prosecutor argued that the State's evidence should be believed. The State never directly attacked the veracity of defendant's testimony; the fact that defendant's testimony regarding the alleged offense "differed from the testimony presented by the State's witnesses did not, in and of itself, justify reception into evidence of testimony regarding defendant's reputation for truth and veracity."

People v. Doll, 126 Ill.App.3d 495, 467 N.E.2d 335 (2d Dist. 1984) Evidence of a witness's good reputation for truth and veracity is admissible only if the credibility of the witness has been attacked on that issue. The defense could not introduce evidence supporting its own witness's credibility until after the witness's credibility had been attacked by the State.

People v. Garza, 92 Ill.App.3d 723, 415 N.E.2d 1328 (3d Dist. 1981) It is improper to impeach a witness's credibility by showing that on a prior occasion he or she lied about an unrelated matter.

People v. Paull, 176 Ill.App.3d 960, 531 N.E.2d 1008 (1st Dist. 1988) Cross-examination which portrayed a defense witness "as a generally immoral person" was improper; the prosecutor asked whether the witness was a stripper, had worked in a lounge, had worked in a theater where pornographic movies were shown, and drank.

People v. Bramlett, 131 Ill.App.3d 616, 476 N.E.2d 44 (5th Dist. 1985) Because the credibility of a character witness is in issue, evidence of the character witness's bad reputation for truth and veracity is admissible.

People v. Roberts, 133 Ill.App.3d 731, 479 N.E.2d 386 (5th Dist. 1985) A defense character witness may not be cross-examined concerning his knowledge of the defendant's prior arrests.

People v. Brink, 294 Ill.App.3d 295, 690 N.E.2d 136 (4th Dist. 1998) To elicit testimony concerning another

witness's reputation for truth and veracity, the proponent should first ask whether the witness knows the general reputation for truthfulness in the community. Where the witness's opinion was based solely on her personal experience and not on reputation, the testimony was inadmissible.

Cumulative Digest Case Summaries **§19-8(c)**

People v. Burgund, 2016 IL App (5th) 130119 (No. 5-13-0119, 11/22/16)

Defendant was convicted of predatory criminal sexual assault of his two children. The State's case consisted of his confession and the testimony of his estranged wife and mother-in-law. The trial court excluded several key pieces of evidence defendant wanted to introduce to show that his confession was false and the testimony of his wife and mother-in-law was not believable.

1. First, the trial court excluded the testimony of a clinical psychologist who would have supported defendant's claim that he gave a false confession due to psychological pressure, manipulation, and suggestion by his wife and mother-in-law. The psychologist would have testified that defendant had the type of personality that made him highly suggestible and easily led, especially by his wife and mother-in-law.

A witness is permitted to testify as an expert if his experience and qualifications give him knowledge that lay people do not have and such testimony will aid the trier of fact. When the State presents evidence of a defendant's confession, the defendant has the right to present evidence that affects the weight a trier of fact will give to the confession.

The Appellate Court held that the psychologist should have been allowed to testify about his opinion that defendant had a personality that was subject to easy manipulation. An average juror would not readily understand why an innocent person might falsely believe he committed a crime. The expert's testimony would have thus aided the jury in evaluating the effect of the psychological environment that defendant claimed made him falsely confess. And it would have touched directly on the credibility of defendant's confession.

The court rejected the State's argument that the expert's testimony was properly excluded because he did not diagnose defendant as having any particular psychological or personality disorder. The jury was not required to find that defendant had a disorder before it could disbelieve his confession.

2. Second, the trial court excluded as hearsay the testimony of two witnesses who would have corroborated defendant's testimony that his wife claimed to have a supernatural power of discernment and was obsessed with making false accusations of lustful behavior. The court also excluded as hearsay the testimony of a witness who dated defendant's wife before she married defendant and would have described numerous instances where the wife accused the witness of being immoral and lustful.

Illinois Rule of Evidence 801 defines hearsay as an out of court statement offered to prove the truth of the mater asserted. Ill. R. Evid. 801(c). An out of court statement is not hearsay if it is offered merely to show that the statement was made, not that it was true.

The Appellate Court held that the testimony was not offered to prove the truth of the matters asserted in the out of court statements made by defendant's wife. Defendant was not trying to prove that his wife actually had a supernatural power of discernment or that one of the witnesses actually had a problem with immoral and lustful behavior. Defendant instead offered the testimony only to prove that his wife had made the statements. Since the statements supported his defense that his wife treated defendant in a similar manner, the trial court erred in precluding this testimony.

3. Third, the trial court excluded the testimony of the ex-husband of defendant's mother-in-law. He would have testified that defendant's wife falsely told people that the ex-husband had sexually abused the mother-in-law. Defendant wanted to introduce this evidence to show that his wife would fabricate sexual abuse allegations to gain sympathy and acceptance within their church community.

Illinois law generally prohibits the impeachment of a witness with specific past instances of untruthfulness. But such evidence may be used to impeach a witness if the past act shows bias, interest, or motive to testify falsely.

The Appellate Court held that this evidence was admissible to show the wife's potential motive, interest, and bias in testifying against defendant. The trial evidence showed that defendant's marriage was tumultuous, with accusations that defendant had lust issues, physical violence stemming from those accusations, and discussions of divorce. Evidence that the wife had made false accusations in the past to gain acceptance in her church as it related to divorce was relevant to show that she may have believed that she would personally benefit again from making false accusations against defendant.

The court granted defendant a new trial.

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§19-8(d)
Complainant's Character

People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 (2001) Where self-defense is raised, the victim's violent and aggressive character is relevant to the question of which party was the aggressor. In such cases, the defense has the right to introduce the victim's "character for violence" to illustrate the circumstances which confronted the defendant, the extent of the danger he faced, and his motive.

Where the defendant was allowed to testify that the decedents (defendant's grandparents) were aggressive and violent, and that his knowledge of their character affected his perceptions and reactions on the day of the offense, the trial judge did not abuse his discretion by excluding evidence that the decedents had abused defendant's mother during her childhood. Because there was nothing to indicate that defendant was aware of how his mother had been treated, the evidence had no relevance to defendant's perceptions at the time of the offense. In addition, in the absence of conflicting versions of the offense, testimony that the mother had been mistreated as a child was inadmissible to corroborate defendant's version of events.

People v. Stombaugh, 52 Ill.2d 130, 284 N.E.2d 640 (1972) In a homicide case in which self-defense is raised and evidence has been introduced from which the jury could believe that deceased was the assailant, evidence concerning the violent temper and disposition of the deceased, and his prior threats to the defendant, is admissible.

People v. Lynch, 104 Ill.2d 194, 470 N.E.2d 1018 (1984) When the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show which party was the aggressor. Evidence of a victim's aggressive and violent character may tend to support a theory of self-defense in two ways: (1) the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior, and (2) evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened.

Thus, the trial court erred by refusing to admit evidence that the decedent had three battery convictions even where the defendant was unaware of those convictions at the time of the offense.

People v. Whiters, 146 Ill.2d 437, 588 N.E.2d 1172 (1992) Where the defense attacked the decedent's good character in opening argument and stated an intent to show his violent nature, the State was entitled to present evidence of the decedent's good character and reputation though the defense did not introduce any evidence of Barker's poor character. "To hold otherwise would enable the defendant to get away with using her opening statement to vilify the victim's character and thus poison the water without offering any supporting evidence."

People v. Hanson, 138 Ill.App.3d 530, 485 N.E.2d 1144 (5th Dist. 1985) There are at least three purposes for which evidence of an alleged victim's prior acts of aggression may properly be used: to show the

reasonableness of the defendant's state of mind in acting in self-defense, to support the defendant's testimony that the alleged victim was the aggressor, and to show the reasonableness of the amount of force used by the defendant. Here, the testimony of witnesses who observed the victim's prior violent acts, coupled with the testimony of the witnesses that defendant was aware of such behavior, was relevant to show defendant's state of mind in acting in self-defense. Additionally, the evidence of the victim's prior violent acts, even without a showing that defendant was aware of them, was relevant to show who was the aggressor. See also, People v. Booker, 274 Ill.App.3d 168, 653 N.E.2d 952 (1st Dist. 1995) (fact that deceased was acquitted of previous murder charge did not preclude defendant from testifying that he was aware of the charge; evidence was relevant to show defendant's state of mind, and State could cross-examine him on whether he was aware of the acquittal).

People v. Gosset, 116 Ill.App.3d 655, 451 N.E.2d 280 (2d Dist. 1983) Where defendant seeks to introduce testimony about prior acts of an alleged victim to show that the victim was the aggressor, it need not be shown that the defendant had knowledge of the prior acts at the time of the incident. See also, People v. Bedoya, 288 Ill.App.3d 226, 681 N.E.2d 19 (1st Dist. 1997) (where off-duty police officer claimed that the decedent was the aggressor, he was entitled to introduce the decedent's prior acts of violence against police officers; evidence was relevant to whether the decedent had been the aggressor and to rebut inference he would have been reluctant to attack an officer).

People v. Goodwin, 98 Ill.App.3d 753, 424 N.E.2d 429 (5th Dist. 1981) Where defendant testified that he shot the deceased in self-defense after the latter pointed a pistol at him and repeatedly "snapped" it in an unsuccessful attempt to fire, the State should not have been permitted to present two witnesses who testified that they had never seen the deceased point a gun at anyone. The testimony had the effect of raising an inference of the deceased's peaceable character, which would have been proper only if the defendant had raised that issue.

In addition, evidence of character is confined to proof of a person's general reputation; it is error to prove character by specific acts.

People v. Gorney, 107 Ill.2d 53, 481 N.E.2d 673 (1985) Evidence of prior false accusations of sexual assault by the victim may be admissible in some circumstances, even where no false charge was actually brought. Here, however, any error was harmless. See also, People v. McClure, 42 Ill.App.3d 952, 356 N.E.2d 899 (1st Dist. 1976) (where a defendant charged with rape raised a consent defense (that the complainant was a prostitute who became upset when he refused to pay), defendant should have been allowed to introduce evidence that the complainant had falsely accused another man of rape when he refused to pay); People v. Nicholl, 210 Ill.App.3d 1001, 569 N.E.2d 604 (2d Dist. 1991) (trial court erred by prohibiting a defendant in an aggravated criminal sexual abuse case from showing that the complainant made a subsequent, unfounded complaint of abuse against the defendant; a false accusation bears on a person's credibility whether it is made before or after the incident giving rise to the charge). Compare, People v. Alexander, 116 Ill.App.3d 855, 452 N.E.2d 591 (1st Dist. 1983) (defendant charged with rape was properly prohibited from bringing out two prior rape charges made by the complainant where the prior charges were not shown to be false).

People v. Keller, 267 Ill.App.3d 602, 641 N.E.2d 891 (1st Dist. 1994) Noting a conflict in authority, the court found that evidence of the habits and customs of the victim is admissible when a sufficient foundation is established. The Court declined to decide whether habit and custom evidence is admissible where direct testimony about the offense is available.

People v. Gibbs, 2016 IL App (1st) 140785 (No. 1-14-0785, 6/1/16)

Where the defendant raises self-defense, evidence of the complainant's violent character is relevant to show which party was the aggressor. **People v. Lynch**, 104 Ill.2d 194, 470 N.E.2d 1018 (1984). Such "**Lynch** evidence" may consist of the complainant's previous arrests or convictions for violent crimes.

Where the trial court allowed a stipulation that the complainant had a 14-year-old conviction for domestic violence, the court did not err by refusing to allow the defense to also question the complainant about the conviction. **Lynch** does not require live testimony concerning the complainant's prior conviction, which is "persuasive proof" of the complainant's conduct. By contrast, where the **Lynch** evidence consists of arrests or altercations for which there was no conviction, live testimony is appropriate because the evidence does not indicate whether the individual actually engaged in the alleged conduct.

The court observed that the trial court could have exercised its discretion to allow limited questioning of the complainant about the prior conviction, but did not abuse its discretion by refusing to do so.

People v. Salcedo, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-3148, 6/9/11)

Where self-defense is properly raised, the defendant may offer evidence of the complainant's aggressive and violent behavior for two purposes: (1) to demonstrate that defendant's knowledge of the complainant's tendencies affected his perception of and reaction to the complainant's behavior, and (2) to support defendant's account of the events where there are conflicting accounts as to which party was the initial aggressor. (**People v. Lynch,** 104 Ill.2d 194, 470 N.E.2d 1018 (1984)). Where the evidence is admitted for the first purpose, the defendant must have knowledge of the complainant's violent nature. When evidence is admitted for the second purpose, however, the defendant's knowledge of the complainant's violent character is irrelevant.

Defendant claimed that the instant offense occurred when the complainant intentionally drove his car into the defendant's car while the two were traveling down a Chicago street. Defendant claimed that he shot the complainant in self-defense after he saw what he believed to be a handgun in the complainant's hand.

The court concluded that the trial judge did not err by refusing to allow the defense to present testimony from the complainant's girlfriend concerning a prior incident in which the complainant intentionally drove into another car because he was angry at the girlfriend. Because defendant did not know the complainant or that he allegedly was of violent character, the first purpose was inapplicable. The court also concluded that the evidence was inadmissible under the second theory of **Lynch** because there was no indication that the prior incident occurred while the car was traveling on a road or was occupied. The court stated:

> An individual's tendency to exercise aggression against an inanimate object such as a parked car does not inherently increase the likelihood that the individual exercised aggression against another person . . . The fact that the complainant hit a parked car out of anger with his girlfriend does not even remotely tend to prove that he was aggressively driving his vehicle in a manner to threaten and/or injure the defendant [and was therefore the aggressor in the incident leading to the offense].

Defendant's convictions for first degree murder and aggravated battery with a firearm were affirmed. (Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

People v. Yeoman, 2016 IL App (3d) 140324 (No. 3-14-0324, 6/17/16)

Where the defendant raises a theory of self-defense, evidence of the victim's aggressive and violent character is relevant for two distinct purposes. First, the evidence is relevant to show the defendant's knowledge of the victim's violent tendencies and that such knowledge affected the defendant's perception of and reaction to the victim's behavior. Second, where there are conflicting accounts of the offense, evidence of the victim's aggressive and violent character is relevant to support defendant's claim that the victim was

the aggressor, whether or not defendant had previous knowledge of the victim's propensity for violence.

Where defendant raised self-defense at his trial for second-degree murder of a person who engaged in road rage after defendant honked at him when he sat at a green light, the trial judge did not err by excluding evidence that in a prior road-rage incident, the decedent approached a car and yelled at the driver. Because yelling and disorderly conduct do not constitute violence, the evidence did not show aggressive and violent behavior.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

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§19-9
Evidence of Escape, Flight, Tampering with Evidence and Witnesses

§19-9(a)
Escape

People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146 (1988) A letter which defendant wrote to his girlfriend stating his desire to escape from jail was admissible to show consciousness of guilt.

People v. Harper, 36 Ill.2d 398, 223 N.E.2d 841 (1967) The jury may not be instructed that escape raises a presumption of guilt. An escape or attempted escape is to be considered with all the other evidence, but "is not sufficient in itself to overcome the presumption of innocence."

People v. Curtis, 7 Ill.App.3d 520, 288 N.E.2d 35 (3d Dist. 1972) Evidence of defendant's escape was admissible even though it took place 52 days after arrest and defendant had four indictments pending against him at the time.

People v. Campbell, 126 Ill.App.3d 1028, 467 N.E.2d 1112 (2d Dist. 1984) At defendant's trial for armed robbery, etc., the State introduced evidence that blanket strips were hanging from the ceiling bars of the defendant's jail cell and that some of the strips were tied together.

The Appellate Court held that the above evidence was proper — "construed either as an escape attempt or suicide attempt, the evidence was probative of the defendant's consciousness of guilt." See also, People v. O'Neil, 18 Ill.2d 461, 165 N.E.2d 319 (1960) (the threat of suicide, like flight, tends to show consciousness of guilt).

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§19-9(b)
Flight

People v. Harris, 52 Ill.2d 558, 288 N.E.2d 385 (1972) Evidence of defendant's flight from police is admissible as a circumstance tending to show a consciousness of guilt.

People v. Hayes, 139 Ill.2d 89, 564 N.E.2d 803 (1990) Evidence that the police were looking for but were unable to apprehend the defendant for two weeks following the crime was not relevant on the ground that it raised an inference defendant intentionally concealed himself from the police. Although evidence of intentional concealment is relevant and admissible as a circumstance tending to show consciousness of guilt,

the inference of guilt that may be drawn from such evidence depends on defendant's knowledge that a crime has been committed and that he is a suspect. Here, there were no facts from which the jury could validly infer that the defendant knew he was a suspect and consciously avoided the police.

People v. Butler, 64 Ill.2d 485, 356 N.E.2d 330 (1976) At defendant's armed robbery trial, the State properly introduced evidence that a co-defendant (but not the defendant) fled from the scene, was pursued, and was shot and killed by police. The Supreme Court held that the flight of the co-defendant was properly admissible to explain how his body and revolver came to be some distance away. The Court also noted that the jury was instructed that the flight of the co-defendant was not admissible to prove defendant's guilt.

People v. Wright, 30 Ill.2d 519, 198 N.E.2d 316 (1964) The State may introduce that defendant resisted arrest four days after the crime. See also, People v. Davis, 14 Ill.2d 196, 151 N.E.2d 308 (1958) (arrest two months after crime).

People v. O'Neil, 18 Ill.2d 461, 165 N.E.2d 319 (1960) The threat of suicide, like flight, tends to show consciousness of guilt. See also, People v. Campbell, 126 Ill.App.3d 1028, 467 N.E.2d 1112 (2d Dist. 1984) (same).

People v. Manion, 67 Ill.2d 564, 367 N.E.2d 1313 (1977) The defendant has a right to show, by any competent evidence, facts which tend to prove that he did not leave the scene of the crime out of a consciousness of guilt.

People v. Montgomery, 16 Ill.App.3d 127, 305 N.E.2d 627 (1st Dist. 1973) A defendant may give an explanation of his flight — evidence of defendant's mental state at the time he fled from the scene is proper.

People v. Armstrong, 43 Ill.App.3d 586, 357 N.E.2d 84 (1st Dist. 1976) Evidence showing that defendant hid under a bed to avoid arrest was admissible.

People v. Zertuche, 5 Ill.App.3d 303, 282 N.E.2d 201 (2d Dist. 1972) The concept of flight involves more than merely leaving the scene of a crime.

People v. Maldonudo, 3 Ill.App.3d 216, 278 N.E.2d 225 (1st Dist. 1971) Evidence that defendant secreted himself in the community for two years after incident, by using false identities, was admissible.

People v. Nightengale, 168 Ill.App.3d 968, 523 N.E.2d 136 (1st Dist. 1988) The State was properly allowed to show that as the defendant was walking down the street, police stopped him and asked him to come to the station for a "name check." Defendant refused, pulled a gun on the police and ran. "The probative value of the evidence of defendant's flight is that the jury could infer that defendant had something to hide."

Cumulative Digest Case Summaries **§19-9(b)**

People v. Wilcox, 407 Ill.App.3d 151, 941 N.E.2d 461 (1st Dist. 2010)

1. Whether an inference of guilt may be drawn from evidence of flight depends upon whether the defendant knew that a crime had been committed and that he or she was a suspect. The evidence did not support an inference that defendant's flight showed guilt of murder - defendant had been told that police were looking for him, but not that he was a suspect for murder, and he believed that police wanted to talk to him about the violation of an I-bond in an unrelated arrest. The court acknowledged that defendant obtained false identification several years after he fled, but held that "[i]f defendant had been fleeing from the murder, he

most likely would not have waited so long to obtain fake identification."

Because the evidence did not support an inference that defendant fled Illinois to avoid arrest for the murder in question, the trial court erred by admitting the evidence of flight. Furthermore, because the evidence was prejudicial, the evidence was closely balanced, and during closing argument the State relied heavily on defendant's flight, the plain error rule applied.

2. An out-of-court statement offered to establish the truth of the matter asserted is hearsay and is generally inadmissible. However, in the interests of justice, an out-of-court statement which is against the declarant's penal interest is admissible if there are sufficient *indicia* of trustworthiness. Factors considered in determining whether an out-of-court statement is sufficiently trustworthy to be admitted include whether: (1) the statement was made spontaneously to a close acquaintance shortly after the crime; (2) the statement is corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's penal interest; and (4) there is an adequate opportunity to cross-examine the declarant. These four factors are merely guidelines; all four need not be present for a statement to be admitted. The primary consideration is whether the statement was made under circumstances which provide objective *indicia* of trustworthiness.

Where a witness provided the defense with a signed statement in which he said a third person admitted shooting the decedent, the trial court erred by finding that the statement was insufficiently reliable to be admitted. The parties agreed that the statement was self-incriminating and against the declarant's penal interest, and that the declarant was available for cross-examination. Thus, the third and fourth factors were satisfied.

Furthermore, the first factor was satisfied because the statement was made spontaneously to a close acquaintance shortly after the shooting in question. Although the record did not show the relationship between the declarant and the witness who gave the signed statement, defense counsel informed the court that if the witness was permitted to testify he would state that he and the declarant were active members of the same gang and knew each other well enough that the declarant knew where to find the witness at a particular time.

The second factor requires that the statement be sufficiently corroborated to show that it was reliable. Under Illinois law, only "some" corroborating evidence need be present. The trial court should admit the statement if the question of corroborating evidence is close.

The court found that sufficient corroboration was present. First, the declarant's description of the shooting was corroborated by expert testimony concerning the decedent's wounds. Second, the statement was consistent with the trial testimony except the testimony which identified defendant as the shooter, which the defense claimed was fabricated and which the third party statement directly rebutted.

Because the third party's statement was sufficiently reliable to be admitted, the trial court abused its discretion by granting the State's motion *in limine* and barring the statement.

Defendant's convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Jonathan Steffy, Chicago.)

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§19-9(c)
Tampering

People v. Fiorito, 413 Ill. 123, 108 N.E.2d 455 (1952) A defendant's attempt to destroy evidence may be introduced. See also, People v. Veal, 149 Ill.App.3d 619, 500 N.E.2d 1014 (3rd Dist. 1986) (same).

People v. Baptist, 76 Ill.2d 19, 389 N.E.2d 1200 (1979) The State may introduce evidence showing that a defendant attempted to kill an eyewitness to the crime charged. The State was properly allowed to show that

defendant's brother shot an eyewitness where, although defendant was not physically involved in the shooting, there was sufficient evidence connecting him to the offense.

People v. Barrow, 133 Ill.2d 226, 549 N.E.2d 240 (1989) At the defendant's trial for murder, the State introduced into evidence several pieces of mail which the defendant, while in custody, had sent to his brother. The mail included a caricature of a rat in the jaws of a skull and was labeled with the nickname of a State's key witness. Another item was a copy of a picture of a man lying under water, with the above witness's name written across his forehead.

The court held that the evidence was improperly admitted because it was "plainly irrelevant to a determination of the defendant's guilt or innocence." An attempt to intimidate or influence a witness is relevant to show a consciousness of guilt; however, there was nothing to suggest that defendant was attempting to influence a witness by sending letters to his own brother and no showing that defendant intended the letters to be seen by any one other than the brother.

People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146 (1988) Where defendant's girlfriend was a State witness who connected defendant to the crime, the State was properly allowed to introduce a letter which defendant sent to the witness before trial. The letter was fairly interpreted an attempt by defendant to "affectionately" influence the witness not to testify against him. "[T]estimony is relevant and admissible that relates to any attempt by a party to conceal or, by threat or otherwise, to suppress evidence or otherwise obstruct an investigation." See also, People v. McEwen, 104 Ill.App.3d 410, 432 N.E.2d 1043 (1st Dist. 1982) (State witness was properly allowed to testify that defendant asked her not to come to court).

People v. Goodman, 55 Ill.App.3d 294, 371 N.E.2d 168 (4th Dist. 1977) The defendant's attempted intimidation of a witness is relevant to show consciousness of guilt.

People v. Townsend, 111 Ill.App.2d 316, 250 N.E.2d 169 (5th Dist. 1969) Evidence that defendant offered money to witness to say she made a mistake in identifying him was admissible.

People v. Frazier, 107 Ill.App.3d 1096, 438 N.E.2d 623 (1st Dist. 1982) Where the evidence showed that the complainant and/or her father attempted to "shake down" the defendant for $1000 in return for dismissal of the charges, defendant's unsuccessful attempts to obtain $1000 to pay the complainant did not tend to show a consciousness of guilt and was not admissible.

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§19-10
Out of Court Statements Generally

§19-10(a)
Definition of Hearsay

People v. Rogers, 81 Ill.2d 571, 411 N.E.2d 223 (1980) Hearsay is "testimony of an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter."

People v. Caffey, 205 Ill.2d 52, 792 N.E.2d 1163 (2001) As a matter of first impression, information displayed on a "Caller ID" device does not constitute hearsay, because there is no out-of-court asserter. Provided it is relevant, such evidence is admissible upon a showing that the "Caller ID" unit has been shown to be reliable. A showing that a "Caller ID" device is reliable may be established by testimony that the person

who received telephone calls checked the device's display and observed the same number appearing each time a particular person called. See also, People v. Rohlfs, 368 Ill.App.3d 540, 858 N.E.2d 616 (3d Dist. 2006) (trial court did not abuse its discretion by admitting evidence that certain telephone numbers were displayed on caller ID devices at times relevant to the case; caller ID evidence is admissible if the evidence shows that the caller ID device was reliable; reliability of the complainant's caller ID device was shown by testimony that: (1) whenever a friend called, the friend's phone number was displayed on the caller ID, and (2) every time the recipient received a call from a number subsequently traced to defendant's cellblock at the Tazewell County Jail, the complainant heard the same voice).

People v. Heard, 187 Ill.2d 36, 718 N.E.2d 58 (1999) At defendant's trial for the murder of his ex-girlfriend and her new boyfriend, the trial court properly admitted evidence that a few days before the offenses, the girlfriend's new boyfriend told defendant that he had "done something you couldn't do" because the girlfriend "is pregnant with my baby." The evidence was not hearsay; it was offered not to prove the truth of the matter asserted - that the girlfriend was pregnant with the boyfriend's child - but that defendant was motivated to commit the crimes by his jealousy over the girlfriend's relationship with another man.

People v. Ramsey, 205 Ill.2d 287, 793 N.E.2d 25 (2002) "[O]nce hearsay is properly admitted, the trier of fact is free to give it its natural probative value."

People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991) At defendant's trial for aggravated criminal sexual assault, the evidence showed that after the complainant was abducted she convinced defendant to allow her to call her father. The father asked the complainant a series of "yes-no" questions which informed him of complainant's general location and that she was alone with an armed man. Both the complainant and her father testified about the telephone call.

The Supreme Court held that the evidence was hearsay. There could be no question that the telephone conversation was used as substantive evidence - the prosecutor made substantive use of the conversation in closing argument, and in its brief the State urged that the evidence was "independent evidence" of lack of consent. Thus, the State could not claim that the statement was used only for non-hearsay purposes.

The Court rejected the State's contention that a statement from a witness as to his or her own prior out-of-court statement does not violate the hearsay rule because the witness testifies under oath and is subject to cross-examination. The presence or absence of the declarant in court is irrelevant to determining whether an out-of-court statement is hearsay.

People v. Edwards, 144 Ill.2d 108, 579 N.E.2d 336 (1991) Defendant was convicted of murder and aggravated kidnapping; the victim was buried in a box in the ground and eventually suffocated. After his arrest, defendant asked to talk with his lawyer and the State's Attorney in order to "make a deal." The police were unable to reach defendant's lawyer, and defendant chose to proceed without the lawyer because "we don't have time." The defendant then led the police to the location where the victim was buried. When told that the victim was dead, defendant said, "[O]h no, oh no, he can't be dead."

The Court rejected defendant's contention that his statement at the burial site was a nonhearsay "reaction" rather than a testimonial assertion offered for the truth of the matter asserted. The statement was not a "verbal act;" instead, it gained its evidentiary value from its "substantive content and not simply in the fact it was made."

People v. Olinger, 176 Ill.2d 326, 680 N.E.2d 321 (1997) Illinois does not recognize the residual hearsay exception contained in Federal Rule of Evidence 804(b)(5). Under that exception, statements that do not satisfy the requirements for traditional hearsay exceptions are admissible if they exhibit equivalent guarantees of trustworthiness.

People v. Hill, 278 Ill.App.3d 871, 663 N.E.2d 503 (5th Dist. 1996) The Appellate Court rejected the State's argument that there is a res gestae exception to the hearsay rule. Various courts and legal scholars have "criticized the notion of res gestae for its imprecision," and the exception fails "to contribute to an understanding of the problem and inhibit[s] any meaningful analysis." In addition, continued use of the res gestae exception "will continue to obscure rational analysis and . . . demean established evidentiary rules designed to promote the admission of reliable evidence." See also, People v. Dennis, 181 Ill.2d 87, 692 N.E.2d 325 (1998) (res gestae refers to the circumstances, facts, and declarations which grow out of the main fact and serve to illustrate its character, and which are so spontaneous and contemporaneous with the main fact as to exclude the idea of deliberation or fabrications; as a basis for the admissibility of hearsay evidence, Illinois has abandoned the concept of res gestae).

People v. Kneller, 83 Ill.App.3d 325, 403 N.E.2d 1252 (2d Dist. 1980) Testimony about an out-of-court statement may constitute hearsay even though the offering party asserts that it is being offered for a purpose other than to prove the truth of the matter asserted therein.

People v. Higgs, 11 Ill.App.3d 1032, 298 N.E.2d 283 (1st Dist. 1973) Testimony concerning the assertive conduct of a third party, as well as his verbal statements, may be inadmissible hearsay. Testimony that certain persons at the murder scene attacked defendant was hearsay, because it showed that such persons believed defendant to be the murderer.

People v. Orr, 149 Ill.App.3d 348, 500 N.E.2d 665 (1st Dist. 1986) Testimony by State witnesses (that they were at the scene of an arson and saw some individuals struggle with and chase the defendant) was improper. The testimony "related the assertive conduct of others which demonstrated that the persons who 'chased' the defendant believed that he committed the arsons. This assertive conduct was tantamount to a verbal declaration that defendant had committed the crime and should not have been admitted into evidence."

People v. Velasco, 216 Ill.App.3d 578, 575 N.E.2d 954 (4th Dist. 1991) At defendant's trial for criminal sexual assault, the State argued that a videotape of a police interview of the 31-year-old complainant should be admitted to permit the jury to compare the complainant's manner of speaking during the interview with her testimony in court, to illustrate the interviewing technique so that the jury could assess the credibility of the original complaint, and to allow the jury to assess whether the complainant had the mental capacity to consent to a sexual act. The Court rejected these arguments.

1. Allowing the State to introduce a prior statement for comparison with live testimony would nullify the hearsay rule by authorizing the admission of any out-of-court statement.

2. The videotape could not be introduced to show the circumstances of the interview. Because no evidence had been admitted concerning the statements made during the interview, there was no need to show that such statements were the result of acceptable interviewing techniques.

3. The videotape was not admissible to help the jury assess whether the complainant was capable of consenting to a sexual act, as the jury could make that determination from the complainant's demeanor and in-court testimony.

People v. Quick, 236 Ill.App.3d 446, 603 N.E.2d 53 (1st Dist. 1992) Defendant was convicted of solicitation to commit murder after she asked an undercover officer to kill her husband. Defendant raised entrapment and compulsion, and claimed that she felt compelled to go through with the crime because the friend who first introduced her to the hit men told her that she or her children would be killed if she backed out. On hearsay grounds, the trial court refused to admit defendant's testimony concerning these statements.

The Appellate Court found that excluding such testimony violated defendant's constitutional right to present a defense. The statements were crucial to the compulsion defense, and were not hearsay because they were offered to show their effect on defendant's state of mind and not to prove the truth of the matter

asserted.

People v. Taylor, 314 Ill.App.3d 658, 732 N.E.2d 120 (3d Dist. 2000) As an issue of first impression, the court held that testimony about conduct observed on a videotape is not hearsay. Relying on precedent from other jurisdictions, the court concluded that such testimony is not "assertive conduct" intended to "convey a message."

The court also found that the testimony about hearing a defendant's voice on the video was not hearsay. The witnesses testified only that they recognized defendant's voice, and did not describe any statements.

People v. Averhart, 311 Ill.App.3d 492, 724 N.E.2d 154 (1st Dist. 1999) Where defendant contended that a police officer "planted" drugs on him in order to discredit him and thereby foreclose further investigation of an earlier complaint which defendant had filed against the officer, the trial court should have admitted both the result of the previous disciplinary hearing and the fact that defendant had been acquitted of charges arising from the violation which gave rise to the complaint. Because this evidence was offered not for its truth, but to show the impact of events on the officer's state of mind and to explain his subsequent conduct, it was not hearsay.

Cumulative Digest Case Summaries **§19-10(a)**

People v. Leach, 2012 IL 111534 (No. 111534, 11/29/12)

1. 725 ILCS 5/115-5.1 provides that reports of autopsies "kept in the ordinary course of business of the coroner's office" and "duly certified" are admissible in "any civil or criminal action." Ill. R. Evid. 803(6) provides for admission as an exception to the hearsay rule of records of regularly conducted activities if kept in the normal course of business, "but not including in criminal cases medical records." Ill. R. Evid. 803(8) codifies the long-standing hearsay exception for records "of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel."

Under these statutes and Ill. R. Evid. 803, autopsy reports are admissible as an exception to the hearsay rule. Autopsy reports are not medical reports because a deceased person is not a patient and the medical examiner is not the deceased's doctor.

2. Upon review of post-**Crawford** decisions up to and including **Williams v. Illinois**, 567 U.S. ___, 132 S. Ct. 2221, ___ L.Ed.2d ___ (2012), the Illinois Supreme Court concluded that there is a split of opinion among the justices of the United States Supreme Court regarding when out-of-court statements qualify as testimonial. Eight of the justices conclude that statements may be testimonial if obtained (1) for the primary purpose of accusing a targeted individual of engaging in criminal conduct, or (2) for the primary purpose of providing evidence in a criminal case. These are objective tests looking for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. In the view of Justice Thomas alone, the test of whether an out-of-court statement is testimonial is the degree of solemnity and formality under which it was made. Whether a defendant's Sixth Amendment confrontation right was violated is a question of law reviewed *de novo*.

Under any of these tests, business records will rarely qualify as testimonial statements because they are prepared in the routine course of the operation of the business activity or the public office or agency, rather than for the purpose of admission against a criminal defendant.

Under state law, a coroner must conduct an investigation into the circumstances of a death if any one of five enumerated conditions exists. 55 ILCS 5/3-3013. The medical examiner's office does not act as an agent of law enforcement, but is charged with protecting the public health by determining the cause of a

death. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the manner and cause of death, which, if determined to be homicide, could result in charges being brought. Even where foul play is suspected, an autopsy might exonerate a suspect. Autopsy reports are not usually prepared for the sole purpose of litigation, even though they might eventually be used in litigation of some sort.

Thus the primary purpose of preparing an autopsy report is not to accuse a targeted individual of engaging in criminal conduct or to provide evidence in a criminal trial. Neither is an autopsy report certified or sworn in anticipation of its being used as evidence. Considering the split of opinion among the justices of the United States Supreme Court, the Illinois Supreme Court concluded that, while it was not prepared to say that an autopsy report could never be testimonial in nature, autopsy reports prepared in the normal course of business of a medical examiner's office are nontestimonial. They are not rendered testimonial merely because the examiner conducting the autopsy is aware that the police suspect homicide and that a specific person might be responsible.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

In re Jovan A., 2014 IL App (1st) 103835 (No. 1-10-3835, 2/13/14)

The Appellate Court reversed the minor's delinquency adjudication and remanded for further proceedings after finding that the trial judge improperly relied on inadmissible hearsay to establish the minor's guilt.

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless it falls within a recognized exception to the hearsay rule. One such exception permits a police officer to testify about information received during the course of an investigation in order to explain why he or she made an arrest or took steps in the investigation. Such testimony is not offered to show the truth of the matters asserted, but merely to show the steps which the officer performed.

However, the exception does not allow an officer to testify to information beyond what is necessary to explain his or her actions. Similarly, the officer may not testify about the content of any statements he received.

2. The exception for statements made in the course of an investigation has been applied only to testimony by law enforcement officers, and not to testimony by lay witnesses who conducted private investigations. The court found that it need not consider the State's argument that the exception should be extended to lay witnesses because even if the exception did apply, the testimony in this case would have exceeded the scope of the exception. The witness testified not only to the steps which she took in her private investigation, but also to the content of the craigslist.org advertisement which led her to a bicycle which had been stolen a few minutes earlier.

3. A police officer testified that the lay witness told him that a stolen bicycle was being sold on craigslist.org. The officer testified that he viewed the website, found a telephone number, and obtained related names, addresses and car registration information. The officer also testified that when he arrested the respondent he called the phone number listed in the advertisement, and the respondent's cellular phone rang.

The Appellate Court concluded that because the detective was a police officer acting in the line of duty, the "course of an investigation" exception applied to the portions of his testimony stating that he viewed the advertisement, obtained information concerning a car, went to a particular address where he observed the car, and arrested the respondent. Such testimony qualified for the investigation exception because it explained the steps the detective took which resulted in the respondent's arrest.

However, the trial court improperly admitted other portions of the detective's testimony, including that the layperson told him that the bicycle was being sold on craigslist.org, the detective called the number listed in the advertisement, and the respondent's cellular phone rang. The court stressed that the investigation exception does not allow an officer to testify to the content of a statement, and that the content of the advertisement related directly to the essence of the dispute at trial - whether the respondent was the person who stole the bicycle. Furthermore, the content of the advertisement was not necessary to explain the course

of the detective's investigation.

4. Erroneous admission of hearsay requires reversal unless the record shows that the error was harmless. To determine whether this standard has been satisfied, the reviewing court must ask whether there is a reasonable probability that the trier of fact would have been acquitted had the hearsay been excluded.

The court concluded that the erroneous admission of the hearsay was not harmless where, although there was some evidence that the bicycle in question was the one which had been stolen a few minutes earlier, the trial court's oral pronouncement showed that it relied not on the properly admitted evidence but entirely on the improper hearsay, which it considered for its truth. Under these circumstances, there was a reasonable probability that the trier of fact would have acquitted the respondent had the hearsay been excluded.

The court acknowledged that there is a presumption that a trial judge sitting as trier of fact considered only competent evidence. The court concluded that the presumption was overcome because the record affirmatively showed that the judge considered the hearsay for its truth when it found that the respondent had stolen the bicycle. The Appellate Court acknowledged that had the trial court based its finding solely on admissible evidence, reversal would not be required.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Bailey, 409 Ill.App.3d 574, 948 N.E.2d 690 (1st Dist. 2011)

1. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Out-of-court statements offered for a purpose other than to prove the truth of the matter asserted, such as to show the effect on the listener's state of mind, or to show why the listener acted the way that he or she did, are not hearsay.

The court rejected the defendant's argument that the out-of-court statements she sought to admit were not hearsay because they were offered to explain defendant's conduct. As there was no evidence that defendant actually heard these statements, the evidence could not be used to show its effect on defendant, and it was inadmissible hearsay.

2. Out-of-court statements that have independent legal significance as "words of contract" are not hearsay. **Kukla Press, Inc. v. Family Media, Inc.**, 133 Ill.App.3d 939, 479 N.E.2d 1116 (1st Dist. 1985). The out-of-court statements that defendant sought to admit were not admissible as non-hearsay words of contract because they did not purport to authorize defendant to do anything.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Burgund, 2016 IL App (5th) 130119 (No. 5-13-0119, 11/22/16)

Defendant was convicted of predatory criminal sexual assault of his two children. The State's case consisted of his confession and the testimony of his estranged wife and mother-in-law. The trial court excluded several key pieces of evidence defendant wanted to introduce to show that his confession was false and the testimony of his wife and mother-in-law was not believable.

1. First, the trial court excluded the testimony of a clinical psychologist who would have supported defendant's claim that he gave a false confession due to psychological pressure, manipulation, and suggestion by his wife and mother-in-law. The psychologist would have testified that defendant had the type of personality that made him highly suggestible and easily led, especially by his wife and mother-in-law.

A witness is permitted to testify as an expert if his experience and qualifications give him knowledge that lay people do not have and such testimony will aid the trier of fact. When the State presents evidence of a defendant's confession, the defendant has the right to present evidence that affects the weight a trier of fact will give to the confession.

The Appellate Court held that the psychologist should have been allowed to testify about his opinion that defendant had a personality that was subject to easy manipulation. An average juror would not readily understand why an innocent person might falsely believe he committed a crime. The expert's testimony would have thus aided the jury in evaluating the effect of the psychological environment that defendant

claimed made him falsely confess. And it would have touched directly on the credibility of defendant's confession.

The court rejected the State's argument that the expert's testimony was properly excluded because he did not diagnose defendant as having any particular psychological or personality disorder. The jury was not required to find that defendant had a disorder before it could disbelieve his confession.

2. Second, the trial court excluded as hearsay the testimony of two witnesses who would have corroborated defendant's testimony that his wife claimed to have a supernatural power of discernment and was obsessed with making false accusations of lustful behavior. The court also excluded as hearsay the testimony of a witness who dated defendant's wife before she married defendant and would have described numerous instances where the wife accused the witness of being immoral and lustful.

Illinois Rule of Evidence 801 defines hearsay as an out of court statement offered to prove the truth of the mater asserted. Ill. R. Evid. 801(c). An out of court statement is not hearsay if it is offered merely to show that the statement was made, not that it was true.

The Appellate Court held that the testimony was not offered to prove the truth of the matters asserted in the out of court statements made by defendant's wife. Defendant was not trying to prove that his wife actually had a supernatural power of discernment or that one of the witnesses actually had a problem with immoral and lustful behavior. Defendant instead offered the testimony only to prove that his wife had made the statements. Since the statements supported his defense that his wife treated defendant in a similar manner, the trial court erred in precluding this testimony.

3. Third, the trial court excluded the testimony of the ex-husband of defendant's mother-in-law. He would have testified that defendant's wife falsely told people that the ex-husband had sexually abused the mother-in-law. Defendant wanted to introduce this evidence to show that his wife would fabricate sexual abuse allegations to gain sympathy and acceptance within their church community.

Illinois law generally prohibits the impeachment of a witness with specific past instances of untruthfulness. But such evidence may be used to impeach a witness if the past act shows bias, interest, or motive to testify falsely.

The Appellate Court held that this evidence was admissible to show the wife's potential motive, interest, and bias in testifying against defendant. The trial evidence showed that defendant's marriage was tumultuous, with accusations that defendant had lust issues, physical violence stemming from those accusations, and discussions of divorce. Evidence that the wife had made false accusations in the past to gain acceptance in her church as it related to divorce was relevant to show that she may have believed that she would personally benefit again from making false accusations against defendant.

The court granted defendant a new trial.

People v. Davis, 2014 IL App (4th) 121040 (No. 4-12-1040, 12/8/14)

Defendant argued that his trial counsel was ineffective for failing to object to the introduction of a text message used to prove his intent to deliver cocaine. The State introduced evidence that a detective searched defendant's cell phone and found a text message asking to meet defendant "for a 30 or a 40." During defendant's interrogation (recorded on video and played at trial), the detective confronted defendant with this message. The detective then testified that he believed this message was about trying to purchase $30 or $40 of cocaine.

Defendant argued that counsel should have objected to the text message on three grounds: (1) lack of foundation; (2) violation of the best evidence rule; and (3) hearsay. The Appellate Court held that counsel was not ineffective since none of these objections would have succeeded.

1. The court rejected the foundation argument because it rested on a faulty assumption that the State had to lay a foundation for the introduction of a document. The State, however, never introduced any document. It simply played a video of the interrogation where the detective confronted defendant with the text message and then asked the detective what the message meant. Once the detective testified that he had read the message, there was a proper foundation for him to testify about its contents.

2. The court rejected the best evidence rule argument because it only applies when the contents of a writing are at issue. Here the State did not try to prove the content of the text message; it instead used the text message as circumstantial evidence that defendant intended to deliver cocaine. The actual content of the message did not matter.

3. Finally, the court rejected the hearsay argument because the detective's testimony about the contents of the text message was not offered to prove the truth of the matter asserted in the message. Instead, it was offered to show police investigation and circumstantial evidence of defendant's intent.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

People v. Hill, 2014 IL App (2d) 120506 (No. 2-12-0506, 3/31/14)

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Statements which are offered for a reason other than to prove the truth of the matter asserted are not hearsay and are generally admissible.

Under Illinois Rule of Evidence 803(3), statements concerning the declarant's then existing state of mind, emotion, sensation, or physical condition are admissible under the "state of mind" exception to the hearsay rule. However, a hearsay statement is not admissible to prove the state of mind, emotion, sensation, or physical condition of a person other than the declarant.

By contrast, a statement is not hearsay if it is offered to show the effect of the statement on the listener's state of mind or to explain why the listener acted as he did. Thus, a statement may be admissible to show that it gave rise to a motive on the part of a person who heard the statement.

2. The trial court properly admitted notes which the decedent wrote before she died in a fire which defendant was charged with setting. The notes indicated that the decedent intended to end her relationship with defendant.

The evidence showed that defendant and the decedent were arguing in the apartment before the fire broke out, neighbors saw defendant's car speed away moments before the fire was first observed, and the decedent's handwritten notes were likely seen by the defendant because they were found in areas of the home where he had necessarily been during and after the argument. The court concluded that the notes were admissible on two theories - to show the decedent's state of mind, and to show the effect of the notes on defendant, including creating a motive to murder the decedent.

Defendant's convictions for first degree murder and aggravated arson were affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Jacobs, 2016 IL App (1st) 133881 (No. 1-13-3881, 9/29/16)

Defendant was charged with possession of a stolen motor vehicle. At trial, the son of the owners of the vehicle testified that jewelry was taken from his parents' house at the same time the vehicle was stolen. The son testified that when he went to a pawn shop to see if he could find his mother's jewelry, he saw defendant drive the stolen car away from the store.

Before trial, the trial court granted a motion in limine excluding the evidence that jewelry had been taken from the home. However, the trial court overruled defense objections when the prosecutor mentioned the jewelry in opening argument. The trial judge then stated that the evidence was admissible to show that the car had been stolen.

The Appellate Court held that the evidence was improperly admitted as other crimes evidence, and was especially prejudicial where the trial court refused to allow defendant to present evidence that another person had been arrested for burglarizing the house.

1. Other-crimes evidence is inadmissible if used merely to show defendant's propensity to commit crimes. Evidence of other crimes may be admitted for other purposes, such as proving motive, opportunity, intent, preparation, planning, knowledge, identity, or absence of mistake or accident. In addition, under the continuing-narrative exception, defendant's other bad acts are admissible when those acts are part of a

continuing narrative which concerns the circumstances of the entire transaction and are not separate and distinct crimes. The continuing-narrative exception will not apply, even where crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at different places and times.

The Appellate Court concluded that even if the continuing narrative exception applied, the probative value of the evidence that jewelry was stolen was substantially outweighed by the prejudicial effect. The court noted that the State could have established that the son saw defendant driving the stolen vehicle without stating that the car had been at a pawn shop and creating an inference that defendant had been involved with the burglary and theft of the jewelry. The evidence was prejudicial to defendant not only because it created an unmistakable inference that he was involved in a crime for which he was not on trial, but also because it directly impacted his defense that he had been allowed to drive the car by an acquaintance and did not know it had been stolen.

2. In addition, defendant was improperly precluded from introducing evidence that another person had been arrested for the burglary of the home. First, the trial judge erred by finding that the excluded evidence was hearsay where it referred only to the fact of an arrest, and not to any out-of-court assertion. Second, the concerns underlying the admission of other-crimes evidence are not present where the uncharged crime was committed by someone other than the defendant. Exclusion of the evidence here was critical because the fact that another person was arrested for the burglary could have dispelled much of the prejudice created by the admission of evidence of the burglary and theft of the jewelry.

3. The evidentiary errors were not harmless. The improperly admitted evidence created an inference that defendant had committed a burglary of the home and therefore likely stole the car which he was charged with possessing, directly contradicting his claim that he did not know the vehicle was stolen. In addition, the trial court failed to give a limiting instruction concerning the other crimes evidence. Finally, the risk of prejudice was increased because defendant was impeached with a prior conviction for residential burglary, the offense to which he was improperly linked by the other crimes evidence.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Jenkins, 2012 IL App (2d) 091168 (No. 2-09-1168, 1/19/12)

Defendant was convicted of obstructing justice based on responding falsely to a police officer's questioning concerning whether he had a son who drove a particular car. On appeal, he argued that the trial court erred by excluding the testimony of the son and of defendant's wife concerning the questions asked by the officer and the answers given by the defendant. Defendant's wife was present during the conversation, and defendant's son overheard the conversation because he was talking to his father over a cell phone when the police approached. At trial, the judge found that the testimony of the defendant's wife and son concerning the conversation was inadmissible hearsay.

1. The trial court erred by excluding the anticipated testimony of defendant's son and wife as hearsay. Hearsay is an out-of-court statement offered to establish the truth of the matter asserted. An out-of-court statement used for a purpose other than to prove the truth of the matter asserted is not hearsay.

The court concluded that the testimony of the defendant's wife and son was not hearsay. First, all three witnesses witnessed the conversation between the officer and the defendant - defendant and his wife were eyewitnesses, and the son overheard the conversation over the cell phone by which he was conversing with his father. As occurrence witnesses, all three could testify to the version of events they witnessed.

Furthermore, the trial court erred by finding that testimony about defendant's statements to the officer would have been hearsay. The dispute at trial concerned what questions were asked by the officer and what answers were given by the defendant. Testimony about defendant's statements to the officer were not offered to prove the truth of those statements, but to rebut the officer's testimony that defendant made the statements which the State claimed were false.

2. Defendant was prejudiced by the exclusion of his wife and son's testimony, because he was required to testify to fill the "significant gaps" in his defense which existed because his witnesses were not

allowed to testify. Thus, reversal was required.

(Defendant was represented by Assistant Defender Patrick Carmody, Elgin.)

People v. Littleton, 2014 IL App (1st) 121950 (No. 1-12-1950, 6/26/14)

At defendant's trial for robbery, the State presented other crimes evidence to prove *modus operandi.* As part of that evidence, the State presented testimony from two retired police officers recounting statements from nine people concerning offenses to which defendant entered guilty pleas several years earlier. The State contended that the statements were not hearsay because they were offered as proof of *modus operandi* rather than to prove the truth of the matters asserted. The Appellate Court rejected this argument and held that the testimony contained inadmissible hearsay.

1. Hearsay consists of an out of court statement offered to prove the truth of the matter asserted. An out-of-court statement is not hearsay if it is offered for some reason other than to prove the truth of the matter asserted.

Thus, out-of-court statements concerning other crimes are not hearsay if offered to prove something other than that the crime occurred. For example, in **People v. Moss,** 205 Ill.2d 139, 792 N.E.2d 1217 (2001) and **People v. Lovejoy**, 235 Ill.2d 97, 919 N.E.2d 843 (2009), statements concerning alleged sexual assaults were properly admitted at murder trials not to show that the sexual assaults had occurred, but to show the defendants' motives to kill persons who could have been witnesses at trials for sexual assaults.

2. By contrast, statements about unrelated crimes are hearsay if offered to prove that in fact the other crimes occurred. The *modus operandi* exception to the rule against other crimes evidence allows admission of other crimes to prove the identity of a perpetrator, on the theory that if one crime is committed in a unique way it is likely that another crime committed in the same way was the work of the same person. A pattern which gives rise to an inference of the perpetrator's identity exists only if the statements about the other crimes are true. If the statements about the other crimes are not true, there is no unique pattern of crime that would support the *modus operandi* exception.

Thus, statements presented in support of the *modus operandi* exception are offered to prove the truth of the matter asserted - that the other crimes occurred in a particular fashion. Such statements constitute hearsay and are inadmissible unless a hearsay exception applies.

3. Noting that no Illinois court has recognized an exception to the hearsay rule for statements offered to prove *modus operandi*, the court declined to create such an exception.

4. However, the erroneous admission of hearsay in this case was clearly harmless where the improper evidence was not a significant factor in the conviction, the properly-admitted evidence was overwhelming, and the improper evidence was largely cumulative. Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. The testimony of a nurse regarding the statements of the complainant contained in the triage notes of another nurse was not hearsay. The testimony was not offered for the truth of the matter asserted, but to explain the actions of the nurse in treating the complainant.

2. Even if the testimony of the nurse regarding the triage notes was hearsay, it was properly admitted as an exception to the hearsay rule pursuant to 725 ILCS 5/115-13, which authorizes admission of statements of sexual assault victims made to medical personnel for purposes of medical diagnosis and treatment.

3. Admission of the testimony of the nurse regarding the triage notes did not violate the Sixth Amendment Confrontation Clause because the notes were not testimonial hearsay. To determine whether hearsay is testimonial, the focus is on whether, at the time the statement was made, the declarant was acting in a manner analogous to a witness at trial, describing or giving information regarding events that had previously occurred. When the statement is the product of questioning by persons other than law enforcement

personnel, the proper focus is the intent of the declarant. The inquiry is whether the objective circumstances would lead a reasonable person to conclude that the statement would be used against the defendant.

The court considered the declarant to be the nurse who prepared the triage notes and concluded that because her intent was to gather information for treatment and not prosecution, the notes were not testimonial.

4. A fingerprint examiner should not be permitted to testify that a print found at the scene matches the fingerprint of the defendant where the examiner did not testify to and made no notes of the points of comparison the examiner found. Absent this foundation, the testimony deprives defendant of the means to challenge the conclusion drawn by the examiner. The court found no plain error because the evidence was not closely balanced and the error did not impact the fairness of the trial.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Miller, 2013 IL App (1st) 110879 (No. 1-11-0879, 6/28/13)

1. The trial court committed plain error at defendant's trial for aggravated possession of a stolen motor vehicle where it sustained a hearsay objection when the defense asked the owner of the car whether she learned, after reporting that the car was missing, that her husband had in fact sold it. The Appellate Court concluded that the question did not necessarily call for a response based on an out-of-court statement, because the record did not indicate how the witness would have come to know that her husband had sold the vehicle. Furthermore, even had the witness learned of the sale from an out-of-court statement, the question would have been proper because it was intended to show the witness's state of mind rather than to prove the truth of the matter asserted – that the car had in fact been sold. The court stressed that the evidence would have been central to the case because the owner's belief that the vehicle had been sold would have rebutted inferences that the car was stolen or that defendant had knowledge of the theft.

2. The court concluded that reversal was required by the cumulative effect of the exclusion of the evidence and the trial judge's reliance on an incorrect recollection of a witness's testimony. Defendant was prejudiced by the errors because the evidence was closely balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner's husband, and defendant's explanation was reasonable and could have convinced a reasonable trier of fact.

3. The court rejected the State's argument that defendant's flight at the time of his arrest was evidence of consciousness of guilt. Defendant was initially pursued because of a traffic violation, and it could not be said on the record that the attempt to elude the police was motivated by knowledge that the vehicle was stolen rather than by a desire to avoid a traffic citation. The court also noted that defendant's alleged statement admitting that he knew the car was stolen was inadmissible because it was elicited during custodial interrogation conducted in the absence of **Miranda** warnings.

Defendant's conviction for aggravated possession of a motor vehicle was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Munoz, 398 Ill.App.3d 455, 923 N.E.2d 898 (1st Dist. 2010)

1. Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless it falls within an exception to the hearsay rule. The trial court's evidentiary rulings on the admissibility of hearsay are reviewed for abuse of discretion.

Under the "state of mind" exception to the hearsay rule, a hearsay statement may be admissible if it expresses the declarant's state of mind at the time of the utterance, the declarant is unavailable to testify, there is a reasonable probability that the hearsay statements are truthful, and the statements are relevant to a material issue in the case.

2. The trial court erred by allowing the State's key witness to testify that at various times before her death, the decedent had stated that: (1) she was tired of her relationship with the defendant, and (2) defendant

was jealous and always wanted to know where she was and what she was doing. Because the "state of mind" exception authorizes the admission of hearsay only if the declarant's state of mind is relevant to a material issue, the decedent's hearsay statements would be admissible only if her state of mind was relevant, and even then only to prove that state of mind.

The court acknowledged it had previously ordered a new trial because the trial court excluded the declarant's statements indicating that she was in a suicidal state of mind. Such statements were highly relevant to a material issue in the case – whether a murder occurred. By contrast, hearsay concerning the declarant's belief that the defendant was jealous had no relevance and should not have been admitted.

The court concluded that the State attempted to use the hearsay evidence as a "back door" method of proving the truth of the hearsay – that defendant was jealous – and that he therefore had a motive to kill the decedent.

The court rejected the argument that the error was harmless, noting that the evidence was closely balanced and the hearsay went to an alleged motive.

3. The conviction should also be reversed on an independent ground - because a detective who interrogated defendant on the night of his arrest testified that he informed defendant that he did not believe defendant was telling the truth, that defendant changed his story three times, and that in the detective's opinion defendant did not "ever" tell the truth on the night of the arrest.

Under Illinois law, a witness is not permitted to comment on the veracity or credibility of another witness. The court rejected the argument that the detective was merely explaining the investigative procedure, noting that on redirect the detective said that he "simply did not believe that the defendant ever told him the truth that night." The court also noted that the statement was specifically elicited by the prosecutor and had no legitimate purpose.

Due to the closeness of the evidence, the court found that plain error occurred. The court stressed that the error was particularly prejudicial because: (1) the ultimate issue was the relative credibility of the witnesses, and (2) the detective was an "authority figure" whose opinion of defendant's credibility was likely to be taken seriously by the jury.

4. The court also noted that an expert witness phrased her opinion of the cause of death in language which "echoed" the reasonable doubt standard. The court stated that on retrial, the witness should refrain from testifying that she believed "beyond a reasonable degree of medical certainty" that the death was the result of a homicide.

People v. Prather, 2012 IL App (2d) 111104 (No. 2-11-1104, 10/29/12)

1. Evidence that is offered to show a person's knowledge or awareness of a circumstance and not to establish the truth of the circumstance is not hearsay.

The testimony of the complaining witness that she used a home pregnancy test and showed the positive result to the defendant was not hearsay where it was offered only to prove defendant's awareness of her pregnancy, and not that she was in fact pregnant. Because the evidence was being offered to prove only notice or knowledge, not a substantive fact, the State was not required to provide any foundation establishing that the home pregnancy test was in working order and used properly.

2. The test of **Frye v. United States**, 293 F. 1013 (1923), which governs the admissibility of scientific testimony, is codified by Illinois Rule of Evidence 702. Rule 702 states: "Where an expert witness testifies to an opinion based on a new or novel scientific principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs."

This rule only refers to expert testimony, but has also been applied to technologies used by non-experts. The **Frye** standard has two parts: general acceptance and new or novel. A court need not determine if the scientific principle has general acceptance unless it is new or novel.

A trial court's determination of whether a **Frye** hearing is necessary is reviewed *de novo*. In conducting *de novo* review, the reviewing court may consider not only the trial court record but also, where

appropriate, sources outside the record, including legal and scientific articles, as well as court opinions from other jurisdictions.

No **Frye** hearing was required to establish the admissibility of evidence of a home pregnancy test because the technology of a home pregnancy test is not new or novel. The basic principle involved has been known since the 1920s and the methodologies involved were developed in the 1970s. The tests have been in wide use for over 30 years.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Sundling, 2012 IL App (2d) 070455-B (No. 2-07-0455, 1/31/12)

1. In **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2011), the Supreme Court held that the defense has an adequate opportunity to cross-examine, and the Confrontation Clause is therefore satisfied, where the witness testifies on direct examination in sufficient detail to establish each element of the charged offenses. Here, the Confrontation Clause was satisfied where the victim testified and was subject to cross-examination, although the witness had gaps in his memory, because those gaps did not reach the point that the witness provided insufficient detail to permit cross-examination. The eight-year-old witness, who was four years old at the time of the alleged sexual abuse, testified that he remembered meeting the defendant and remembered wrestling with him, but could not remember where the defendant touched him or whether defendant said anything.

Because the witness testified and willingly responded to all questions asked on direct examination, and was available for cross-examination had defense counsel sought to question him, the fact that he had trouble remembering some aspects of the incident did not make him unavailable for cross-examination. The court distinguished **People v. Learn**, 396 Ill.App.3d 891, 919 N.E.2d 1042 (2nd Dist. 2009), in which the witness "shut down emotionally and was unable to answer questions," because in this case the witness answered all the questions he was asked and provided enough detail to permit cross-examination.

2. Generally, other crimes evidence is inadmissible to demonstrate the defendant's propensity to commit the charged crime. Evidence regarding other crimes is admissible, however, if offered to prove intent, *modus operandi*, identity, motive, absence of mistake, or some relevant fact other than propensity. Before admitting evidence of other crimes, the trial court must weigh probative value against prejudicial effect. Other crimes evidence may be excluded if the prejudicial effect substantially outweighs the probative value.

In addition, 725 ILCS 5/115-7.3(a)(1) permits the admission of some other crimes evidence in prosecutions for certain sex offenses. However, §115-7.3(a)(1) also requires a balancing of probative value and prejudicial effect.

To be admissible, other crimes evidence must have some threshold similarity to the crime charged. As factual similarities increase, the probative value of the evidence also increases. Where the evidence is not offered to show *modus operandi*, mere general areas of similarities are sufficient to support admissibility.

Defendant was charged with aggravated criminal sexual abuse against two children. The court concluded that the trial judge erred by admitting three prior convictions for sex offenses against children.

The court held that it was error to admit a 1984 Cook County conviction for indecent liberties and a 1997 Michigan conviction for attempted criminal sexual conduct with a person under the age of 13, because the only evidence consisted of certified copies and a docketing statement for the Cook County case and a copy of the charge and sentencing order in the Michigan case. Because the supporting evidence was insufficient to permit the trial court to determine that there were similarities between the prior offenses and the instant charges, the evidence should have been excluded.

Similarly, the trial court erred by admitting a 1997 Indiana conviction for child molestation. Although the State introduced a probable cause affidavit from the Indiana case, the affidavit should have been excluded for two reasons. First, the affidavit lacked sufficient indicia of reliability concerning the conduct underlying the conviction because it related to the original charges, not to a subsequent guilty plea which defendant entered after an Appellate Court in Indiana overturned the original conviction.

Second, the affidavit was inadmissible hearsay because it was an out-of-court statement offered to

prove the truth of the matters asserted. The court found that the affidavit could not qualify for the business record exception to the hearsay rule; the business record exception does not apply to documents which are prepared in anticipation of litigation, and a probable cause affidavit is clearly created for purposes of litigation.

However, the court concluded that the erroneous admission of the other crimes evidence was not plain error. The defendant did not claim that the error was so serious that it affected the fairness of the trial and challenged the integrity of the process, and the court concluded that the evidence was not closely balanced.

Defendant's convictions for aggravated criminal sexual abuse were affirmed.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

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§19-10(b)
Constitutional Aspects of Hearsay

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 1. Where "testimonial" hearsay is to be offered into evidence at a criminal trial, the Sixth Amendment requires a showing that: (1)the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant concerning the testimony. Ohio v. Roberts, 438 U.S. 56 (1980) erred by suggesting that the Confrontation Clause can be satisfied by the trial court's finding that testimonial hearsay is reliable; although the Confrontation Clause is intended to insure that evidence is reliable, such reliability is assessed in only one way - "by testing in the crucible of cross-examination."

2. "Testimonial" statements include, at a minium, testimony at a preliminary hearing, before a grand jury or at a previous trial, and statements made in response to police questioning. Equivalent statements (such as affidavits and depositions), as well as statements which a reasonable declarant would believe might be used by the prosecution at trial, may also be "testimonial."

Because a statement made by defendant's wife during police interrogation was clearly "testimonial," and defendant had no opportunity for cross-examination due to the State's marital privilege, the Confrontation Clause precluded admission of the statement.

3. Most traditional hearsay exceptions involve non-testimonial hearsay, for which the Sixth Amendment permits States to exercise flexibility in developing the law of hearsay. The court acknowledged that the "dying declaration" exception involves testimonial hearsay, but held that it need not decide here whether the Confrontation Clause permits a "dying declaration" exception to the Sixth Amendment. See also, People v. Ingram, 382 Ill.App.3d 997, 888 N.E.2d 520 (1st Dist. 2008) (admission of statements which qualify for the "dying declaration" exception to the hearsay rule does not violate Crawford v. Washington, even where there was no opportunity for cross-examination; the statements at issue here were not "testimonial," and the Crawford opinion states that even "testimonial" dying declarations are admissible); People v. Redeaux, 355 Ill.App.3d 302, 823 N.E.2d 268 (2d Dist. 2005) (tape-recorded conversations between undercover agent and a coconspirator were admissible despite Crawford v. Washington; the decision in Crawford was not intended to abrogate "firmly rooted exceptions to the hearsay rule," such as the co-conspirators' exception; in addition, the tape-recorded statements were not "testimonial" where they were given in furtherance of the planned drug sale, not in response to formal and systematic questioning).

Davis v. Washington; Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) 1. Crawford v. Washington, did not provide a comprehensive definition of the term "testimonial," because the hearsay in question in that case - a witness's statement in a police station several hours after the alleged offense - qualified under any definition. Here, the court again declined to give a definitive definition of the term "testimonial," but stated:

> "Statements are not testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Thus, statements are not "testimonial" when made during a 911 call in which the declarant reports an ongoing crime, is facing an ongoing emergency, and seeks help "against *bona fide* physical threat." By contrast, statements made in response to police questioning by officers who respond to a report of a domestic disturbance are testimonial where no emergency is in progress and the officers are seeking information about prior events.

The court noted that a conversation which begins as an interrogation to determine the need for emergency assistance can "evolve into testimonial statements" once the original purpose has been achieved, and that testimonial portions of such statements should be redacted.

Statements need not be made in response to interrogation to be "testimonial." In addition, the court assumed without deciding that 911 operators are law enforcement agents.

2. The court rejected the argument that the Confrontation Clause is limited to in-court testimony and formal depositions. The primary factor for determining whether a statement is testimonial is whether it was primarily designed to establish or prove some past event or fact.

3. Statements to a 911 operator in Davis were not testimonial, because they were statements about an ongoing crime and were an attempt to obtain police assistance. Statements in Hammon were clearly "testimonial" because any emergency had passed and the officers were investigating past criminal conduct.

4. The court rejected the argument that domestic violence cases require "greater flexibility in the use of testimonial evidence," because such offenses are "notoriously susceptible to intimidation or coercion." Issues of intimidation or coercion should be resolved by application of the "forfeiture by wrongdoing" doctrine, which provides that defendants may forfeit their confrontation clause rights by taking action which results in a declarant being unavailable to testify. While it took no position on the proof necessary to show a forfeiture by wrongdoing, the court noted that cases applying the Federal Rules of Evidence generally hold the government to a preponderance-of-the-evidence standard. The court stated that on remand, the Indiana court is free to determine whether a claim of forfeiture by wrongdoing has been properly raised and is meritorious.

Giles v. California, ___ U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) 1. The Crawford rule is subject to two exceptions: (1) out-of-court statements by a declarant who was on the brink of death and aware that he was dying, and (2) out-of-court statements by a declarant who became unavailable due to actions which the defendant performed with the intent of preventing the witness from testifying (i.e., the "forfeiture by wrongdoing" doctrine).

2. The "forfeiture by wrongdoing" doctrine applies only under the circumstances recognized at common law - when the defendant's actions were intended to make the witness unavailable. Unless an offense is committed for the purpose of preventing a witness from testifying, the forfeiture doctrine does not apply on the theory that by committing the offense with which he is charged, the defendant caused the witness to be unavailable.

Thus, the "forfeiture by wrongdoing" doctrine did not apply in a murder prosecution under the theory that by committing the murder, defendant prevented the decedent from testifying.

Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) Crawford v. Washington does not apply retroactively to collateral review. But see, In re Rolandis G., 232 Ill.2d 13, 902 N.E.2d 600 (2008) (Crawford applies retroactively to all cases which were pending on direct review when Crawford was

decided).

In re Rolandis G., 232 Ill.2d 13, 902 N.E.2d 600 (2008) 1. A statement to a law enforcement agent is "testimonial" if the objective circumstances suggest that the primary purpose is to establish or prove past events in order to identify or convict a perpetrator. A statement to law enforcement personnel is "nontestimonial" if the circumstances objectively indicate the primary purpose of the interpretation is to gather information to meet an ongoing emergency.

2. Where a statement is the product of questioning by police or a police agent, the objective intent of the questioner determines whether the statement was made to establish a particular fact. Where statements are not the product of law enforcement interrogation, however, the test is whether the declarant intended the statement to establish a particular fact and whether a reasonable person would have believed that his statement could be used against the defendant. When the declarant is a child, age is one of the objective circumstances to consider in determining whether a reasonable person would think that the statement would be available for use at trial.

The child welfare worker who obtained the statement of the six-year-old complainant was a police agent because: (1) she worked for a licensed advocacy center which worked with other agencies to investigate and prosecute child sexual abuse cases, (2) the worker was obligated to share any information with the police, (3) there was no evidence that the purpose of the interview was to treat the complainant, (4) the complainant was no longer in any danger from the respondent, (5) a police officer observed the interview, and (6) a copy of the victim's videotaped statement was given to the police. Because the statement was obtained through questioning and was intended to determine past facts, it was "testimonial."

The court stated that it was "not unsympathetic to the State's concern" that Crawford increases the difficulty of prosecuting child abuse cases. However, "we may not abridge constitutional guarantees simply because they are a hindrance to the prosecution of child sexual abuse crimes."

3. The "forfeiture by wrongdoing" doctrine holds that a defendant waives his right to confront the declarant of a hearsay statement if the declarant is unavailable at trial due to the defendant's wrongdoing. Under U.S. Supreme Court precedent, the doctrine applies only if the actions which caused the witness's unavailability were intended by the defendant to prevent the witness from testifying. Because there was no evidence that the respondent committed the crime with the intent to prevent the respondent from testifying, the "forfeiture by wrongdoing" doctrine did not apply. The fact that the respondent made the complainant "pinky swear" not to tell anyone did not show an intent to prevent the complainant from testifying where nothing in the record indicated that respondent did so in contemplation of a future trial at which the complainant would be unavailable. See also, People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007) (plurality opinion)(a statement is "testimonial" if it is: (1) made in a "solemn" fashion, and (2) intended to prove some fact germane to the defendant's prosecution; witnesses were clearly "agents" of law enforcement where both were mandated "reporters" who were required to report to DCFS any reason to believe that a child whom they saw in their professional capacities had been abused or neglected; trial court did not err by finding the witness to be "unavailable"; "unavailability includes child witnesses who are unable to testify because of fear"; "forfeiture by wrongdoing" doctrine applies only if the defendant intentionally procured the witness's absence, and not where some action by the defendant had the ancillary result of making the witness unavailable); **People v. Sutton**, 233 Ill.2d 89, 908 N.E.2d 50 (2009) (hearsay is "testimonial" if the circumstances objectively indicate that the primary purpose of the interrogation was to establish or prove past events in order to identify or convict the perpetrator; whether statement is "testimonial" is a question of law to which the de novo standard of review applies; statement was made in a "solemn" fashion, as required by Illinois precedent, where it was "embedded" in the officer's subsequent police report; previously hypnotized witness was "available" for cross-examination where he was physically present at trial and cross-examination concerned prehypnotic recall).

People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005) 1. The court rejected defendant's argument that

testimony admitted under 725 ILCS 5/115-10, which authorizes the admission of certain hearsay statements made by the victims of child sexual abuse, violates Crawford v. Washington, 541 U.S. 36 (2004). The court noted that the Confrontation Clause does not bar admission of a statement so long as the declarant is present in court to defend or explain it. Thus, Crawford does not apply to testimony admitted under §115-10 because the statute requires the child to be available to testify and therefore subject to cross-examination. (In finding that §115-10 requires that the child be available to testify at the proceeding, the court referred to §115-10(b)(2)(A), which states that the evidence is admissible if the child testifies at the proceeding. The court did not discuss 115-10(b)(2)(B), which holds that even if the child does not testify, the evidence is admissible if the child is unavailable and there is corroborative evidence.)

2. The court concluded that in this case, the circumstances of the statements provided sufficient indicia of reliability to be admitted under §115-10. The court rejected arguments that the 7-year-old complainant used language and exhibited a level of knowledge of sexual activity that would be unusual for a child of her age, noting that she had been exposed to "an appalling environment of prostitution and drug use."

The court also acknowledged testimony that defendant's natural father told her to say "bad things" about the defendant, and that the complainant spent a significant amount of time in the natural father's custody. The court found that such evidence did not establish lack of reliability, because the complainant readily admitted that the natural father had prompted her to speak ill of the defendant but expressly denied that he had told her to falsely claim that defendant had sexually abused her. The court also noted that the trial judge had the advantage of observing the witnesses before concluding that the accusations against defendant were not a result of the natural father's directions.

Although there was evidence suggesting that the complainant tended to confuse the defendant and her natural father, that evidence arose only at trial and therefore could not have been considered by the trial judge at the pretrial reliability hearing. In addition, at trial defendant failed to renew his objection after that evidence was admitted, the minor repeatedly referred to defendant by his first name rather than as her father (reducing the likelihood of a mistaken identification), and the minor did not vacillate concerning the identity of her abuser.

3. The court noted, however, that some of the statements occurred during an interview by a DCFS investigator and a detective, who did not videotape the interview despite the availability of videotaping equipment. The court stated, "While we believe the lack of a contemporaneous video recording does not render the interview unreliable . . ., we once again strongly admonish law enforcement personnel and social workers to record those interviews whenever possible."

People v. Patterson, 217 Ill.2d 407, 841 N.E.2d 889 (2005) 1. **Crawford** was violated when the grand jury testimony of a witness who refused to testify at defendant's trial was read to the jury. The testimony was admitted under 725 ILCS 5/115-10.2, which authorizes the admission of hearsay statements by a declarant who refuses to testify despite a court order. Such testimony can be admitted only if: (1) the hearsay is offered on a material point, (2) the hearsay is more probative on that point than any other evidence which is reasonably available, (3) the hearsay has equivalent circumstantial guarantees of trustworthiness as traditional hearsay exceptions, and (4) the interests of justice will be served by admitting the statement. Although the **Crawford** court did not give a comprehensive definition of "testimonial," there is no question that testimony before a grand jury qualifies.

2. The court concluded, however, that **Crawford** error is subject to harmless error analysis. The court concluded that the error was harmless beyond a reasonable doubt because it could not have contributed to the conviction.

People v. McClanahan, 191 Ill.2d 127, 729 N.E.2d 470 (2000) The Confrontation Clause was violated by 725 ILCS 5/115-15, which provided that in drug prosecutions the State could use lab reports as *prima facie* evidence of the identity of a substance, unless within seven days of receiving the report the defense

demanded live testimony.

People v. Brown, 363 Ill.App.3d 838, 842 N.E.2d 1141 (1st Dist. 2006) 1. The court accepted the State's concession that 725 ILCS 5/115-10.2(a), which authorizes the admission of reliable hearsay statements by a declarant who refuses to testify despite a court order, violates **Crawford** because it permits the admission of testimonial hearsay without an opportunity for cross-examination. However, because the possibility of cross-examination is one of four factors traditionally considered by courts in determining whether such evidence is reliable, and a court could exclude a statement on the basis that there had been no cross-examination, §115-10.2 was not facially invalid.

The court also noted that §115-10.2 has been amended to provide that statements are admissible only if made under oath and subject to cross-examination.

2. Because the statute is not unconstitutional on its face, the **Crawford** error was subject to harmless error analysis. However, the error was not harmless in this case because the statements contributed to the defendant's conviction.

People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007) 1. As a matter of first impression, the court held that a co-defendant's guilty plea is "testimonial" under **Crawford**. The court found that a guilty plea is tantamount to a confession, and noted that confessions of a co-defendant are clearly testimonial.

Thus, a co-defendant's guilty plea cannot be admitted as evidence of the defendant's guilt unless there is an opportunity to cross-examine the co-defendant.

2. The court rejected the State's argument that **Crawford** did not apply because the guilty plea was used merely to impeach the testimony of the defense witness, and not as evidence of the defendant's guilt. "The State's position in this case borders on the frivolous."

3. In the course of its opinion, the court noted that because defense counsel raised only a general objection, the **Crawford** objection could be deemed to have been waived. A general objection raises only a question of relevance, and generally waives other issues unless the grounds for the objection were clear from the record, trial counsel was ineffective, or there was plain error.

People v. Feazell, 386 Ill.App.3d 55, 898 N.E.2d 1077 (1st Dist. 2007) As a matter of plain error, Crawford was violated at a trial for first degree murder where a detective testified that while interrogating the defendant, he discussed statements made by a co-defendant who did not testify at defendant's trial. The co-defendant's hearsay statements were a "powerful force for the State" and "an integral part" of the State's case, because they directly impeached defendant's version of events and "severely contradicted" defendant's testimony. In addition, without the inadmissible testimony there would have been no evidence to contradict the defendant's version of events and no direct evidence to show that she knew the co-defendant had a weapon.

People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005) 725 ILCS 5/115-12 provides that a statement of prior identification is admissible as substantive evidence if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one identifying a person after perceiving him. The court concluded that a declarant is available for cross-examination, both for purposes of §115-12 and under Crawford v. Washington, if he or she is "available at trial, under oath, and willing to testify." The declarant is not "unavailable" for cross-examination merely because he denies making the out-of-court statement.

People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (1st Dist. 2007) An elderly woman's statement to an emergency room doctor - that she had been "tied and raped" - was "testimonial." The declarant was speaking about a past event, had refused medical treatment at the time of the incident, and was not taken to the hospital until several hours later, after she became upset at police questioning. The statement was clearly not a cry

for help against an existing physical threat, as it was made in a hospital while the declarant was safe and in the absence of any present emergency. Finally, there was nothing in the record to suggest that the victim was "frantic."

Cumulative Digest Case Summaries **§19-10(b)**

Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705, ___ L.Ed.2d ___, 2011 WL 2472799 (2011) (No. 09-10876, 6/23/11)

The Sixth Amendment Confrontation Clause permits introduction of testimonial statements of witnesses absent from trial only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. **Crawford v. Washington**, 541 U.S. 36 (2004). There is no forensic-evidence exception to this rule. An analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial and therefore within the compass of the Confrontation Clause. **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009).

To admit a forensic laboratory report certifying that defendant's blood-alcohol level was above the threshold required for aggravated DWI, the State called an analyst from the laboratory who qualified as an expert witness with respect to the gas chromatograph machine used to perform the analysis as well as the laboratory's procedures. The witness had not signed the certificate and had neither participated in nor observed the test on defendant's blood sample. The certifying analyst had been placed on an unpaid leave for an undisclosed reason, and was not called to testify. The court held that this surrogate testimony did not satisfy the Confrontation Clause.

1. The court rejected the argument that cross-examination of the certifying analyst was unnecessary because he was a "mere scrivener" and defendant's true accuser was the gas chromatograph machine. The analyst's certification reported more than a machine-generated number, and also made representations as to past events and human actions not revealed in raw, machine-produced data. Even if that were not true, the obvious reliability of a testimonial statement does not dispense with the Confrontation Clause.

2. The testimony of the surrogate analyst was not a substitute for the testimony of the certifying analyst. The surrogate could not convey what the certifying analyst knew or observed about the test or the testing process. His testimony could not expose any lapses or lies on the certifying analyst's part, or address the circumstances that led to the certifying analyst's unpaid leave. The surrogate analyst had no independent opinion regarding defendant's blood-alcohol level. The Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. In short, when the State elected to introduce the analyst's certification, the certifying analyst became the witness defendant had the right to confront.

3. The certified blood-alcohol reports were testimonial. A document created solely for an evidentiary purpose, made in aid of a police investigation ranks as testimonial. That the reports were not sworn to as in **Melendez-Diaz** was not dispositive.

Justice Sotomayor, specially concurring, emphasized that a statement is testimonial if its primary purpose is to create an out-of-court substitute for trial testimony. The formality of the certified report is also an indicator of its testimonial purpose. She identified four variants not present in the case before the court that were therefore not addressed by the opinion:

- the admissibility of a certified report where the State suggests an alternate purpose for the report other than its use as evidence;
- the admissibility of the testimony of a supervisor, reviewer, or someone else with a personal connection to the test at issue, and the degree of involvement in the testing procedure that might be required of the witness;
- the admissibility an independent opinion of an expert witness about underlying testimonial reports

that were not themselves admitted into evidence, pursuant to Federal Rule of Evidence 703 (which provides that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted);

- the admissibility of only machine-generated results.

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)

1. Under **Crawford v. Washington**, 541 U.S. 36 (2004), testimonial hearsay may be admitted at trial only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination. The affidavit of a laboratory analyst indicating the result of the analysis of a seized substance was clearly testimonial hearsay – **Crawford** itself specifically mentioned affidavits in discussing types of testimonial evidence. Thus, **Crawford** required the analyst to testify before the affidavit could be admitted.

2. The court rejected several arguments advanced by the State "to avoid this rather straight-forward application" of **Crawford**, including that: (1) only "accusatory" or "conventional" witnesses need be subjected to confrontation, (2) evidence of "neutral, scientific testing" is not subject to **Crawford** because it is not "prone to distortion or manipulation," (3) affidavits prepared by laboratory analysts for use at trial are "akin" to business records, which qualify for a hearsay exception, (4) the defendant could have subpoenaed the analyst had he wanted live testimony, and (5) relaxation of the Confrontation Clause is necessary to accommodate the "necessities of trial."

3. In the course of its holding, however, the court noted that State statutes requiring the defense to give pretrial notice of its confrontation-based objection to use of an analyst's affidavit at trial are not necessarily unconstitutional, at least "[i]n their simplest form." The court found that such statutes do not shift any burden to the defendant; instead, they require the State to disclose before trial that it intends to introduce the analyst's report, and merely require the defendant to assert his constitutional right to confrontation at that time rather than waiting until trial.

Michigan v. Bryant, ___ U.S. ___, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) (No. 09-150, 2/28/11)

1. Under **Crawford v. Washington**, 541 U.S. 36 (2006), the Sixth Amendment permits the admission of "testimonial" hearsay only if the declarant is unavailable and there was a prior opportunity for cross-examination. Although **Crawford** did not provide a comprehensive definition of "testimonial" hearsay, at a minimum prior testimony and statements made during police interrogations are included.

In **Davis v. Washington** and **Hammond v. Indiana**, 547 U.S. 813 (2006), the court concluded that statements made in response to police questioning are "testimonial" if the objective circumstances indicate that the primary purpose is to establish or prove past events for potential use in a subsequent criminal prosecution. Such statements are nontestimonial if the primary purpose is to enable police to meet an ongoing emergency.

The court found here that any statement made with a primary purpose other than to create evidence should be deemed nontestimonial. Factors besides ongoing emergencies may demonstrate that the primary purpose of a statement was not to create evidence for a trial. In determining the primary purpose of a statement, "standard rules of hearsay, [which are] designed to identify some statements as reliable, will be relevant."

An objective test is used to determine the primary purpose of statements made during police interrogation. In other words, statements are nontestimonial if the primary purpose of reasonable persons in the positions of the declarant and the officers who conducted the interrogation would not have been to create evidence for trial.

To avoid difficulties caused by the fact that parties may act with mixed motives, the primary purposes of both the declarant and the interrogators must be considered. "In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers."

2. Here, the declarant's statements were nontestimonial. In **Davis** and **Hammond**, the question was whether statements had the primary purpose of dealing with an "ongoing emergency" concerning domestic disputes. Here, police found a person who had suffered a gunshot wound which later proved to be fatal. Because the officers did not know who had fired the shot, where the incident had occurred, whether the victim was in danger of a renewed attack, or whether the assailant might target other individuals, the primary purpose of the interrogation was to allow police to deal with a possible threat to public safety.

The extent of the threat to public safety was affected by the fact that a firearm had been used, as compared to the assailant's fists in **Davis** and **Hammond**. Furthermore, the questioning occurred in an informal manner at the scene, a situation that was less likely to have been intended to create evidence than formal questioning at a police station.

The determination of the primary purpose was also impacted by the declarant's medical condition, to the extent that it shed light on the likelihood that he was concerned with providing evidence against his assailant. The declarant's medical condition also provided "important context" to the police in evaluating the nature of the threat to public safety.

Here, the declarant was suffering from a mortal gunshot wound and interrupted the questioning to inquire when emergency medical services would arrive. Under such circumstances, it is unlikely that his focus was on creating evidence to be used against the defendant. Because the circumstances objectively indicate that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency, the declarant's statements were nontestimonial. Therefore, the statements were properly admitted at trial.

3. The court acknowledged, however, that the emergency did not continue until the perpetrator was apprehended a year later. It was unnecessary to determine the precise instance at which the primary purpose shifted, however, because all of the statements which the prosecution introduced at trial occurred within the first few minutes after the police arrived and well before they secured the scene.

4. In a footnote, the court noted that **Crawford** raised the possibility that "dying declarations" are nontestimonial. The only factual basis for admitting the statements was as excited utterances, however, and the lower courts did not address the possibility that the statements were dying declarations.

5. In a second footnote, the majority stated that apart from the Confrontation Clause, the due process clauses of the Fifth and Fourteenth Amendments may bar the admission of unreliable evidence.

Ohio v. Clark, U.S. , S.Ct. , L.Ed.2d (2015) (No. 13-1352, 6/18/15)

1. The Sixth Amendment Confrontation Clause generally prohibits the introduction of testimonial statements by a witness who does not testify at trial. Under the "primary purpose" test, statements elicited through interrogation are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

When the primary purpose of the interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus statements elicited in response to such interrogation are not prohibited by the Confrontation Clause. But the "existence *vel non* of an ongoing emergency" is not the end of the inquiry; it is just one factor in the ultimate question about the primary purpose of the interrogation.

2. Teachers at L.P.'s preschool observed suspicious marks on his body and asked him who was responsible. L.P., who was three years old, eventually made statements to the teachers implicating defendant. These statements were introduced at trial, but L.P. did not testify. Defendant argued that the statements were testimonial and thus prohibited by the Confrontation Clause.

3. The Supreme Court held that the statements were not testimonial. The Court declined to adopt a categorical rule that statements made to persons other than law enforcement officers are never testimonial. But, such statements are much less likely to be testimonial. And considering all the relevant circumstances in this case, L.P.'s statements "clearly were not made with the primary purpose of creating evidence for [defendant's] prosecution," and thus were not barred by the Sixth Amendment.

First, the statements were made in the context of an ongoing emergency about suspected child abuse. When the teachers saw the injuries, they needed to know whether it was safe to release L.P. to his guardian

at the end of the day. Their immediate concern was to protect L.P. by identifying and ending the abuse.

Second, there was no evidence that the primary purpose was to gather evidence for defendant's prosecution. The teachers never informed L.P. that his answers would be used to arrest or punish the abuser, and L.P. never indicated that he intended his statements to be used in a prosecution.

Third, L.P.'s young age contributed to the finding that the statements were not testimonial. "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." Few three-year-old children understand the criminal justice system and it is unlikely that someone that young would intend his statements to be a substitute for trial testimony.

Finally, the Court found it highly relevant, if not categorically dispositive, that L.P. was speaking to teachers rather than law enforcement officers. Statements to persons who are not "principally charged with and uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."

In light of all these circumstances, the Court held that the introduction of L.P.'s statements did not violate the Sixth Amendment.

4. The Court specifically rejected two of defendant's arguments. First, Ohio's mandatory reporting obligations for teachers did not turn their questions into the equivalent of police interrogation. Even with this obligation, the teacher's overriding concern "was to protect L.P. and remove him from harm's way." Such reporting statutes cannot convert concerned questions from a teacher "into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

Second, the Court refused to view this issue from the jury's perspective. Doing so would make virtually all out-of-court statements testimonial. The prosecution typically offers those statements when they support its case, and in this context, the context the jury sees, all such statements could be viewed as testimonial. But the Court has never suggested that the Confrontation Clause bars all out-of-court statements that support the prosecution's case. Such a broad rule would eliminate the primary purpose test.

Williams v. Illinois, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2012 WL 2202981 (No. 10-8505, 6/18/12)

A plurality of the Court (Alito, J., joined by Roberts, C.J., Kennedy, and Breyer, JJ.), found no Confrontation Clause violation where the prosecution's DNA expert testified she matched defendant's DNA profile to a DNA profile that another laboratory, Cellmark, derived from semen found on the victim's vaginal swabs.

1. The Confrontation Clause has no application to out-of-court statements not offered to prove the truth of the matter asserted. The out-of-court statement by Cellmark was not offered for its truth, but was related by the expert only for the purpose of explaining the assumptions on which that opinion rested.

Both the Illinois and Federal Rules of Evidence allow an expert to base an opinion on facts made known to the expert of which the expert has no personal knowledge. The expert's reliance on such facts does not constitute admissible evidence of the underlying information. In a jury trial, the disclosure of such underlying information is generally barred. In a bench trial, it is presumed that the judge will understand the reason for the disclosure of the underlying inadmissible information and will not rely on it for any improper purpose.

The prosecution's expert answered in the affirmative when asked, "Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [the victim] to a male DNA profile that had been identified as having originated from Sandy Williams?" The testimony that the matching DNA profile was found in the semen from the victim's vaginal swabs was not substantive evidence of that fact; it was a mere premise of the prosecutor's question that the expert assumed to be true.

The plurality found no support for the conclusion that the trial court considered the basis testimony for an improper purpose. The admissible evidence supported the conclusion that the sample tested by Cellmark came from the victim's vaginal swabs, as no other plausible explanation exists for how Cellmark could have produced a DNA profile that matched defendant's.

Independent circumstantial evidence supported the conclusion that Cellmark's profile was deduced from semen found on the vaginal swab. Whether that evidence provided a sufficient foundation for the expert's testimony was not a Confrontation Clause question.

2. Even if the out-of court statement by Cellmark had been offered for its truth, there was no Confrontation Clause violation. All of the cases in which a Confrontation Clause violation has been found post-**Crawford v. Washington**, 541 U.S. 36 (2004), involve out-of-court statements whose primary purpose was to accuse a targeted individual of engaging in criminal conduct. An objective test is applied to determine the primary purpose that a reasonable person would ascribe to the out-of-court statement, taking into account all of the surrounding circumstances.

The primary purpose of the Cellmark report was not to accuse the defendant or create evidence for use at trial, but to catch a dangerous rapist who was still at large. The report was produced before any suspect was identified. No one at Cellmark could have known whether the profile would turn out to be incriminating or exonerating, or both.

Breyer, J., specially concurred. He believed the case should be set for reargument to address how the Confrontation Clause applies to the "panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians?" In the absence of reargument, he joined the plurality's opinion.

Thomas, J., concurred in the judgment. He agreed with the dissent that Cellmark's out-of-court statements were offered for their truth. He was also critical of the plurality's primary-purpose test as it limits defendant's confrontation right to statements made after the accused's identity becomes known.

He concluded, however, that the admission of Cellmark's statements did not violate the Confrontation Clause because Cellmark's report lacked the requisite formality and solemnity to be considered testimonial. The Confrontation Clause regulates only the use of statements bearing "indicia of solemnity," *e.g.*, depositions, affidavits, prior testimony, or statements resulting from formalized dialogue such as custodial interrogation. The Cellmark report lacks the solemnity of an affidavit or a deposition because it is neither certified nor sworn to.

Kagen, J., joined by Scalia, Ginsburg, and Sotomayor, JJ., dissented.

1. The report at issue showing that a DNA profile was produced by an analyst at Cellmark from a vaginal swab taken from a rape victim is indistinguishable from the reports in **Melendez-Diaz v. Massachusetts**, 557 U.S. 305 (2009), and **Bullcoming v. New Mexico**, 564 U.S. ___, 131 S. Ct. 2705, ___ L.Ed.2d ___ (2011). Using the prosecution expert as the conduit for this evidence is functionally equivalent to the surrogate testimony offered in **Bullcoming**, yet worse because at least the surrogate witness in **Bullcoming** worked at the lab and was familiar with its procedures.

2. The dissent rejected the plurality's conclusion that this evidence was not offered for its truth but for the limited purpose of explaining the basis for the expert's conclusion. When an expert repeats an out-of-court statement as the basis for a conclusion, the statement's utility is dependent on its truth. To determine the validity of the expert's conclusion, the trier of fact must assess the truth of the out-of-court statement. Nothing in the expert's testimony indicated that she merely assumed the truth of Cellmark's findings or considered those findings as a hypothesis.

The identity of the decision maker as a judge does not change this analysis. Even if the judge understood that he could not consider the Cellmark report for its truth and found independent circumstantial evidence establishing the source of the sample that Cellmark tested and the reliability of the Cellmark profile, the admission of the expert's testimony would be error, but harmless. Moreover, there are indications to the contrary in the judge's findings where the judge never referred to the circumstantial evidence, but focused solely on the testimony of the expert calling her "the best DNA expert I have ever heard," and referring to defendant as "the guy whose DNA, according to the evidence from the experts, is in the semen recovered from the victim's vagina."

The dissent criticized the plurality for allowing state-law labels to define federal constitutional requirements, which allows the prosecution to do through subterfuge and indirection what the Court had

previously held the Confrontation Clause prohibits.

3. The plurality adopts a test for testimonial evidence (whether the report was prepared for the primary purpose of accusing a targeted individual) that derives from neither the text nor the history of the Confrontation Clause and has no basis in the court's precedents. The typical problem with laboratory analyses has to do with careless or incompetent work, which is unaffected by whether at the time of the test, the police have a suspect. It is also inappropriate to analogize this situation to an ongoing emergency where the swabs were not sent to Cellmark until nine months after the rape and the results were not received for another four months. The assumed trustworthiness of forensic evidence has previously been rejected as a reason to exempt it from the reach of the Confrontation Clause.

"Justice Thomas's approach grants constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections." Recognizing a distinction based on whether a document is labeled a "certificate" or a "report of laboratory examination" would invite circumvention, is illogical, and has not been adopted by any other member of the Court.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

In re Brandon P., 2014 IL 116653 (No. 116653, 5/22/2014)

1. The court agreed with the State's concession that out-of-court statements made by the three-year-old complainant to a police officer were "testimonial" for purposes of the confrontation clause. Statements to police are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is establish past events potentially relevant to criminal prosecution.

Here, the primary purpose of the interview was to establish events for a potential criminal prosecution. Thus, statements made during the interview were testimonial.

2. The court agreed with the State's concession that the three-year-old was unavailable to testify for purposes of 725 ILCS 5/115-10. Under §115-10, "unavailable" witnesses include children who are unable to testify because of fear. **People v. Stechly**, 225 Ill. 2d 246 (2007).

The record here shows that the complainant was unavailable because of her fear and youth. She could barely answer the trial court's preliminary questions, and froze when the State began its direct examination. The trial court, defense counsel, and the prosecutor all agreed that the complainant was unavailable. Under these circumstances, the trial court did not abuse its discretion by finding that the witness was unavailable for purposes of §115-10.

(Respondent was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Barner, 2015 IL 116949 (No. 116949, 4/16/15)

1. Under **Crawford v. Washington**, 541 U.S. 36 (2004), testimonial hearsay may not be admitted at a criminal trial unless the declarant is unavailable and there was a prior opportunity for cross-examination. Pluralities of the U.S. Supreme Court have held that scientific reports are "testimonial" where the primary purpose of an affidavit or report was to provide *prima facie* evidence of the nature of an analyzed substance and it could be safely assumed that the analyst was aware of the affidavit's evidentiary purpose (**Melendez-Diaz v. Massachusetts**, 557 U.S. 305 (2009)), or the primary purpose for preparing a report on a suspected drunk driver's blood alcohol level was so the report could be introduced at trial (**Bullcoming v. New Mexico**, 564 U.S. ___, 131 S. Ct. 2705 (2011)).

Justice Thomas provided the fifth vote in both **Melendez-Diaz** and **Bullcoming**, and in the former case rejected the plurality's conclusion that whether a report is testimonial depends on its primary purpose. Instead, Justice Thomas believes that extrajudicial statements are testimonial and thus implicate the Confrontation Clause only to the extent they are formalized and solemn. Thus, Justice Thomas would afford testimonial status to such materials as affidavits, depositions, prior testimony, or confessions.

In **Williams v. Illinois**, 567 U.S. ___, 132 S. Ct. 2221 (2012), a four-member plurality found that the Confrontation Clause was not violated by an expert's testimony concerning testing performed by nontestifying analysts because: (1) the testimony was not offered for the truth of the matter asserted, and (2)

the Confrontation Clause does not apply to a report concerning testing that was conducted before any suspect was identified and was intended to identify the offender rather than creating evidence to be used against a particular person.

In **Williams**, the fifth vote was again provided by Justice Thomas, who stated that although the testimony was offered for the truth of the matters asserted it lacked the solemnity and formality associated with testimonial evidence.

2. The Illinois Supreme Court concluded that under **Williams**, whether a scientific report is testimonial depends on whether a reasonable person would believe that the report was made for the purpose of proving the guilt of a particular defendant at trial. **People v. Leach**, 2012 IL 111534. The **Leach** court noted the position of the **Williams** dissenters - that a report is testimonial if it is made for the purpose of providing evidence against *any* person - but found that the autopsy reports at issue in that case did not satisfy the standard of either the plurality or dissent.

3. The court concluded that a reasonable person would not believe that the DNA testing in this case was performed for the purpose of proving the guilt of defendant, because the testing was performed before defendant was a suspect and for the purpose of uploading a DNA profile to a statewide law enforcement database. Thus, an expert's testimony concerning testing conducted by other analysts was not testimonial. The court also found that if Justice Thomas's standard was applied, the testimony lacked the formality and solemnity required for a finding that it was testimonial.

The court rejected the argument that where the blood sample on which the testing was performed had been drawn because defendant was a suspect in a murder, the evidence was testimonial although it was admitted at a trial for unrelated sexual assaults for which defendant was not a suspect at the time of the testing. The court stressed that the reports had been produced for the purpose of solving the unrelated murder and that the analysts could not have known that their reports would become evidence in the sexual assault case.

4. The court also concluded that even if **Crawford** was violated by an expert's testimony concerning additional testing that was subsequently performed by nontestifying analysts, the error was harmless beyond a reasonable doubt. Admission of testimonial hearsay is harmless where the error did not contribute to the verdict obtained at trial. In determining whether an error is harmless, a reviewing court may consider whether the error might have contributed to the conviction, whether the properly admitted evidence overwhelmingly supports the conviction, and whether the improperly admitted evidence is cumulative to properly admitted evidence. The court concluded that in light of the properly admitted evidence, any violation of the right to confrontation concerning the subsequent testing was harmless.

5. In dissent, Justice Kilbride found that **Williams** has no precedential value and stands only for the proposition that under the facts of that case, five justices believed the evidence to be admissible.

(Defendant was represented by Assistant Defender Pam Rubeo, Chicago.)

People v. Hanson, 238 Ill.2d 74, 939 N.E.2d 238 (2010)

The Supreme Court affirmed defendant's convictions and death sentence:

1. The trial court did not err by admitting testimony by the sister of one of the decedents concerning a conversation which she had with the decedent about six weeks before the latter's death. In that conversation, the decedent said that defendant had threatened to kill her if she told their father that defendant had obtained credit in their parents' names.

The State admitted that the statements were hearsay, but argued that defendant had forfeited his right to challenge the evidence under the "forfeiture by wrongdoing" doctrine. Under that doctrine, statements are admissible against a party who, with the intent to prevent the witness from testifying, procures the absence of the declarant from trial. The State contended that defendant murdered the decedent with the intent of keeping her from going to the police or testifying against him.

Defendant did not dispute the finding that he acted with intent to make the decedent unavailable, but argued that the doctrine of forfeiture by wrongdoing does not permit nontestimonial hearsay to be admitted.

In the alternative, defendant argued that if nontestimonial hearsay can be admitted under the forfeiture by wrongdoing doctrine, the trial court must first consider whether the statements are sufficiently reliable to be considered.

The court concluded that the forfeiture by wrongdoing doctrine is not merely a basis by which the defendant's constitutional right to confrontation may be extinguished. Instead, the doctrine also constitutes an exception to the hearsay rule which allows the admission of both testimonial and nontestimonial hearsay.

Furthermore, the reliability of the statements need not be considered in determining whether statements are admissible under the forfeiture by wrongdoing doctrine. The court stressed that by intentionally preventing the declarant from testifying, the defendant forfeited his ability to challenge the reliability of the statements. "Requiring additional *indicia* of reliability would . . . undermine the equitable considerations at the center of the doctrine."

2. The trial court did not err by admitting a detective's testimony that while talking to the defendant, he stated that defendant's sister believed defendant had committed the murders.

A. Defendant did not waive the issue by cross-examining the witness about the statement after defense counsel's objection to admissibility was overruled. "When a circuit court makes an adverse evidentiary decision, defense counsel cannot be forced to choose between waiving an issue for appeal and allowing damaging testimony to go unanswered on cross-examination. Facing such a choice undermines counsel's ability to fully and vigorously pursue a client's interest."

B. Whether evidence is relevant and should be admitted is left to the discretion of the trial court, whose decision will not be overturned unless it is arbitrary, fanciful or unreasonable. Here, the trial court did not abuse its discretion by admitting the evidence.

1) The court rejected the argument that the testimony was improper opinion evidence. Neither the detective nor the sister testified about the sister's present opinion of defendant's guilt or innocence. Instead, the evidence concerned a conversation which occurred immediately after the offenses, when the sister reported to police that defendant might have been responsible.

2) The evidence was relevant in that it explained why the investigation had focused on the defendant, and answered defendant's earlier question to the officer about why he was being questioned.

In addition, the sister's belief was relevant to explain defendant's actions after talking to the police officer, including his unannounced return to Illinois from California and drive to Wisconsin, where he was arrested. The fact that defendant knew that his sister had shared her suspicions with the police made it more likely that he was attempting to flee.

3) The evidence was not hearsay. An out-of-court statement is admissible if offered for some purpose other than to establish the truth of the matter asserted. The evidence was not offered to prove that defendant was guilty, or even to prove that the sister thought he was guilty. Instead, it was intended to provide context for the investigation and explain defendant's state of mind when he returned to Illinois.

4) The evidence should not be excluded because the danger of unfair prejudice outweighed any probative value. The court noted that the sister was not an authority figure whose opinion was likely to be especially persuasive to the jury, the jury was not likely to believe that the sister was "uniquely knowledgeable" about defendant's role in the offense, and at no point did any witness testify that he or she believed defendant to be guilty.

(Defendant was represented by Assistant Defender Steve Clark, Supreme Court Unit.)

People v. Hood, 2016 IL 118581 (No. 118581, 9/22/16)

1. A criminal defendant has a constitutional right to physically face persons who testify against him and to conduct cross-examination. Under **Crawford v. Washington**, 541 U.S. 36 (2004), where the State seeks to admit "testimonial" hearsay, it must establish both that the declarant is unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. Under **Crawford,** depositions are testimonial hearsay.

2. Here, the State sought to admit the deposition of the complainant. The court found that the State demonstrated that the complainant was unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. The complainant's attending physician testified that at the time of trial, the complainant was living in a nursing home and was unable to care for himself. In addition, the testimony established that the complainant was suffering from severe dementia, had no awareness of his environment, and was unable to communicate in any meaningful way.

Furthermore, defendant had the opportunity for cross-examination although he was not present at the deposition. The court noted that defendant was not barred or prevented from attending the deposition; in fact, the trial court's order for the deposition directed the Cook County Sheriff to transport defendant to the deposition "over the objection of the defendant." This paragraph was then crossed out by hand. At trial, defense counsel confirmed that he had waived defendant's presence at the deposition. Under these circumstances, defendant was fully aware that the deposition had been ordered and that he had the right to attend.

In addition, two assistant public defenders appeared on defendant's behalf at the deposition and conducted cross-examined.

Because both the unavailability of the complainant and a prior opportunity for cross-examination were shown, admission of the deposition did not violate **Crawford**.

3. Similarly, admission of the deposition did not violate defendant's due process right to be present. The due process right to be present is a "lesser right" that is violated only if the defendant's absence results in an unfair proceeding or the loss of an underlying substantial right. The court found that because defendant's confrontation rights were not violated, there could be no violation of the secondary due process right to be present.

4. Supreme Court Rule 414(e) provides that defendant and defense counsel have the right to confront and cross-examine any witness whose deposition is taken, but that defendant and defense counsel "may waive such right in writing." The court rejected the argument that the trial court violated Rule 414(e) by admitting a deposition that had been obtained without defendant's written waiver. The court found that the written waiver requirement was not constitutionally mandated, but was merely a procedural rule to ensure the defendant was given notice of the deposition and an opportunity to appear. Where it was clear that defendant knew of the deposition and that he could attend if he wanted, the absence of a written waiver did not cause prejudice.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Kitch, 239 Ill.2d 452, 942 N.E.2d 1235 (2011)

1. The defense has an adequate opportunity to cross-examine a witness to satisfy the Sixth Amendment where the witness testifies on direct examination in sufficient detail to establish the element of each charged offense.

Defendant was charged with multiple counts of predatory criminal sexual assault of his stepdaughter and stepson and aggravated criminal sexual abuse of his stepson. It was undisputed that defendant was over the age of 17 and that the victims were under the age of 13 when the offenses occurred. Although it may have been unclear from the testimony of the victims when every act of sexual penetration or sexual conduct occurred, the State was not required to prove the dates of commission, only to provide some way to differentiate between the various counts. The direct-examination testimony of the stepdaughter and stepson established separate acts of sexual penetration or conduct as charged by the State during the relevant time period. Therefore their testimony provided enough detail to allow for effective cross-examination within the meaning of the Sixth Amendment.

2. A statute is unconstitutional on its face only if no set of circumstances exist under which it would be valid.

Section 115-10 of the Code of Criminal Procedure, 725 ILCS 5/115-10 allows admission of a child

victim's hearsay statements under two scenarios: (1) the court finds the statement reliable and the child testifies at trial, or (2) the child does not testify, the court finds the statement reliable, and the allegation of sexual abuse is independently corroborated.

The confrontation clause places no restriction on the admission of hearsay testimony under scenario one above since the declarant testifies at trial and is present to defend or explain that testimony. Where the child does not testify under scenario two above, testimonial statements are admissible under **Crawford v. Washington**, 541 U.S. 36 (2004), only if the defendant had a prior opportunity to cross-examine the declarant.

That under both scenarios the statement must also meet the additional reliability requirement set forth in **Ohio v. Roberts**, 448 U.S. 56 (1980), that was repudiated in **Crawford**, is not problematic. This requirement only provides the defendant with additional protection over and above that provided by the confrontation clause. It does not affect the constitutionality of § 115-10 because the hearsay testimony must still satisfy **Crawford**'s constitutional requirements in addition to the statutory requirement of reliability. The evidentiary question of whether hearsay testimony satisfies a statutory exception such as § 115-10 is separate from, and antecedent to, the issue of whether admitting the testimony satisfies the confrontation clause. Therefore, the fact that § 115-10 does not incorporate the limitations on admissibility imposed by **Crawford** does not affect its constitutionality.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Leach, 2012 IL 111534 (No. 111534, 11/29/12)

1. 725 ILCS 5/115-5.1 provides that reports of autopsies "kept in the ordinary course of business of the coroner's office" and "duly certified" are admissible in "any civil or criminal action." Ill. R. Evid. 803(6) provides for admission as an exception to the hearsay rule of records of regularly conducted activities if kept in the normal course of business, "but not including in criminal cases medical records." Ill. R. Evid. 803(8) codifies the long-standing hearsay exception for records "of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel."

Under these statutes and Ill. R. Evid. 803, autopsy reports are admissible as an exception to the hearsay rule. Autopsy reports are not medical reports because a deceased person is not a patient and the medical examiner is not the deceased's doctor.

2. Upon review of post-**Crawford** decisions up to and including **Williams v. Illinois**, 567 U.S. ___, 132 S. Ct. 2221, ___ L.Ed.2d ___ (2012), the Illinois Supreme Court concluded that there is a split of opinion among the justices of the United States Supreme Court regarding when out-of-court statements qualify as testimonial. Eight of the justices conclude that statements may be testimonial if obtained (1) for the primary purpose of accusing a targeted individual of engaging in criminal conduct, or (2) for the primary purpose of providing evidence in a criminal case. These are objective tests looking for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. In the view of Justice Thomas alone, the test of whether an out-of-court statement is testimonial is the degree of solemnity and formality under which it was made. Whether a defendant's Sixth Amendment confrontation right was violated is a question of law reviewed *de novo*.

Under any of these tests, business records will rarely qualify as testimonial statements because they are prepared in the routine course of the operation of the business activity or the public office or agency, rather than for the purpose of admission against a criminal defendant.

Under state law, a coroner must conduct an investigation into the circumstances of a death if any one of five enumerated conditions exists. 55 ILCS 5/3-3013. The medical examiner's office does not act as an agent of law enforcement, but is charged with protecting the public health by determining the cause of a death. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the manner and cause of death, which, if determined to be homicide, could result in charges being

brought. Even where foul play is suspected, an autopsy might exonerate a suspect. Autopsy reports are not usually prepared for the sole purpose of litigation, even though they might eventually be used in litigation of some sort.

Thus the primary purpose of preparing an autopsy report is not to accuse a targeted individual of engaging in criminal conduct or to provide evidence in a criminal trial. Neither is an autopsy report certified or sworn in anticipation of its being used as evidence. Considering the split of opinion among the justices of the United States Supreme Court, the Illinois Supreme Court concluded that, while it was not prepared to say that an autopsy report could never be testimonial in nature, autopsy reports prepared in the normal course of business of a medical examiner's office are nontestimonial. They are not rendered testimonial merely because the examiner conducting the autopsy is aware that the police suspect homicide and that a specific person might be responsible.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Lovejoy, 235 Ill.2d 97, 919 N.E.2d 843 (2009)

1. The decision to qualify an expert rests in the sound discretion of the trial, whose decision will be reversed only where it was so arbitrary, fanciful or unreasonable that no reasonable person would have taken the same view. A person is permitted to testify as an expert where his or her experience and qualifications afford knowledge that is not common to the average layperson and which will assist the jury in evaluating the evidence and reaching a conclusion. An expert is not required to meet any precise requirements regarding experience, education, scientific study, or training.

The trial court did not abuse its discretion by accepting a forensic scientist as an expert in the field of fabric pattern impressions. Although the witness had participated in only two weeks of training in this area some ten years prior to trial and had not been qualified as an expert in this field before the instant trial, he had extensive experience comparing other, analogous types of impressions and possessed knowledge of the process by which impressions are left on objects. Furthermore, such knowledge was not common to the average layperson and was helpful to the jury.

2. Other crimes evidence is admissible if relevant for any purpose other than to show the defendant's propensity to commit crimes. Other crimes evidence can be admissible to show motive to commit the crime charged, so long as the probative value of the evidence is not outweighed by the prejudicial effect.

Where the defendant was charged with the first degree murder of his stepdaughter, the trial court properly admitted, as evidence of motive, the stepdaughter's allegations that the defendant had sexually assaulted her. The court noted that the trial court weighed the probative value and prejudicial effect of such evidence, limited the testimony that was admitted, and gave a limiting instruction.

Admission of such evidence did not violate the right to confrontation under **Crawford v. Washington**, which holds that testimonial hearsay is inadmissible unless the witness is unavailable for trial and there was a prior opportunity for cross-examination. The statements fell outside the **Crawford** rule because they were admitted not to prove the truth of the matter asserted – that the defendant had assaulted the decedent – but to prove a possible motive for the murder.

3. Nor was **Crawford** violated where a medical examiner was allowed to testify concerning the results of toxicology testing done by an outside laboratory, where the examiner did not know the identity of the person who performed the testing or whether the equipment was in proper operating condition.

Under Illinois law, experts may both consider medical and psychological records commonly relied upon by members of their profession and testify about the contents of those records at trial. Because the medical examiner testified that it was common practice to rely on toxicological reports prepared by an outside laboratory when drawing conclusions related to the cause of death, and testified that he was trained to interpret such test results, those results were admissible. The court also noted that the statements were not admitted for the truth of the matter asserted – that the decedent had specified levels of substances in her blood – but to explain the expert's opinion concerning cause of death.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

People v. Torres, 2012 IL 111302 (No. 111302, 2/2/12)

1. Evidentiary and constitutional requirements for the admission of former testimony are the unavailability of the witness at trial and an adequate opportunity to effectively cross-examine the witness at the prior hearing. The proponent of the evidence bears the burden of proving the necessary elements for admissibility.

Unavailability is a narrow concept, subject to a rigorous standard. A witness is not unavailable unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The law does not require the doing of a futile act. But if there is a possibility, albeit remote, that affirmative measures might produce the witness, the obligation of good faith may demand their effectuation. The lengths to which the prosecution must go to produce a witness is a question of reasonableness.

In considering whether there was a prior adequate opportunity to cross-examine the witness, a court should look to whether the motive and focus of the examination conducted at the prior hearing was the same or similar to that which would have been conducted at trial. The motive-and-focus test is not the sole guide to resolution of the question of the adequacy of the prior opportunity to cross-examine, however.

Two other factors are also relevant. Defendant must be afforded the freedom to fully question the witness regarding critical areas of observation and recall, to test him for any bias and prejudice, and to otherwise probe for matters affecting his credibility. What counsel knows while conducting the cross-examination may also impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing. Counsel's opportunity to cross-examine may not have been adequate if the hearing was conducted without the benefit of discovery.

2. The State sought to admit at defendant's trial the preliminary hearing testimony of an occurrence witness. The State alleged that the witness was unavailable because he had been deported to Mexico more than 20 years prior. Simply establishing the fact of deportation may not be enough to establish the witness's unavailability. But since the parties agreed that the witness had been deported, and the defense conceded that the requirement of unavailability had been met, the court concluded that the defense forfeited any challenge to the unavailability of the declarant.

Defendant had not been afforded an adequate opportunity to cross-examine the witness at the preliminary hearing, however, and therefore the former testimony was inadmissible. At that hearing, counsel was not privy to inconsistent statements that the witness had given to the police that might have been used to confront the witness and induce further changes in the witness's version of the events. Counsel also was unaware of the status of the witness as an alien, or the circumstances of his departure from the United States, all of which might have been relevant to a motive of the witness to curry favor with the State.

The preliminary hearing court also placed restrictions—overt and covert—on defense counsel's cross-examination. Remarks that the court made at the start of the hearing evinced that the court was not enthusiastic about proceeding immediately with the hearing. Two objections that the court sustained when defense counsel attempted to probe for possible bias and prejudice of the witness also appeared to send "the message to counsel to wrap it up, and counsel did just that. We think it clear from the record that counsel would have done more with the witness at the preliminary hearing if he had felt free to do so."

The error in the admission of the preliminary hearing testimony of the witness was not harmless as his testimony was the only trial evidence placing defendant inside the bar where the shooting occurred at or near the time of the shooting.

People v. Williams, 238 Ill.2d 125, 939 N.E.2d 268 (2010)

At defendant's sexual assault trial, a State Police scientist testified that she compared defendant's DNA profile with a profile developed from evidence at the crime scene, and concluded that the samples matched. The crime scene profile was developed not by the ISP lab, but by Cellmark, a private company.

1. The court found that the State was not required to show that the Cellmark profile was reliable by producing evidence that the Cellmark equipment was operating properly at the time of the testing. Under **Wilson v. Clark**, 84 Ill. 2d 186, 417 N.E.2d 1382 (1981), an expert may base an opinion on facts that are

typically relied upon by experts in the field, even where those facts are not in evidence. However, the facts underlying an expert opinion may be introduced to explain the opinion, and the opposing party may choose to elicit those facts when cross-examining the expert.

Here, the witness used her independent expertise to evaluate evidence (including the Cellmark report) of a type generally relied upon by forensic experts in forming opinions. Because the relevant evidence was the expert's opinion, not the Cellmark report, testimony concerning the reliability of Cellmark's equipment was not required.

The court also noted the witness's testimony that: (1) Cellmark is an accredited lab and required to comply with certain protocols, (2) there was no indication of a problem in the chain of custody, and (3) there did not appear to have been any degradation of the crime scene samples before Cellmark was able to develop the profile.

2. Under **Crawford v. Washington**, 541 U.S. 36 (2004), admission of "testimonial" hearsay violates the Confrontation Clause unless the declarant is unavailable and the defense had a prior opportunity to cross-examine. **Crawford** applies only if the evidence in question is hearsay, however.

The court found that the Cellmark report was not hearsay, because it was used to explain the basis of an expert opinion rather than to prove the truth of the matter asserted. Therefore, **Crawford** did not apply.

The court distinguished this case from **Melendez-Diaz v. Massachusetts**, 174 L. Ed. 2d 314, 129 S. Ct. 2527 (2009), in which the prosecution introduced analysts' affidavits at a cocaine trafficking trial to provide *prima facie* evidence of the seized substance's composition, quality and weight. The U.S. Supreme Court held that the affidavits were "testimonial" evidence, and that **Crawford** therefore applied.

Here, by contrast, the expert used her own skill and expertise to analyze evidence, including the Cellmark report, and arrive at an independent opinion that defendant's DNA profile matched the profile developed from the crime scene. By contrast, the affidavits in **Melendez-Diaz** were evidence of the defendant's guilt, and were thus "categorically different" from the Cellmark report at issue here.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

In re Brandon P., 2013 IL App (4th) 111022 (No. 4-11-1022, 8/5/13)

1. Testimonial statements of a witness who does not testify at trial are inadmissible under the confrontation clause unless (1) the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the witness. When the declarant appears for cross-examination at trial, the confrontation clause places no constraints on the use of prior testimonial statements.

The key inquiry when determining whether a declarant is available for cross-examination is whether the declarant was present for cross-examination and answered questions asked by defense counsel. A witness can be available for cross-examination within the meaning of the confrontation clause even though the witness is apparently unwilling or unable to testify on direct examination about the events at issue. When a defendant does not attempt to cross-examine a witness about her out-of-court statements, he cannot complain that the witness was unavailable for cross-examination. While defense counsel is placed in the precarious position of not wanting to elicit evidence that will hurt his client, such strategic considerations do not make the witness unavailable for cross-examination.

2. After responding to preliminary questions on direct examination, the four-year-old witness stopped answering questions and shrugged her shoulders when the prosecutor asked, "Do you want to talk to us?" The prosecutor informed the court that he would ask no other questions. Defense counsel stated, "No questions, your Honor," before the court excused the witness. In ruling on the admissibility of the witness's out-of-court statements, the court found that it was "clear that the child is unavailable as a witness."

Despite the trial court's finding and the State's concession that the witness was unavailable, the Appellate Court concluded that the admission of her out-of-court statements, even if testimonial, did not violate the confrontation clause. The witness appeared for cross-examination within the meaning of the confrontation clause despite her unwillingness or inability to testify about any of the events at issue on direct examination. Defense counsel could have cross-examined her but chose not to do so.

(Respondent was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Antonio, 404 Ill.App.3d 391, 935 N.E.2d 540 (1st Dist. 2010)

1. **Crawford v. Washington**, 541 U.S. 36, 55 (2004), identified business records as among the well-established hearsay exceptions that by their nature are not testimonial and subject to the Sixth Amendment cross-examination requirement.

Relying on 725 ILCS 5/115-5.1, the Appellate Court concluded that reports of postmortem examinations are business records that may be admitted without the requirement of an opportunity to cross-examine the declarant. Section 115-5.1 provides in pertinent part that "the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court in this State, to the extent permitted by this Section."

Because postmortem examinations are business records, a medical examiner properly testified to the results of examinations conducted by another medical examiner and a forensic anthropologist. The medical examiner who performed the autopsy of a decomposed, headless body found no trauma other than dismemberment, and could not determine the cause or manner of death. The anthropologist examined the skeletal remains, found no antemortem injuries, and also could not determine a cause of death.

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009), did not change this result. The United States Supreme Court concluded that reports of experts who tested controlled substances were comparable to affidavits offered to prove a fact at issue, and therefore among the core class of testimonial statements for which cross-examination was required. In contrast, the reports of the medical examiner and the anthropologist reached no conclusion as to the cause and manner of death, and did not prove the identity of the victim. There was little or nothing to confront in either report.

2. Generally, other crime evidence is admissible where relevant to a material issue other then propensity.

Defendant was charged with first degree murder but convicted of involuntary manslaughter based on his statement to the police that he and the deceased argued, he became angry and pushed her, and she fell and struck her head on a piece of furniture. At trial, the State offered evidence that three years earlier defendant had threatened the life of his ex-wife with a gun.

The other crime evidence was properly admitted to prove intent, absence of mistake, and *modus operandi*. The similarities of the two offenses were unmistakable, despite their differences. The evidence of the other crime illustrated defendant's manner of handling stressful or upsetting situations.

People v. Burnett, 2015 IL App (1st) 133610 (No. 1-13-3610, 12/18/15)

725 ILCS 5/115-10.2a provides that in domestic violence prosecutions, a statement which is not specifically covered by a hearsay exception but which has equivalent circumstantial guarantees of trustworthiness may be admitted if the declarant is unavailable and the statement is offered as evidence of a material fact, is more probative on that point than any other evidence which can be procured by reasonable efforts, and the purposes of the domestic violence statute and the interests of justice will be served. "Unavailability" is defined for purposes of §115-10.2a as refusing to testify concerning the subject matter of the statement despite a court order to do so or testifying to a lack of memory on the subject matter of the prior statement. Section 115-10.2a was enacted before the U.S. Supreme Court decided **Crawford v. Washington**, 541 US 36 (2004), which holds that the admission of hearsay satisfies constitutional concerns only if the witness is available for cross-examination or the witness is unavailable and the defendant had a prior opportunity to cross-examine.

Defendant was convicted in a bench trial of violating an order of protection that had been obtained by his girlfriend. At trial, the girlfriend testified that she did not remember the events of the day in question.

Despite being shown a typed statement she had made to police, she continued to state that she had no memory of the incident. Under the authority of §115-10a, the trial court admitted the witness's statement to police.

In an apparent case of first impression, the Appellate Court held that the witness was "unavailable" for purposes of §115-10a but "available" for purposes of the **Crawford** rule and the Sixth Amendment. First, the witness was deemed "unavailable" under §115–10.2a because she "persist[ed] in refusing to testify" or "testifie[d] to a lack of memory" concerning the subject matter of the prior statement. 725 ILCS 5/115-10a(c)(2),(3). Thus, the statement was admissible under §115-10.2a.

Second, **Crawford** states that a witness is "available" for Sixth Amendment purposes if she is "present at trial to defend or explain" the out-of-court statement. Because the witness answered preliminary questions and a number of questions about the offense which was described in the prior statement, the court concluded that she was "available" for purposes of **Crawford**. Thus, admission of the statement did not violate **Crawford**.

(Defendant was represented by Assistant Defender Samuel Hayman, Chicago.)

People v. Burney, 2011 IL App (4th) 100343 (No. 4-10-0343, 12/27/11)

The confrontation clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. **Crawford v. Washington**, 541 U.S. 36 (2004). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." **Davis v. Washington**, 547 U.S. 813, 822 (2006).

To determine whether the primary purpose of the interrogation is to enable the police to meet an ongoing emergency, a court must "objectively evaluat[e] the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation." **Michigan v. Bryant**, ___ U.S. ___, 131 S.Ct. 1143, 1162 (2011).

The court concluded that statements made by an elderly woman to the police when they responded to a report that an intruder had forced his way into her home were not testimonial. The circumstances of the encounter as well as the statements and actions of the woman and the interrogating officer objectively indicate that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency. At the time that the statements were made, the suspect had not been found. The woman was upset and shaking, making it likely that she did not have the primary purpose to establish or prove past events relevant to a future prosecution. Nothing indicates that the interrogation was structured. The responses focused on what happened and what the intruder was wearing. This was not a situation where the officer, with pen in hand after the emergency had ended and reports were being contemplated and prepared, asked the victim to recount the entire sequence of events.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Burney, 2011 IL App (4th) 100343 (No. 4-10-0343, 12/27/11, modified on denial of rehearing, 1/26/12)

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(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Cleary, 2013 IL App (3rd) 110610 (No. 3-11-0610, 11/21/13)

725 ILCS 5/115-10.2(a) creates a hearsay exception for "domestic violence prosecutions" where the statements in question were made by a person who is protected by the Domestic Violence Act of 1986 (750 ILCS 60/101). Such statements are admissible if the declarant is unavailable to testify and the statements are not covered by any other hearsay exception but have equivalent circumstantial guarantees of trustworthiness. In addition, the trial court must find that the statements are evidence of a material fact, the statements are more probative than any other reasonably available evidence, and admission of the statements will serve the general purposes of the statute and the interests of justice.

Defendant conceded that §115-10.2(a) authorized the admission of his wife's hearsay statements at his trial for murdering her, but claimed that admission of the statements violated **Crawford v. Washington**, 541 U.S. 36 (2004).

1. **Crawford** holds that the Confrontation Clause is violated if a "testimonial" hearsay statement is admitted at a criminal trial, unless the declarant is unavailable to testify and there was a prior opportunity for cross-examination. Non-testimonial hearsay statements are not subject to the Confrontation Clause, but may be inadmissible under the rules of evidence.

A. Under United States Supreme Court precedent, whether a statement is "testimonial" depends on its primary purpose, which is determined from the objective circumstances surrounding the statement as evidenced by the actions of both the declarant and any other party to the conversation. A statement is testimonial if the objective circumstances indicate that the primary purpose is to establish or prove past events that are potentially relevant to a subsequent prosecution. Statements made to enable police to meet an ongoing emergency are not "testimonial," because the primary purpose is not to prove a fact for use at a later trial.

B. In **People v. Stechly**, 225 Ill. 2d 246 (2007), a plurality of the Illinois Supreme Court held that to be "testimonial," a statement must satisfy two requirements. First, the statement must be made in a

solemn fashion. Second, the statement must have the primary purpose of establishing a particular fact that is relevant to a later prosecution. Under **Stechly**, if the statement is the product of law enforcement interrogation, the primary purpose is determined from the intent of the questioner. If the statement is not a product of police interrogation, the primary purpose is determined by the intent of the declarant.

The Appellate Court concluded that a majority of the Illinois Supreme Court adopted the position of the **Stechly** plurality in **In re Rolandis G.**, 232 Ill. 2d 13 (2008) and **People v. Sutton**, 233 Ill. 2d 89 (2009). The court observed, however, that in its most recent Confrontation Clause case, the Illinois Supreme Court did not apply the **Stechly** framework. (**People v. Leach**, 2012 IL 111534). The Appellate Court also noted that the **Stechly** plurality may be inconsistent with **Michigan v. Bryant**, 562 U.S. ____, 131 S.Ct. 1143 (2011), in which the U.S. Supreme Court stated that for **Crawford** purposes the primary purpose of an out-of-court statement is determined by analyzing the objective circumstances based on the perspectives of both the declarant and the person receiving the statement.

2. Despite the uncertainty as to the applicable standard, the Appellate Court elected to use the **Stechly** plurality test to determine whether the statements of the decedent were testimonial. The court concluded that under **Stechly**, statements which the decedent made to family and friends about her fear of the defendant were non-testimonial and could be admitted without implicating the Confrontation Clause.

First, the statements were not made in a solemn fashion. A statement is made in solemn fashion if it is formal or if there are threats of consequences for dishonesty. Here, the statements were made to friends and family in the course of discussing her relationship with her husband, and were not made under oath, contained in any kind of formalized document, or made to law enforcement personnel or other authority figures. Under these circumstances, the statements were insufficiently solemn to satisfy the first prong of the **Stechly** test.

Second, the court concluded that a reasonable person in the declarant's situation would not have anticipated that the statements would have been transmitted to police for use in a possible future prosecution. The statements referred to defendant's threats to kill the decedent, and occurred in conversations where the decedent was discussing her relationship and why she was afraid to leave it. The court found that the statements could have been explanations for why the decedent stayed in the relationship, expressions of her feelings of helplessness, or cries for help. However, "[i]t is not axiomatic that a reasonable person would make these statements with the intent that they be transmitted to law enforcement in the event of a subsequent crime occurring." Furthermore, there did not appear to be any adverse consequences if the decedent was being dishonest.

3. The court declined to adopt the *per se* rule of **People v. Richter**, 2012 IL App (4th) 101025, in which the Fourth District held that hearsay statements are testimonial for **Crawford** purposes only if there is government involvement either in eliciting or receiving the statements. Noting that **Richter** relied heavily on Graham's ***Handbook of Illinois Evidence***, the court found that the *per se* rule advocated by Graham is contrary to the Supreme Court's case-by-case approach to this issue. The court also noted that neither the U.S. nor Illinois Supreme Courts have decided that only statements made to government actors can be categorized as "testimonial."

4. The court concluded that it could properly reach the issue although defendant failed to preserve it in the lower court. Defendant's challenge was to the statute's constitutionality as applied. Generally, a challenge to the constitutionality of the statute may be raised at any time.

Defendant's conviction for murder was affirmed.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Coleman, 2014 IL App (5th) 110274 (No. 5-11-0274, 12/31/14)

1. Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle is sufficiently established to have gained general acceptance in its particular field. But **Frye** only applies to scientific evidence. If an expert's opinion is derived solely from his observations and experiences, it is not scientific evidence.

Following a **Frye** hearing, the State was allowed to introduce the testimony of an expert linguist who compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the **Frye** test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

2. The trial court properly admitted the testimony of five witnesses about hearsay statements made by the decedent, defendant's wife, that defendant wanted a divorce. This evidence was properly admissible (a) under the statutory hearsay exception for the intentional murder of a witness; (b) under the doctrine of forfeiture by wrong doing; and (c) to establish defendant's motive.

(a) Under 725 ILCS 5/115-10.6(a), a hearsay statement is admissible if it is offered against a defendant who killed the declarant to prevent her from being a witness in a criminal or civil proceeding. The statute requires a pretrial hearing to determine the admissibility of the statements.

Here the trial court properly found at the pretrial hearing that defendant murdered his wife to prevent her from being a witness at a potential dissolution proceeding. Moreover, the statutory provision applies even though defendant had not initiated divorce proceedings.

(b) The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for out-of-court statements made by an unavailable witness if the defendant intentionally prevented the witness from testifying. Here defendant intentionally prevented his wife from testifying by killing her, and thus her out-of-court statements were admissible.

(c) The deceased wife's out-of-court statements were also admissible to show defendant's motive. Her statements indicated that defendant wanted a divorce but might lose his job if he tried to obtain one. The statements thus provided a motive for killing her.

3. The trial court did not abuse its discretion in allowing an expert in document examination to compare writings spray-painted on the wall of the murder scene with defendant's known writings in documents. Although there is some difficulty in comparing writing in documents with spray-painted writing on a wall, the expert merely pointed out similarities between the writings and never identified defendant as the actual author of the wall writing. The jury, which saw photographs of the wall writing was thus free to accept or reject the expert's testimony. Defense counsel thoroughly cross-examined the expert, and presented his own expert who cast doubt on the ability to make such comparisons.

4. The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

5. The trial court properly admitted the testimony of an officer who reviewed Master Card statements and determined that spray paint was purchased using a credit card traced to defendant. Illinois Rule of Evidence 803(24) provides an exception to the hearsay rule and allows a receipt or paid bill to serve as *prima facie* evidence of the fact of a payment.

People v. Connolly, 406 Ill.App.3d 1022, 942 N.E.2d 71 (3d Dist. 2011)

1. Statements are admissible under the excited-utterance exception to the hearsay rule where there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate the statement, and a statement relating to the circumstances of the

occurrence. The critical inquiry with respect to time is whether the statement was made while the declarant was still affected by the excitement of the event. That the statement was made in response to inquiry does not necessarily destroy spontaneity.

An act of domestic violence is sufficiently startling to render inoperative the normal reflective thought processes of a victim. Statements made within a few minutes of an act of domestic violence also do not allow time for reflection while the emotional upset resulting from the event continues. Therefore the trial court did not abuse its discretion in concluding that the totality of circumstances supported the conclusion that defendant's wife's statements were excited utterances, even though made in response to police questioning.

2. An out-of-court statement made to a law enforcement official is not testimonial when the circumstances objectively indicate that the primary purpose of any questioning was to address an ongoing emergency. Factors to be considering in deciding whether the interrogation was to meet an ongoing emergency are: (1) whether the purpose was to determine a past fact or ascertain an ongoing event; (2) whether the situation could be described as an emergency; (3) whether the nature of the questions focused on the present or on the past; and (4) the level of formality involved.

The statements by defendant's wife were not testimonial because the statements were made while the police addressed an ongoing emergency. Defendant's neighbor called the police when she observed defendant and his wife screaming and yelling at each other as defendant held their son. The police arrived on the scene five to seven minutes after the dispatch and spoke with defendant's wife who appeared nervous, upset, and agitated. Defendant's wife reported that defendant had battered her, had set their son in the street, and then had left with the son. The police questioned other witnesses to assess the ongoing situation, and then proceeded to locate defendant and the child, who was returned to the wife.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. Dobbey, 2011 IL App (1st) 091518 (No. 1-09-1518, 8/19/11)

1. A hearsay statement is admissible under the excited utterance or spontaneous declaration exception where: (1) there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) there is an absence of time for the declarant to fabricate the statement; and (3) the statement relates to the circumstances of the occurrence.

A statement made by a shooting victim qualified for admission as an excited utterance or spontaneous declaration. The statement was made after the declarant was mortally wounded in a shooting while a passenger in a car. The driver was also injured. A backseat passenger drove the car to a gas station to call for help. This scenario was sufficiently startling to produce a spontaneous and unreflecting statement. Only a matter of minutes elapsed between the shooting and the statement, and the statement was made as the declarant was lying on the ground experiencing the physical effects of the shooting to his chest, before he had time to reflect on the event. As the statement identified the defendant as the shooter, the statement related to the circumstances of the shooting.

2. Testimonial statements may be admitted into evidence against an accused only when: (1) the witness is unavailable to testify; and (2) the defendant had a prior opportunity to cross-examine the witness. A statement is testimonial when its primary purpose is to establish or prove past events potentially relevant to a later criminal prosecution. Statements are not testimonial when the circumstances of the encounter, as well as the statement and the actions of the witness and the police, objectively indicate that the primary purpose of the interrogation is to assist the police to meet an ongoing emergency. **Michigan v. Bryant**, ___ U.S. __, 131 S.Ct. 1143, ___ L.Ed.2d ___ (2011).

Bryant did not address whether this same test applies where statements are made to nonofficial individuals. Nonetheless, the court applied this same analysis, and concluded that the statement of a shooting victim was not testimonial, even though it was made to a witness who was present during the shooting but did not see the shooter. The statement was made when the declarant and the witness were in an exposed public gas station, prior to the arrival of emergency personnel, as the declarant was being dragged from their

vehicle after suffering a gunshot wound to the chest. The primary purpose of the statement was to respond to an ongoing emergency. Although they had driven a few blocks from the scene, it was possible that the shooter had followed them and still posed a threat. The declarant was mortally wounded and in serious pain and could not have had as his primary purpose to establish or prove past events relevant to a future prosecution. The informality of the encounter and the absence of solemnity shows that the declarant would not have been alerted to the possible future prosecutorial use of his statements.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)

1. Statements made to a testifying witness by a third party describing events of which the witness has no firsthand knowledge are inadmissible as substantive evidence pursuant to the prior-inconsistent-statement exception to the hearsay rule provided by 725 ILCS 5/115-10.1(c)(2). Therefore, a statement made by Fillyaw to a prosecution witness admitting that he had kicked in a door and shot three people was inadmissible under the personal-knowledge limitation of §115-10.1(c)(2).

2. Admission of a nontestifying co-defendant's admission inculpating the defendant in the offense violates not only a defendant's federal constitutional right to confrontation, but also Illinois hearsay rules. Therefore, Fillyaw's statement implicating Parker in the commission of the offense was inadmissible against Parker. Although the jury was instructed to give separate consideration to each defendant, that any evidence limited to one defendant should not be considered as to the other, and that a statement made by one defendant may not be considered as to the other, it was given no contemporaneous instruction to disregard the statement when considering Parker's guilt. These instructions were insufficient to remedy the state law error; only complete redaction of all references to Parker would suffice.

The admission of this evidence was plain error. Because the error implicated defendant's due process and confrontation clause rights, it necessarily affects substantial rights and satisfies the second prong of the plain-error analysis. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

3. The mental health history of a witness may be relevant if it relates to the credibility of the witness. Witness Deshae R.'s psychiatric diagnosis, treatment with psychotropic medications, and experience with hallucinations may be relevant to her credibility as a witness. Therefore the circuit court was directed to conduct a further *in camera* review of her mental health records on remand, and tender to the defense attorneys the relevant portions of those documents.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Garcia-Cordova, 392 Ill.App.3d 468, 912 N.E.2d 280 (2d Dist. 2009)

1. Under **Crawford v. Washington**, testimonial hearsay by a non-testifying declarant is inadmissible unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Where the declarant appears for cross-examination at trial, however, the Confrontation Clause places no constraints on the use of prior testimonial hearsay.

2. A witness is available for cross-examination where she attempts to answer questions, but states that she either does not remember or does not know the answers. The court distinguished **In re Rolandis G.**, 232 Ill.2d 13, 902 N.E.2d 600 (2008), as holding only that a declarant who refuses to answer substantive questions regarding the allegations is "unavailable."

Because the seven-year-old declarant testified under oath, made an in-court identification of the defendant, and recalled speaking with investigators concerning the incident, but testified that she could not remember or did not know the answers to substantial questions asked on direct examination, she was

"available" for cross-examination. (The court noted that although defense counsel chose not to cross-examine the declarant, he was free to question her about the answers she had given and to explore her claim of lack of memory).

3. Even if the admission of the declarant's hearsay statements violated **Crawford**, the court concluded that the error was harmless because the investigator's testimony was cumulative of properly admitted evidence.

4. The trial court did not err by denying defendant's motion *in limine* to exclude portions of defendant's statements to police which indicated that he had been sexually abused as a child. Evidence is admissible if it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the proceeding either more or less probable than would otherwise be the case. The trial court has discretion to determine whether evidence is relevant and admissible.

The court concluded that defendant's history of having been sexually abused as a child was relevant in two respects: (1) in evaluating the credibility of defendant's statements to police, and (2) concerning the context in which those statements were made. The court noted testimony that defendant's demeanor changed after he admitted having been sexually abused as a child, and that he then made the written and oral statements that were admitted at trial.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Garcia-Cordova, 2011 IL App (2d) 070550-B (No. 2-07-0550, rev. op. 12/20/11)

1. Under **Crawford v. Washington**, testimonial hearsay by a non-testifying declarant is inadmissible unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Where the declarant appears for cross-examination at trial, however, the Confrontation Clause places no constraints on the use of prior testimonial hearsay.

2. A witness is available for cross-examination where she attempts to answer questions, but states that she either does not remember or does not know the answers. Gaps in a witness's memory do not render her unavailable for cross-examination.

The court also rejected the argument that under **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2011), a complainant appears for cross-examination only if his or her testimony is accusatory. Similarly, the court rejected the argument that a complainant who does not recall making a statement to police must be confronted with that statement by the prosecution. The court also stated that where a witness appears at trial and submits to cross-examination, no confrontation issue arises even if the witness fails to testify concerning his or her out-of-court statement that is admitted into evidence.

Because the seven-year-old declarant testified under oath, made an in-court identification of the defendant, and recalled speaking with investigators concerning the incident, she was "available" for cross-examination although she testified that she could not remember or did not know the answers to several questions asked on direct examination. The court also noted that for tactical reasons defense counsel chose not to cross-examine the declarant; however, the witness could have been cross-examined about the answers she gave and her lack of memory.

3. Even if the admission of the declarant's hearsay statements violated **Crawford**, the error was harmless because the testimony was cumulative of properly admitted evidence.

4. The trial court did not err by denying a motion *in limine* to exclude portions of defendant's statements to police which indicated that he had been sexually abused as a child. Evidence is admissible if it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. Evidence is relevant if it tends to make the existence of a fact that is of consequence to the proceeding either more or less probable than would otherwise be the case. The trial court has discretion to determine whether evidence is relevant and admissible.

The court concluded that defendant's history of having been sexually abused as a child was relevant

in two respects: (1) in evaluating the credibility of defendant's statements to police, and (2) concerning the context in which those statements were made. The court noted testimony that defendant's demeanor changed after he admitted having been sexually abused as a child, and that he then made the written and oral statements that were admitted at trial.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Hampton, 406 Ill.App.3d 925, 941 N.E.2d 228 (1st Dist. 2010)

Admission of testimonial hearsay violates the accused's sixth amendment right to confrontation unless the declarant is unavailable and the accused had the earlier opportunity to cross-examine the declarant. **Crawford v. Washington**, 541 U.S. 36 (2004). One who obtains the absence of a witness by wrongdoing, however, forfeits the constitutional right to confrontation. To invoke this doctrine of forfeiture by wrongdoing, the State must prove by a preponderance of the evidence that the defendant intended by his actions to procure the absence of the witness. Any conduct by an accused intended to render a witness against him unavailable to testify is wrongful and may result in forfeiture of the accused's privilege to confront the witness. The doctrine also applies when defendant acquiesces in wrongdoing intended to procure the unavailability of the declarant as a witness. His active participation in the wrongdoing is not required.

At defendant's trial, the State called an alleged accomplice as a witness. The accomplice invoked his fifth amendment privilege when asked questions related to the offense and the court ultimately admitted the accomplice's prior statement pursuant to 725 ILCS 5/115-10.2 (admissibility of prior statements when witness refused to testify despite a court order to testify). On appeal, the State agreed that admission of the statement violated **Crawford**, but argued that the defendant forfeited his right to claim a violation of his right to confrontation because he wrongfully procured the silence of the witness. The Appellate Court remanded for a hearing on the claim of forfeiture by wrongdoing.

Following remand, the Appellate Court held that the State proved by a preponderance of the evidence that defendant engaged in conduct intended to render a witness unavailable to testify against him at trial. Defendant mailed a letter to the witness four days after defendant's trial began, informing the witness that he would be called to testify and repeatedly telling the witness to "plead the fifth." In the letter, the defendant directed the witness to call defendant's mother. Even though the witness did not receive the letter, the witness did call the defendant's mother and on multiple occasions she encouraged him to "plead the fifth," and coached him how to lie under oath at defendant's trial. The recorded conversations between the witness and the defendant's mother also supplied evidence that the witness was in communication with defendant about his being called as a witness. Because the record supported the trial court's finding that defendant and his mother engaged in a concerted effort to influence the witness not to testify, the Appellate Court concluded that it was not necessary for the State to show that the defendant was the actual cause of the decision of the witness not to testify.

(Defendant was represented by Assistant Defender Arianne Stein, Chicago.)

People v. Jenkins, 2013 IL App (4th) 120628 (No. 4-12-0628, 3/15/13)

1. The hearsay exception for dying declarations applies where: (1) at the time a hearsay statement was made the declarant believed that his or her death was imminent, and (2) the statement related to the cause or circumstances of what the declarant believed to be the impending death. The trial court did not act against the manifest weight of the evidence where it concluded that because there was no evidence the declarant believed his death to be imminent, a statement made in the hospital after the declarant came out of surgery for a gunshot wound did not qualify for the dying declaration. The court noted that no one asked the declarant whether he thought he was dying, and he never communicated a belief that his death was impending. Although the declarant might not have believed that his survival was assured, where he had lived through surgery and was still being treated the record did not contradict the trial court's conclusion that the declarant did not believe his death to be imminent.

2. The forfeiture by wrongdoing exception to the hearsay rule applies where a hearsay statement is offered against a party which has engaged or acquiesced in wrongdoing that was intended to, and did, procure the declarant's unavailability as a witness. The exception applies only where the party in question acted with the intent to make the declarant unavailable. The mere fact that certain actions resulted in the unavailability of the witness does not trigger the forfeiture by wrongdoing exception.

The court concluded that the trial judge did not act contrary to the manifest weight of the evidence by concluding that a defendant who shot the declarant during an armed robbery did not act with the intent to make the declarant unavailable as a witness. Under the "manifest weight of evidence" standard of review, a party seeking to overturn the trial judge's finding must do more than merely argue that inferences which favor its position could be drawn from the evidence. "Even if one *may* or *can* reasonably infer that defendant had the intent to procure [the declarant's] unavailability as a witness, it does not follow that the opposite inference, that defendant lacked such an attempt, is unreasonable or against the manifest weight of the evidence." The court also noted that the factual representations made in the State's brief were not included in its offer of proof at trial. Given the State's offer of proof in the lower court, the trial judge did not act against the manifest weight of the evidence by finding that the forfeiture by wrongdoing exception did not apply.

3. The court concluded that the manifest weight of the evidence standard applied because the contentions between the parties were factual: (1)whether the evidence was such that the trial court could infer only that the declarant believed his death to be imminent at the time of the statement, and (2) whether the evidence was such that the trial court could infer only that defendant acted with the intent to make the declarant unavailable as a witness. The *de novo* standard of review would apply only if the issues concerned legal disputes about the applicability of the hearsay exceptions in light of uncontested facts.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Johnson, 394 Ill.App.3d 1027, 915 N.E.2d 845 (1st Dist. 2009)

1. The court reiterated precedent that **Crawford v. Washington** is not violated where an expert who did not perform DNA analysis testifies about the test results as part of explaining her expert opinion. (See **People v. Williams**, 385 Ill.App.3d 359, 895 N.E.2d 961 (1st Dist. 2008) (leave to appeal granted 1/28/09 as No. 107550 and **People v. Johnson**, 389 Ill.App.3d 618, 906 N.E.2d 70 (1st Dist. 2009)).

2. The court rejected the argument that the State failed to establish a proper foundation for admission of the DNA profile where there was no evidence that the equipment used to prepare the profile was adequately calibrated and functioning properly. Under **Wilson v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981), an expert is allowed to give his opinion based on matters that are not in evidence, if such matters are reasonably relied upon the experts in the particular field. Where expert testimony is based on an electronic or mechanical device, however, the expert must provide some foundational proof that the device was functioning properly at the time it was used.

Because the expert testified that she had worked as laboratory director at the facility which performed the DNA analysis, described extensively the laboratory's accreditations and the review required to obtain such accreditations, and stated that the file indicated specific notations which showed that proper procedures for DNA analysis had been followed, her testimony provided a sufficient foundation of the procedures and specifications on which her expert opinion could reasonably be based.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Johnson, 406 Ill.App.3d 114, 940 N.E.2d 264 (1st Dist. 2010)

A DNA analyst, who worked as the laboratory director for Cellmark, testified to the lab process performed to create a DNA profile from a swab recovered from the scene of the crime, based on her review of notes and documentation in the lab folder. She testified that Cellmark was an accredited laboratory and proper procedures were followed with the appropriate control tests. An Illinois State Police forensic scientist then compared the profile prepared from the swab by Cellmark to the DNA profile obtained from a buccal

swab taken from the defendant, and concluded that the profiles matched to a reasonable degree of scientific certainty.

1. Relying on **People v. Williams**, 238 Ill.2d 125, ___ N.E.2d ___, 2010 WL 2780344 (2010), the court concluded that the Cellmark analyst's testimony did not constitute testimonial hearsay because it was not offered for its truth but only as a basis for the experts' opinions that proper procedures were followed in the analysis and that the profiles matched. As in **Williams**, the court concluded that **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527 (2009), is distinguishable because the Cellmark witness presented more than a bare-bones statement about the procedures employed at Cellmark.

2. As in **Williams**, the testimony of the Cellmark witness was not inadmissible on the ground that the State failed to prove that the Cellmark equipment was functioning properly at the time that the tests were performed. The Cellmark witness was the laboratory director and testified about Cellmark's accreditation and procedures. Any challenge to her testimony went to its weight, rather than its admissibility.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Leach, 391 Ill.App.3d 161, 908 N.E.2d 120 (1st Dist. 2009)

1. Under **Crawford v. Washington**, "testimonial" hearsay may be admitted at trial only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination.

2. The medical examiner's records concerning an autopsy are not "testimonial" hearsay, and therefore are not subject to **Crawford**. Among the types of records deemed by **Crawford** to be "historically nontestimonial" are business records, which are similar to the type of records prepared during an autopsy. In addition, there is a "public records" hearsay exception for records required or authorized to be maintained by a public officer, and records of the medical examiner are a species of "public documents" which are subject to a statutory hearsay exception under 725 ILCS 5/115-5.1.

Because autopsy records are non-testimonial, defendant's right to confrontation was not violated when an expert witness gave an opinion of the cause of death based on autopsy records compiled by a retired pathologist. In the course of its holding, the court noted that the medical examiner's office is not a law enforcement agency, but an agency empowered to investigate deaths and perform autopsies in a number of situations, only one of which concerns the possibility that a death resulted from a criminal act.

3. In addition, autopsy records are the type of record normally used by experts to form the basis of an opinion. Thus, autopsy records are admissible under **Wilson v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981), which holds that an expert may base an expert opinion on facts that are not in evidence if the facts are of a type reasonably relied upon by experts in the field. Under **Clark**, an expert may testify concerning the findings of non-testifying experts.

People v. Leach, 405 Ill.App.3d 297, 939 N.E.2d 537 (1st Dist. 2010)

1. Under **Crawford v. Washington**, "testimonial" hearsay may be admitted at trial only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination. Although **Crawford** did not definitively define the term "testimonial," it did note that certain records are historically deemed to be nontestimonial, including records prepared in the normal course of business. Because such records are routinely prepared and relied upon for the conduct of business, they are unlikely to be falsified.

Similarly, Illinois law recognizes a "public records" hearsay exception for records required or authorized to be maintained by a public officer and evincing matters properly required to be noted and maintained. Medical examiner records are a type of "public document," and are generally admissible. Furthermore, autopsy records are specifically admitted under the statutory hearsay exception adopted in 725 ILCS 5/115-5.1.

Because autopsy records are nontestimonial, **Crawford** does not apply to their admission. Thus, **Crawford** was not violated at a murder trial when an expert witness testified concerning the contents of the records of an autopsy that had been performed by a pathologist who had retired by the time of trial.

In the course of its holding, the court noted that the medical examiner's office is not a law

enforcement agency, but an agency empowered to investigate deaths and perform autopsies in a number of situations, only one of which concerns the possibility that a death resulted from a criminal act.

2. Even if the autopsy records were testimonial, they would have been admissible because they were offered for a purpose other than to prove the truth of the matter asserted. **Crawford** holds only that the confrontation clause bars testimonial hearsay which is offered to prove the truth of the matter asserted. (**People v. Williams**, ___ Ill.2d ___, ___ N.E.2d ___ (2010) (No. 107550, 7/15/10).

Here, the testifying expert relied on the autopsy reports in reaching her own expert opinion concerning the cause of death, and testified about those records to explain her own opinion. Because the records were not offered for the truth of the matters asserted, **Crawford** did not apply.

3. The court also noted that the expert's testimony about the autopsy records was admissible under **Wilson v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981). Under **Wilson**, an expert may base her expert opinion on records of a type reasonably relied upon by experts in the field, and may testify concerning those records in order to explain that opinion.

(Defendant was represented by Assistant Defender Maya Szilak, Chicago.)

People v. Martin, 408 Ill.App.3d 891, 946 N.E.2d 990 (2d Dist. 2011)

1. Under 725 ILCS 5/115-10.1, an out-of-court statement may be admitted if it: (1) is inconsistent with the declarant's testimony at trial, (2) is the subject of cross-examination of the declarant, (3) was made under oath or described an event of which the witness had personal knowledge, and (4) was written or signed by the witness, acknowledged under oath, or recorded electronically.

The prior statement need not directly contradict the trial testimony in order to be admitted. Instead, the term "inconsistent" includes evasive answers, silence, or changes in position. "One of the policies underlying §115-10.1 . . . is to protect parties from 'turn coat' witnesses who back away from a former statement made under circumstances indicating that it was likely to be true." (**People v. Tracewski**, 399 Ill.App.3d 1160, 927 N.E.2d 1271 (4th Dist. 2010)).

2. The trial court properly applied §115-10 to admit a written statement of the complainant, who claimed at trial that she had been drinking on the night of the offense and did not recall any incident with the defendant. In the written statement, which had been prepared at the request of the arresting officers, the complainant stated that defendant grabbed her arm while she was driving and then hit her in the face. At trial, the complainant did not recall talking to police on the night of the offense. However, she identified the document as being in her handwriting.

The court concluded that the written statement contradicted the complainant's claim that she was unable to recall the incident, and noted that the trial court found that the complainant was being evasive at trial. Furthermore, the written statement explained events which were within the witness's personal knowledge when the statement was made, and the witness acknowledged making the statement by identifying the handwriting. Finally, the complainant was subject to cross-examination because she testified and responded to defense counsel's questions, although she was unable to recall the event. "[A] witness who appears and is able to testify is not unavailable for cross-examination simply because he or she cannot recall some events."

3. Under **Crawford v. Washington**, a testimonial statement by an unavailable witness is inadmissible unless the defendant had a prior opportunity for cross-examination. However, where the declarant appears for cross-examination at trial, the Confrontation Clause does not restrict use of her prior testimonial statements.

The court found that the factors leading to the conclusion that the complainant was available for cross-examination under §115-10 apply equally to the **Crawford** inquiry. Thus, **Crawford** is satisfied where a witness appears, answers questions, and is cross-examined, even if she is unable to remember some events.

Because the witness's out-of-court statement was properly admitted, defendant's convictions for aggravated battery and domestic battery were affirmed.

(Defendant was represented by Panel Attorney Thomas Brandstrader, Chicago.)

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. The testimony of a nurse regarding the statements of the complainant contained in the triage notes of another nurse was not hearsay. The testimony was not offered for the truth of the matter asserted, but to explain the actions of the nurse in treating the complainant.

2. Even if the testimony of the nurse regarding the triage notes was hearsay, it was properly admitted as an exception to the hearsay rule pursuant to 725 ILCS 5/115-13, which authorizes admission of statements of sexual assault victims made to medical personnel for purposes of medical diagnosis and treatment.

3. Admission of the testimony of the nurse regarding the triage notes did not violate the Sixth Amendment Confrontation Clause because the notes were not testimonial hearsay. To determine whether hearsay is testimonial, the focus is on whether, at the time the statement was made, the declarant was acting in a manner analogous to a witness at trial, describing or giving information regarding events that had previously occurred. When the statement is the product of questioning by persons other than law enforcement personnel, the proper focus is the intent of the declarant. The inquiry is whether the objective circumstances would lead a reasonable person to conclude that the statement would be used against the defendant.

The court considered the declarant to be the nurse who prepared the triage notes and concluded that because her intent was to gather information for treatment and not prosecution, the notes were not testimonial.

4. A fingerprint examiner should not be permitted to testify that a print found at the scene matches the fingerprint of the defendant where the examiner did not testify to and made no notes of the points of comparison the examiner found. Absent this foundation, the testimony deprives defendant of the means to challenge the conclusion drawn by the examiner. The court found no plain error because the evidence was not closely balanced and the error did not impact the fairness of the trial.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Nelson, 2013 IL App (1st) 102619 (No. 1-10-2619, 7/12/13)

At defendant's jury trial for aggravated kidnaping and aggravated criminal sexual assault, the State presented evidence that Cellmark, a private laboratory, extracted a DNA profile from a rape kit taken from the victim at the hospital. The DNA profile developed by Cellmark was subsequently matched by a different expert to the defendant's profile, which was contained in a database in Illinois.

The only evidence concerning the Cellmark report was the testimony of a Cellmark supervisor, who took cuttings from the rape kit, reviewed the data and documentation, and authored the report in this case. The witness testified that several people worked on various stages of extracting the DNA from the rape kit, and that much of the work was done by robotic instrumentation. The witness also testified that the controls utilized by Cellmark were in proper order and working correctly in this case.

The Appellate Court concluded that defendant's Sixth Amendment right to confrontation was not violated by admission of the supervisor's testimony concerning the Cellmark report.

1. In **Crawford v. Washington**, 541 U.S. 36 (2004), the U.S. Supreme Court held that the Confrontation Clause bars admission of "testimonial" statements by a witness who does not appear at trial, unless the witness is unavailable to testify and there was a prior opportunity for cross-examination. Subsequent cases have reached conflicting conclusions concerning what constitutes a "testimonial" statement. The most recent case involving forensic reports was **Williams v. Illinois**, 567 U.S. ___, 132 S.Ct. 2221, ___ L.Ed.2d ___ (2012), in which the controlling interpretation was that of Justice Thomas's concurrence, which held that the forensic report in that case lacked sufficient formality and solemnity to be considered "testimonial." By contrast, the plurality in **Williams** found that testimonial statements are those which accuse a particular person of a crime.

After reviewing U.S. Supreme Court precedent, the court concluded that no confrontation clause violation occurred. First, the court found that the evidence not testimonial under Justice Thomas's rationale

in **Williams**, which required forensic reports to be formalized and sufficiently solemn. Furthermore, the evidence was not "testimonial" under the plurality's definition in **Williams** because it did not accuse a particular person of a crime.

2. Alternatively, the court concluded that a supervisor who participated in the DNA extraction process may testify concerning the process by which the DNA profile was developed. The court concluded that the case involves an issue which has been left open by the U.S. Supreme Court - where DNA evidence is developed by a team, how many members of the team must testify in order to satisfy the defendant's confrontation rights. Without explaining its holding, the court concluded that the testimony of a supervisor who actually participated in the DNA testing is sufficient to satisfy the defendant's confrontation rights and that the State was not required to call other members of the team.

Defendant's convictions for aggravated kidnaping and aggravated criminal sexual assault were affirmed.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

People v. Peterson, 2012 IL App (3d) 100514-B (No. 3-10-0514, 4/12/12)

1. 725 ILCS 5/115-10.6(a) provides that "[a] statement is not rendered inadmissible by the hearsay rule if it is offered against a party that has killed a declarant in violation of clauses (a)(1) and (a)(2) of Section 9-1 of the Criminal Code of 1961 intending to procure the unavailability of the declarant as a witness in a criminal or civil proceeding." The statute requires the circuit court to conduct a pretrial hearing to determine the admissibility of any statement offered pursuant to the statute at which the proponent of the evidence must establish by a preponderance of the evidence that: (1) the adverse party murdered the declarant and the murder was intended to cause the unavailability of the declarant as a witness; (2) the time, content and circumstances of the statement provide sufficient safeguards of reliability; and (3) the interests of justice will best be served by admission of the statement into evidence. 725 ILCS 5/115-10.6(e). The statute also provides that it does not change or preclude the application of the existing common-law doctrine of forfeiture by wrongdoing. 725 ILCS 5/115-10.6(g).

2. The common-law doctrine of forfeiture by wrongdoing, now codified as Illinois Rule of Evidence 804(b)(5), allows admission of a hearsay statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness, without any showing that the statement is reliable.

3. The Appellate Court concluded that §115-10.6 is in direct conflict with the common-law doctrine of forfeiture by wrongdoing because the statute requires a showing of reliability while the common-law doctrine does not. Because the Supreme Court has the ultimate authority to determine the manner by which evidence may be introduced into the courts, the conflict between the statute and the common-law doctrine must be resolved in favor of the common-law doctrine pronounced by the Supreme Court.

4. At the State's request, the circuit court conducted a hearing pursuant to §115-10.6 and found that the State had proved by a preponderance that defendant had murdered the declarants of statements that the State sought to admit, and that the defendant had done so with the intent to make the declarants unavailable as witnesses. After finding that the State had not satisfied its burden with respect to the reliability of the statements, the court refused to allow their admission. The court reasoned that the statute codified the common law and therefore took precedence over the common law.

5. A court's ruling on a motion *in limine* is typically reviewed for an abuse of discretion. Where a court's exercise of its discretion has been frustrated by an erroneous rule of law, however, review of the court's ruling is *de novo*. The circuit court's ruling on the admissibility of the statements was frustrated by the court's erroneous ruling that the statute supplanted the common law and was therefore erroneous as a matter of law. Because the court made the necessary factual findings for the admission of the statements under the common law codified as Rule 804(b)(5), the Appellate Court concluded that the excluded statements were admissible.

The Appellate Court reversed the circuit court's order and remanded for further proceedings.

People v. Richter, 2012 IL App (4th) 101025 (No. 4-10-1025, 10/22/12)

1. A statement made by an unavailable witness, identified in §201 of the Illinois Domestic Violence Act as a person protected by that Act, may be admitted as a statutory exception to the rule against hearsay in "domestic violence prosecutions," where the statement is not specifically covered by any other hearsay exception but has equivalent circumstantial guarantees of trustworthiness, if the court determines: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (3) the general purposes of the statutory exception and the interests of justice will best be served by the admission of the statement into evidence. 725 ILCS 5/115-10.2a.

Section 201 of the Domestic Violence Act defines protected persons as "any person abused by a family or household member," and also defines "family or household members" and "abuse." While no statutory definition exists for the term "domestic violence prosecution," the Appellate Court found that it encompasses any prosecution in which a family or household member inflicts abuse upon a person protected by §201.

To determine whether a statement has equivalent circumstantial guarantees of trustworthiness, a trial court should examine those factors relevant to an analysis of whether hearsay possesses "particularized guarantees of trustworthiness," as articulated in **People v. Smith**, 333 Ill. App. 3d 622, 776 N.E.2d 281 (1st Dist. 2000). Even though those factors are no longer relevant to the resolution of constitutional issues under the Confrontation Clause, they remain valid analytical tools to resolve statutory issues.

The trial court acted well within its discretion in allowing statements made by the mother of defendant's children to her friends, family members and co-workers to be admitted in defendant's prosecution for her murder based on its consideration of the **Smith** factors. The Appellate Court rejected the defense argument that the statements were unreliable because the declarant had a motive to portray defendant as an unfit parent in anticipation of a custody fight over their children. None of her statements pertained to defendant's fitness as a parent, and they would have been excluded as prior consistent statements at a custody hearing.

2. Only testimonial hearsay implicates the Confrontation Clause. The Appellate Court held that a statement does not constitute testimonial hearsay unless there is government involvement in eliciting or receiving the statement. The court recognized that a defendant cannot be denied his right to confrontation where the declarant uses a third party as a mere conduit to incriminate defendant. "Government involvement" therefore includes the situation where the declarant intends to make a testimonial communication to authorities, and a third party merely acts as a conduit for transmission of the statement from the declarant. Whether the necessary government involvement exists is a question of fact for the trial court.

While the United States Supreme Court has not held that government involvement is necessary for a statement to qualify as testimonial, the Appellate Court found that this conclusion was consistent with United States Supreme Court decisions, and supported by legal scholars and case law from other jurisdictions that had addressed the issue. The Appellate Court acknowledged that a plurality of the Illinois Supreme Court rejected the argument that only statements to law enforcement personnel can be testimonial in **People v. Stechly**, 225 Ill. 2d 246, 870 N.E.2d 333 (2007). That statement by the plurality is dicta because it was unnecessary to the resolution of the issue before the court, and a majority of the court did not support that position.

Because none of the statements admitted at defendant's trial were made to government officials, no Confrontation Clause violation occurred. The declarant volunteered the statements to friends, family members and co-workers "for a host of reasons that had nothing to do with ensuring defendant was incarcerated but, instead, had everything to do with her concern that the defendant might kill her."

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

People v. Vannote, 2012 IL App (4th) 100798 (No. 4-10-0798, 6/4/12)

1. A prior inconsistent statement of a witness may be admitted as substantive evidence if it meets

the requirements of 725 ILCS 5/115-10.1.

To be admitted, the statement must be inconsistent with the trial testimony of the witness, but it need not directly contradict the testimony to be considered inconsistent within the meaning of the statute. The term "inconsistent" includes evasive answers, silence, and changes in position.

A statement can be admitted if it is "proved to have been accurately recorded by a tape recorder, videotape recording, or other similar electronic means of sound recording." 725 ILCS 5/115-10.1(c)(2)(C). A partially-recorded statement is admissible unless the unrecorded portion is so substantial as to render the recording untrustworthy as a whole.

2. The child witness against the defendant testified that he could not recall what occurred on the date of the alleged offense. His statement recorded the day after the incident was thus inconsistent with his trial testimony and admissible pursuant to §115-10.1.

Although 31 to 35 seconds of the 12-minute recording were missing, the missing portion was at the beginning of the interview when background questions were asked. The statements made by the witness at the beginning of the recording were repeated, and similar statements were made in response to non-leading questions during the remainder of the interview. Another witness also corroborated the statements. Therefore, the unrecorded portions of the statement were not so substantial as to render the recording untrustworthy as a whole.

3. No confrontation-clause problem exists simply because a witness's memory precludes him from being cross-examined to the extent the examiner would have liked. Because the witness was available for cross-examination and was cross-examined, there was no violation of defendant's constitutional right to confrontation despite the witness's claim of no memory of the events.

Cook, J., dissented.

The recorded statement of the child witness was testimonial evidence and inadmissible due to the absence of an opportunity to cross-examine. Although a gap in the recollection of a witness does not necessarily preclude the opportunity for effective cross-examination, there was more than a gap here. The witness had no recollection of the events or of the recorded examination. Unlike an adult witness who can be discredited by his lack of memory, a child's inability to remember does not discredit the witness. Due to normal developmental limitations, child witnesses are susceptible to forgetting details when there is substantial delay between the event and the request to recall it at trial. The State was able to take advantage of the witness's inability to recall by portraying him to the jury as emotionally distraught. Although the witness was able to answer "yes" or "no" to questions by the defense, a jury may conclude in such circumstances that the answers are those of the interrogator, and the prosecutor argued to the jury that the witness's answers on cross-examination were in fact worthless.

The recorded statement was also inadmissible because it was not proved to have been accurately recorded. The recording device had a known malfunction that had caused it to skip on previous recordings. The most important part of the interview, which preceded the witness's statement that defendant touched him, was missing, providing no answers to the question of whether the examination was leading or open-ended.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Weinke, 2016 IL App (1st) 141196 (No. 1-14-1196, 3/1/16)

1. On the first day defendant appeared in court, the prosecutor asked the court for permission to conduct a video deposition of the victim to preserve her testimony, asserting that she had suffered critical injuries and it was unclear how long she would survive. Defendant objected to the request.

On the following day, the prosecutor filed a written motion pursuant to Supreme Court Rule 414 requesting that a video deposition be taken that afternoon due to the "substantial possibility" that the victim would be unavailable for trial. The motion contained no details or documentation, but the prosecutor stated that the victim was due for surgery a few days later and her injuries were very extensive. Defendant again objected stating that he was not prepared to cross-examine the victim. The prosecutor stated that based on

her review of the medical records and conversations with the victim's physicians, she might not survive her upcoming surgery.

The court granted the motion and scheduled the deposition that afternoon. Defendant again objected on the basis that he had no time to prepare. When the prosecutor again asserted that the victim might not survive much longer, the court stated that it was granting the motion based on the prosecutor's representation as to the severity of the victim's condition and the chance that she might not survive.

The deposition was taken that afternoon and the victim died two months later prior to trial. At trial, the State moved to admit the deposition. Defendant objected arguing that the lack of notice deprived him of an opportunity to effectively cross-examine the victim. Defendant also submitted the victim's medical records and contended that the prosecution had provided the court with inaccurate information about her condition by exaggerating the extent of her injuries and the seriousness of her condition, and by falsely claiming that its information had come from the treating physicians.

The trial court allowed the deposition into evidence and following a bench trial convicted defendant of first degree murder. The Appellate Court held that the deposition was improperly admitted.

2. First, the court held that as a matter of law the State failed to meet its burden under Rule 414 of providing the court with evidence that the deposition was necessary because there was a substantial possibility that the witness would be unavailable at trial. Ill. S. Ct. R. 414. The State's written motion was "perfunctory, cursory, and without any supporting documentation."

Instead, the State relied on its oral assertions about the victim's injuries and medical condition. But none of these assertions constituted evidence. They were simply assertions. The court thus found that even if the assertions had been accurate, they did not satisfy the rule's requirement that at least some evidence is needed to satisfy the movant's burden. Additionally, the court found that many of the State's assertions were "false, misleading, or both." The State seriously exaggerated the victim's injuries and her medical condition, as well as the source of its information.

Allowing the deposition to be taken before defendant had an opportunity to investigate the case and develop evidence gave the defense virtually no ability to fulfill its necessary adversarial function. Under these circumstances, granting the deposition was reversible error.

3. The court also found that the admission of the deposition violated defendant's right to confront witnesses under the federal and Illinois constitutions. Preexisting testimony is admissible if the witness is unavailable at trial and defendant had an adequate opportunity to effectively cross-examine the witness. To determine whether a defendant had an adequate opportunity for cross-examination, courts examine the motive and focus of the prior cross-examination, whether the cross was unlimited, and what counsel knew when conducting the examination.

The court found that here the motive was the same and that there was no limit placed on counsel's cross. But the focus of the cross would have been different at trial because counsel was not prepared to question whether the evidence supported defendant's guilt because he had no opportunity to prepare for the hastily convened deposition. Additionally, counsel was at a "severe informational disadvantage" due to his inability to prepare. Thus, since counsel did not have an adequate opportunity to cross-examine the witness, the use of the deposition at trial violated defendant's right to confrontation.

Defendant's conviction was reversed and remanded for a new trial.

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§19-10(c)
Examples: Admissible Testimony

People v. Ransom, 65 Ill.2d 339, 357 N.E.2d 1164 (1976) During defendant's murder trial, a physician was allowed to testify that the body on which he conducted an autopsy had a tag bearing the name "Ernest Tiller."

Defendant contended that such testimony was inadmissible hearsay.

The Supreme Court held that the testimony was not hearsay because it was not offered to prove that the body to which the tag was attached was that of Ernest Tiller; rather, the testimony was offered to show that the body was the one delivered to the funeral home and identified by its manager as that of Ernest Tiller.

People v. Silagy, 101 Ill.2d 147, 461 N.E.2d 415 (1984) At defendant's trial for murder, a doctor stated on cross-examination that another psychiatrist had previously diagnosed the defendant as not being sexually dangerous. The Supreme Court held that the testimony was not hearsay, because it was not elicited to show the truth of the matters asserted therein. Instead, the prior diagnosis was elicited for the purpose of impeaching the testifying doctor.

People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 (1986) A psychiatric expert may reveal, on direct examination, the contents of reports and defendant's statements on which he relied in arriving at his conclusion. Such testimony is not hearsay; the reports and statements are not offered for their truth, but for the limited purpose of explaining the basis of the opinion.

People v. Reed, 108 Ill.App.3d 984, 439 N.E.2d 1277 (2d Dist. 1982) The contents of an address book found in a vehicle was not hearsay. The book was not introduced to prove the matter asserted therein (i.e., that defendant's phone number was 898-8973), but to show that the owner of the vehicle knew the defendant.

People v. O'Neal, 44 Ill.App.3d 133, 358 N.E.2d 47 (1st Dist. 1976) Witness's testimony (that a third party "pulled a gun and said stay in the store") was not hearsay, since it was not offered to prove the truth of the matter asserted.

People v. Garlick, 46 Ill.App.3d 216, 360 N.E.2d 1121 (5th Dist. 1977) Trial court erred in prohibiting defendant's mother and sister from testifying about various statements made by defendant during the month before the alleged murder. Such testimony was not hearsay, because it was offered not to show the truth of the matter asserted, but on the issue of defendant's mental state and insanity defense.

People v. DeJesus, 71 Ill.App.3d 235, 389 N.E.2d 260 (2d Dist. 1979) An interpreter's translation of testimony does not constitute hearsay. The interpreter is merely a conduit for testimony and makes no statement of his or her own.

People v. Williams, 62 Ill.App.3d 966, 379 N.E.2d 1268 (1st Dist. 1978) Policeman's testimony about a description of the defendant obtained from a radio broadcast was not hearsay where it was not offered to prove the truth of the broadcast, but only to prove that the broadcast was made and that the officer had probable cause to make an arrest.

People v. Moore, 294 Ill.App.3d 410, 689 N.E.2d 1181 (2d Dist. 1998) Noting a "surprising dearth" of authority concerning whether testimony about the actions of a narcotics dog is hearsay, the court concluded that the "reaction of the police dog, although subject to different interpretations, [is] sufficiently probative of the presence of narcotics to be admissible." Thus, the trial court did not err by admitting testimony that a police dog alerted during a sniff of the defendant's automobile.

Cumulative Digest Case Summaries **§19-10(c)**

People v. Leach, 2012 IL 111534 (No. 111534, 11/29/12)

1. 725 ILCS 5/115-5.1 provides that reports of autopsies "kept in the ordinary course of business of

the coroner's office" and "duly certified" are admissible in "any civil or criminal action." Ill. R. Evid. 803(6) provides for admission as an exception to the hearsay rule of records of regularly conducted activities if kept in the normal course of business, "but not including in criminal cases medical records." Ill. R. Evid. 803(8) codifies the long-standing hearsay exception for records "of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel."

Under these statutes and Ill. R. Evid. 803, autopsy reports are admissible as an exception to the hearsay rule. Autopsy reports are not medical reports because a deceased person is not a patient and the medical examiner is not the deceased's doctor.

2. Upon review of post-**Crawford** decisions up to and including **Williams v. Illinois**, 567 U.S. ___, 132 S. Ct. 2221, ___ L.Ed.2d ___ (2012), the Illinois Supreme Court concluded that there is a split of opinion among the justices of the United States Supreme Court regarding when out-of-court statements qualify as testimonial. Eight of the justices conclude that statements may be testimonial if obtained (1) for the primary purpose of accusing a targeted individual of engaging in criminal conduct, or (2) for the primary purpose of providing evidence in a criminal case. These are objective tests looking for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. In the view of Justice Thomas alone, the test of whether an out-of-court statement is testimonial is the degree of solemnity and formality under which it was made. Whether a defendant's Sixth Amendment confrontation right was violated is a question of law reviewed *de novo*.

Under any of these tests, business records will rarely qualify as testimonial statements because they are prepared in the routine course of the operation of the business activity or the public office or agency, rather than for the purpose of admission against a criminal defendant.

Under state law, a coroner must conduct an investigation into the circumstances of a death if any one of five enumerated conditions exists. 55 ILCS 5/3-3013. The medical examiner's office does not act as an agent of law enforcement, but is charged with protecting the public health by determining the cause of a death. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the manner and cause of death, which, if determined to be homicide, could result in charges being brought. Even where foul play is suspected, an autopsy might exonerate a suspect. Autopsy reports are not usually prepared for the sole purpose of litigation, even though they might eventually be used in litigation of some sort.

Thus the primary purpose of preparing an autopsy report is not to accuse a targeted individual of engaging in criminal conduct or to provide evidence in a criminal trial. Neither is an autopsy report certified or sworn in anticipation of its being used as evidence. Considering the split of opinion among the justices of the United States Supreme Court, the Illinois Supreme Court concluded that, while it was not prepared to say that an autopsy report could never be testimonial in nature, autopsy reports prepared in the normal course of business of a medical examiner's office are nontestimonial. They are not rendered testimonial merely because the examiner conducting the autopsy is aware that the police suspect homicide and that a specific person might be responsible.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Burgund, 2016 IL App (5th) 130119 (No. 5-13-0119, 11/22/16)

Defendant was convicted of predatory criminal sexual assault of his two children. The State's case consisted of his confession and the testimony of his estranged wife and mother-in-law. The trial court excluded several key pieces of evidence defendant wanted to introduce to show that his confession was false and the testimony of his wife and mother-in-law was not believable.

1. First, the trial court excluded the testimony of a clinical psychologist who would have supported defendant's claim that he gave a false confession due to psychological pressure, manipulation, and suggestion by his wife and mother-in-law. The psychologist would have testified that defendant had the type of

personality that made him highly suggestible and easily led, especially by his wife and mother-in-law.

A witness is permitted to testify as an expert if his experience and qualifications give him knowledge that lay people do not have and such testimony will aid the trier of fact. When the State presents evidence of a defendant's confession, the defendant has the right to present evidence that affects the weight a trier of fact will give to the confession.

The Appellate Court held that the psychologist should have been allowed to testify about his opinion that defendant had a personality that was subject to easy manipulation. An average juror would not readily understand why an innocent person might falsely believe he committed a crime. The expert's testimony would have thus aided the jury in evaluating the effect of the psychological environment that defendant claimed made him falsely confess. And it would have touched directly on the credibility of defendant's confession.

The court rejected the State's argument that the expert's testimony was properly excluded because he did not diagnose defendant as having any particular psychological or personality disorder. The jury was not required to find that defendant had a disorder before it could disbelieve his confession.

2. Second, the trial court excluded as hearsay the testimony of two witnesses who would have corroborated defendant's testimony that his wife claimed to have a supernatural power of discernment and was obsessed with making false accusations of lustful behavior. The court also excluded as hearsay the testimony of a witness who dated defendant's wife before she married defendant and would have described numerous instances where the wife accused the witness of being immoral and lustful.

Illinois Rule of Evidence 801 defines hearsay as an out of court statement offered to prove the truth of the mater asserted. Ill. R. Evid. 801(c). An out of court statement is not hearsay if it is offered merely to show that the statement was made, not that it was true.

The Appellate Court held that the testimony was not offered to prove the truth of the matters asserted in the out of court statements made by defendant's wife. Defendant was not trying to prove that his wife actually had a supernatural power of discernment or that one of the witnesses actually had a problem with immoral and lustful behavior. Defendant instead offered the testimony only to prove that his wife had made the statements. Since the statements supported his defense that his wife treated defendant in a similar manner, the trial court erred in precluding this testimony.

3. Third, the trial court excluded the testimony of the ex-husband of defendant's mother-in-law. He would have testified that defendant's wife falsely told people that the ex-husband had sexually abused the mother-in-law. Defendant wanted to introduce this evidence to show that his wife would fabricate sexual abuse allegations to gain sympathy and acceptance within their church community.

Illinois law generally prohibits the impeachment of a witness with specific past instances of untruthfulness. But such evidence may be used to impeach a witness if the past act shows bias, interest, or motive to testify falsely.

The Appellate Court held that this evidence was admissible to show the wife's potential motive, interest, and bias in testifying against defendant. The trial evidence showed that defendant's marriage was tumultuous, with accusations that defendant had lust issues, physical violence stemming from those accusations, and discussions of divorce. Evidence that the wife had made false accusations in the past to gain acceptance in her church as it related to divorce was relevant to show that she may have believed that she would personally benefit again from making false accusations against defendant.

The court granted defendant a new trial.

People v. Coleman, 2014 IL App (5th) 110274 (No. 5-11-0274, 12/31/14)

1. Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle is sufficiently established to have gained general acceptance in its particular field. But **Frye** only applies to scientific evidence. If an expert's opinion is derived solely from his observations and experiences, it is not scientific evidence.

Following a **Frye** hearing, the State was allowed to introduce the testimony of an expert linguist who

compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the **Frye** test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

2. The trial court properly admitted the testimony of five witnesses about hearsay statements made by the decedent, defendant's wife, that defendant wanted a divorce. This evidence was properly admissible (a) under the statutory hearsay exception for the intentional murder of a witness; (b) under the doctrine of forfeiture by wrong doing; and (c) to establish defendant's motive.

(a) Under 725 ILCS 5/115-10.6(a), a hearsay statement is admissible if it is offered against a defendant who killed the declarant to prevent her from being a witness in a criminal or civil proceeding. The statute requires a pretrial hearing to determine the admissibility of the statements.

Here the trial court properly found at the pretrial hearing that defendant murdered his wife to prevent her from being a witness at a potential dissolution proceeding. Moreover, the statutory provision applies even though defendant had not initiated divorce proceedings.

(b) The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for out-of-court statements made by an unavailable witness if the defendant intentionally prevented the witness from testifying. Here defendant intentionally prevented his wife from testifying by killing her, and thus her out-of-court statements were admissible.

(c) The deceased wife's out-of-court statements were also admissible to show defendant's motive. Her statements indicated that defendant wanted a divorce but might lose his job if he tried to obtain one. The statements thus provided a motive for killing her.

3. The trial court did not abuse its discretion in allowing an expert in document examination to compare writings spray-painted on the wall of the murder scene with defendant's known writings in documents. Although there is some difficulty in comparing writing in documents with spray-painted writing on a wall, the expert merely pointed out similarities between the writings and never identified defendant as the actual author of the wall writing. The jury, which saw photographs of the wall writing was thus free to accept or reject the expert's testimony. Defense counsel thoroughly cross-examined the expert, and presented his own expert who cast doubt on the ability to make such comparisons.

4. The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

5. The trial court properly admitted the testimony of an officer who reviewed Master Card statements and determined that spray paint was purchased using a credit card traced to defendant. Illinois Rule of Evidence 803(24) provides an exception to the hearsay rule and allows a receipt or paid bill to serve as *prima facie* evidence of the fact of a payment.

People v. Connolly, 406 Ill.App.3d 1022, 942 N.E.2d 71 (3d Dist. 2011)

1. Statements are admissible under the excited-utterance exception to the hearsay rule where there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate the statement, and a statement relating to the circumstances of the occurrence. The critical inquiry with respect to time is whether the statement was made while the declarant

was still affected by the excitement of the event. That the statement was made in response to inquiry does not necessarily destroy spontaneity.

An act of domestic violence is sufficiently startling to render inoperative the normal reflective thought processes of a victim. Statements made within a few minutes of an act of domestic violence also do not allow time for reflection while the emotional upset resulting from the event continues. Therefore the trial court did not abuse its discretion in concluding that the totality of circumstances supported the conclusion that defendant's wife's statements were excited utterances, even though made in response to police questioning.

2. An out-of-court statement made to a law enforcement official is not testimonial when the circumstances objectively indicate that the primary purpose of any questioning was to address an ongoing emergency. Factors to be considering in deciding whether the interrogation was to meet an ongoing emergency are: (1) whether the purpose was to determine a past fact or ascertain an ongoing event; (2) whether the situation could be described as an emergency; (3) whether the nature of the questions focused on the present or on the past; and (4) the level of formality involved.

The statements by defendant's wife were not testimonial because the statements were made while the police addressed an ongoing emergency. Defendant's neighbor called the police when she observed defendant and his wife screaming and yelling at each other as defendant held their son. The police arrived on the scene five to seven minutes after the dispatch and spoke with defendant's wife who appeared nervous, upset, and agitated. Defendant's wife reported that defendant had battered her, had set their son in the street, and then had left with the son. The police questioned other witnesses to assess the ongoing situation, and then proceeded to locate defendant and the child, who was returned to the wife.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. The testimony of a nurse regarding the statements of the complainant contained in the triage notes of another nurse was not hearsay. The testimony was not offered for the truth of the matter asserted, but to explain the actions of the nurse in treating the complainant.

2. Even if the testimony of the nurse regarding the triage notes was hearsay, it was properly admitted as an exception to the hearsay rule pursuant to 725 ILCS 5/115-13, which authorizes admission of statements of sexual assault victims made to medical personnel for purposes of medical diagnosis and treatment.

3. Admission of the testimony of the nurse regarding the triage notes did not violate the Sixth Amendment Confrontation Clause because the notes were not testimonial hearsay. To determine whether hearsay is testimonial, the focus is on whether, at the time the statement was made, the declarant was acting in a manner analogous to a witness at trial, describing or giving information regarding events that had previously occurred. When the statement is the product of questioning by persons other than law enforcement personnel, the proper focus is the intent of the declarant. The inquiry is whether the objective circumstances would lead a reasonable person to conclude that the statement would be used against the defendant.

The court considered the declarant to be the nurse who prepared the triage notes and concluded that because her intent was to gather information for treatment and not prosecution, the notes were not testimonial.

4. A fingerprint examiner should not be permitted to testify that a print found at the scene matches the fingerprint of the defendant where the examiner did not testify to and made no notes of the points of comparison the examiner found. Absent this foundation, the testimony deprives defendant of the means to challenge the conclusion drawn by the examiner. The court found no plain error because the evidence was not closely balanced and the error did not impact the fairness of the trial.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Richter, 2012 IL App (4th) 101025 (No. 4-10-1025, 10/22/12)

1. A statement made by an unavailable witness, identified in §201 of the Illinois Domestic Violence Act as a person protected by that Act, may be admitted as a statutory exception to the rule against hearsay in "domestic violence prosecutions," where the statement is not specifically covered by any other hearsay exception but has equivalent circumstantial guarantees of trustworthiness, if the court determines: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (3) the general purposes of the statutory exception and the interests of justice will best be served by the admission of the statement into evidence. 725 ILCS 5/115-10.2a.

Section 201 of the Domestic Violence Act defines protected persons as "any person abused by a family or household member," and also defines "family or household members" and "abuse." While no statutory definition exists for the term "domestic violence prosecution," the Appellate Court found that it encompasses any prosecution in which a family or household member inflicts abuse upon a person protected by §201.

To determine whether a statement has equivalent circumstantial guarantees of trustworthiness, a trial court should examine those factors relevant to an analysis of whether hearsay possesses "particularized guarantees of trustworthiness," as articulated in **People v. Smith**, 333 Ill. App. 3d 622, 776 N.E.2d 281 (1st Dist. 2000). Even though those factors are no longer relevant to the resolution of constitutional issues under the Confrontation Clause, they remain valid analytical tools to resolve statutory issues.

The trial court acted well within its discretion in allowing statements made by the mother of defendant's children to her friends, family members and co-workers to be admitted in defendant's prosecution for her murder based on its consideration of the **Smith** factors. The Appellate Court rejected the defense argument that the statements were unreliable because the declarant had a motive to portray defendant as an unfit parent in anticipation of a custody fight over their children. None of her statements pertained to defendant's fitness as a parent, and they would have been excluded as prior consistent statements at a custody hearing.

2. Only testimonial hearsay implicates the Confrontation Clause. The Appellate Court held that a statement does not constitute testimonial hearsay unless there is government involvement in eliciting or receiving the statement. The court recognized that a defendant cannot be denied his right to confrontation where the declarant uses a third party as a mere conduit to incriminate defendant. "Government involvement" therefore includes the situation where the declarant intends to make a testimonial communication to authorities, and a third party merely acts as a conduit for transmission of the statement from the declarant. Whether the necessary government involvement exists is a question of fact for the trial court.

While the United States Supreme Court has not held that government involvement is necessary for a statement to qualify as testimonial, the Appellate Court found that this conclusion was consistent with United States Supreme Court decisions, and supported by legal scholars and case law from other jurisdictions that had addressed the issue. The Appellate Court acknowledged that a plurality of the Illinois Supreme Court rejected the argument that only statements to law enforcement personnel can be testimonial in **People v. Stechly**, 225 Ill. 2d 246, 870 N.E.2d 333 (2007). That statement by the plurality is dicta because it was unnecessary to the resolution of the issue before the court, and a majority of the court did not support that position.

Because none of the statements admitted at defendant's trial were made to government officials, no Confrontation Clause violation occurred. The declarant volunteered the statements to friends, family members and co-workers "for a host of reasons that had nothing to do with ensuring defendant was incarcerated but, instead, had everything to do with her concern that the defendant might kill her."

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

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§19-10(d)
Examples: Inadmissible Testimony

People v. Spivey, 58 Ill.App.3d 677, 374 N.E.2d 1068 (1st Dist. 1978) Trial court erred by allowing a police officer to testify about a third party's conversation, on the ground that the defendant was present during the conversation. The mere presence of the defendant when an out of court statement was made does not constitute an exception to the hearsay rule.

People v. Harbold, 124 Ill.App.3d 363, 464 N.E.2d 734 (1st Dist. 1984) At defendant's trial for murder, a State witness was allowed to testify about a conversation she had with the victim's wife, in the presence of defendant. According to the alleged statement by the wife, she and the defendant had spent time together in a cottage in Wisconsin. The wife did not testify.

The Appellate Court held that the testimony was hearsay and was prejudicial because it tended to show that defendant had a motive to kill the decedent. The Court also held that the wife's alleged statements were not admissions by defendant - defendant was present when the statements were made, but did not adopt them.

People v. Trotter, 27 Ill.App.3d 136, 326 N.E.2d 524 (1st Dist. 1975) Policeman's testimony concerning the alleged statement of defendant's neighbor (that defendant was not at his apartment on the date he had claimed) was inadmissible hearsay.

People v. Parrott, 40 Ill.App.3d 328, 352 N.E.2d 299 (1st Dist. 1976) During defendant's trial for unlawful use of weapons, two police officers were permitted to testify about a police department memorandum and a photo of defendant. The memo stated that firearms were being sold to street gangs, and the officers testified that defendant was to be contacted to see if he was "indeed involved" in such sales.

The court held that such testimony was a classic example of incompetent hearsay, because the contents of the memorandum were offered for the purpose of establishing the truth of the statements therein and the person who prepared the memorandum was not subject to cross-examination.

People v. Davis, 130 Ill.App.3d 41, 473 N.E.2d 387 (1st Dist. 1984) At a trial for armed robbery, the victim testified that a few months after the crime defendant's mother apologized and asked her to drop the charges against the defendant. The mother was subsequently called as a defense witness, and denied that she had asked the victim to drop the charges. On cross-examination, the State was allowed to bring out the conversation between the victim and defendant's mother.

Although the defendant did not object to the victim's testimony, the Appellate Court found that plain error occurred. The only conceivable purpose for eliciting the apology testimony was to raise the highly prejudicial inference that the defendant's own mother believed him to be guilty of the crimes charged. Under these circumstances, the admission of the hearsay was error.

People v. Escobar, 77 Ill.App.3d 169, 395 N.E.2d 1028 (1st Dist. 1979) The testimony by a State witness (that everybody knew the defendant as "New York" and somebody at the crime scene pointed to the perpetrator's car and said "that's New York") was inadmissible hearsay.

Also, a State witness's testimony that he gave a shell to the police because he had been told it was found in defendant's car was inadmissible hearsay for the purpose of showing that the shell came from that car, as was argued by the prosecutor in closing argument. Such testimony was inadmissible even if, as argued by the State, its purpose was to merely explain why the witness brought the shell to the police. "[T]he danger that the jury would misuse the evidence is so much greater than the value of detailing why [the witness]

thought the shells were important."

People v. McClinton, 59 Ill.App.3d 168, 375 N.E.2d 1342 (1st Dist. 1978) Police officer's testimony that a certain handgun was registered to the defendant was inadmissible hearsay. The testimony did not come within the public records exception to the hearsay rule, as there was no showing that the officer personally examined the public record and that it was physically impossible to produce the registration document in court.

People v. Virgin, 302 Ill.App.3d 438, 707 N.E.2d 97 (1st Dist. 1998) The trial judge erred by admitting several items of hearsay.

1. The judge erred by admitting the contents of the search warrant. Such evidence may be admitted for the limited purpose of explaining the officers' conduct, but not to prove that the defendant fit the warrant's description of the offender and therefore must have been the person who possessed cocaine.

2. The trial court erred by admitting evidence that an occupant of the searched premises told police that her home was elsewhere in Chicago, to prove the prosecution's theory that defendant was the tenant of the bedroom where drugs were found. The court rejected the State's argument that the testimony was admissible as impeachment.

Where a witness is impeached with her own out-of-court statements, her credibility is undermined by the mere fact that she made conflicting statements, but the out-of-court statements are not considered for the truth of the matters asserted. Where the alleged "impeachment" is a contradictory, out-of-court statement made by a person other than the witness, its evidentiary value lies not in the fact of self-contradiction, but in the truthfulness of the contradictory statement. Such a statement is classic hearsay because it is probative only if considered for the truth of its assertions.

Here, the officer's testimony about the statement had evidentiary value only because it contradicted defense testimony that the declarant lived in the bedroom where the cocaine was found. Because the statement clearly was offered to prove the truth of the matters asserted, it was improperly admitted.

People v. Tucker, 186 Ill.App.3d 683, 542 N.E.2d 804 (1st Dist 1989) A police officer testified that after stopping the defendant, he checked with a police dispatcher, was told that the car in defendant's possession was stolen and obtained the name and phone number of the person who had reported it stolen.

The Appellate Court held that the portion of the officer's testimony concerning the dispatcher's response (i.e., "the name and phone number of the person who had reported the car stolen") was improper hearsay.

People v. Richardson, 48 Ill.App.3d 307, 362 N.E.2d 1104 (2d Dist. 1977) Police reports are not admissible in evidence, and the prosecutor's attempt to introduce a police report before the jury, notwithstanding the cautionary comment of the court, was error.

People v. Smith, 256 Ill.App.3d 610, 628 N.E.2d 1176 (3d Dist. 1994) 1. At defendant's trial for armed robbery, the trial court erred by admitting a fingerprint examiner's testimony that her identification of a latent fingerprint as having been made by the defendant had been "verified by another fingerprint examiner." Such testimony was clearly offered to prove the truth of the matter asserted - that the fingerprint had been left by the defendant - and therefore was inadmissible hearsay.

2. The error was not harmless on the theory that the second examiner's opinion was cumulative and the evidence of guilt overwhelming. One State's witness made a pre-trial identification of a man other than the defendant, and there were significant discrepancies between the descriptions given shortly after the offense and defendant's physical appearance at trial. In addition, the jury's questions showed a special interest in both fingerprint evidence and the second expert's opinion. Furthermore, in the State's closing argument the prosecutor not only used the hearsay to boost the credibility of the testifying expert, but also blamed the

defendant for not calling the second expert, whose existence had never been disclosed to the defense.

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Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705, ___ L.Ed.2d ___, 2011 WL 2472799 (2011) (No. 09-10876, 6/23/11)

The Sixth Amendment Confrontation Clause permits introduction of testimonial statements of witnesses absent from trial only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. **Crawford v. Washington**, 541 U.S. 36 (2004). There is no forensic-evidence exception to this rule. An analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial and therefore within the compass of the Confrontation Clause. **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009).

To admit a forensic laboratory report certifying that defendant's blood-alcohol level was above the threshold required for aggravated DWI, the State called an analyst from the laboratory who qualified as an expert witness with respect to the gas chromatograph machine used to perform the analysis as well as the laboratory's procedures. The witness had not signed the certificate and had neither participated in nor observed the test on defendant's blood sample. The certifying analyst had been placed on an unpaid leave for an undisclosed reason, and was not called to testify. The court held that this surrogate testimony did not satisfy the Confrontation Clause.

1. The court rejected the argument that cross-examination of the certifying analyst was unnecessary because he was a "mere scrivener" and defendant's true accuser was the gas chromatograph machine. The analyst's certification reported more than a machine-generated number, and also made representations as to past events and human actions not revealed in raw, machine-produced data. Even if that were not true, the obvious reliability of a testimonial statement does not dispense with the Confrontation Clause.

2. The testimony of the surrogate analyst was not a substitute for the testimony of the certifying analyst. The surrogate could not convey what the certifying analyst knew or observed about the test or the testing process. His testimony could not expose any lapses or lies on the certifying analyst's part, or address the circumstances that led to the certifying analyst's unpaid leave. The surrogate analyst had no independent opinion regarding defendant's blood-alcohol level. The Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. In short, when the State elected to introduce the analyst's certification, the certifying analyst became the witness defendant had the right to confront.

3. The certified blood-alcohol reports were testimonial. A document created solely for an evidentiary purpose, made in aid of a police investigation ranks as testimonial. That the reports were not sworn to as in **Melendez-Diaz** was not dispositive.

Justice Sotomayor, specially concurring, emphasized that a statement is testimonial if its primary purpose is to create an out-of-court substitute for trial testimony. The formality of the certified report is also an indicator of its testimonial purpose. She identified four variants not present in the case before the court that were therefore not addressed by the opinion:

- the admissibility of a certified report where the State suggests an alternate purpose for the report other than its use as evidence;
- the admissibility of the testimony of a supervisor, reviewer, or someone else with a personal connection to the test at issue, and the degree of involvement in the testing procedure that might be required of the witness;
- the admissibility an independent opinion of an expert witness about underlying testimonial reports that were not themselves admitted into evidence, pursuant to Federal Rule of Evidence 703 (which provides that facts or data of a type upon which experts in the field would reasonably rely in forming

an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted);

- the admissibility of only machine-generated results.

People v. Bailey, 409 Ill.App.3d 574, 948 N.E.2d 690 (1st Dist. 2011)

1. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Out-of-court statements offered for a purpose other than to prove the truth of the matter asserted, such as to show the effect on the listener's state of mind, or to show why the listener acted the way that he or she did, are not hearsay.

The court rejected the defendant's argument that the out-of-court statements she sought to admit were not hearsay because they were offered to explain defendant's conduct. As there was no evidence that defendant actually heard these statements, the evidence could not be used to show its effect on defendant, and it was inadmissible hearsay.

2. Out-of-court statements that have independent legal significance as "words of contract" are not hearsay. **Kukla Press, Inc. v. Family Media, Inc.**, 133 Ill.App.3d 939, 479 N.E.2d 1116 (1st Dist. 1985). The out-of-court statements that defendant sought to admit were not admissible as non-hearsay words of contract because they did not purport to authorize defendant to do anything.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)

1. Statements made to a testifying witness by a third party describing events of which the witness has no firsthand knowledge are inadmissible as substantive evidence pursuant to the prior-inconsistent-statement exception to the hearsay rule provided by 725 ILCS 5/115-10.1(c)(2). Therefore, a statement made by Fillyaw to a prosecution witness admitting that he had kicked in a door and shot three people was inadmissible under the personal-knowledge limitation of §115-10.1(c)(2).

2. Admission of a nontestifying co-defendant's admission inculpating the defendant in the offense violates not only a defendant's federal constitutional right to confrontation, but also Illinois hearsay rules. Therefore, Fillyaw's statement implicating Parker in the commission of the offense was inadmissible against Parker. Although the jury was instructed to give separate consideration to each defendant, that any evidence limited to one defendant should not be considered as to the other, and that a statement made by one defendant may not be considered as to the other, it was given no contemporaneous instruction to disregard the statement when considering Parker's guilt. These instructions were insufficient to remedy the state law error; only complete redaction of all references to Parker would suffice.

The admission of this evidence was plain error. Because the error implicated defendant's due process and confrontation clause rights, it necessarily affects substantial rights and satisfies the second prong of the plain-error analysis. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

3. The mental health history of a witness may be relevant if it relates to the credibility of the witness. Witness Deshae R.'s psychiatric diagnosis, treatment with psychotropic medications, and experience with hallucinations may be relevant to her credibility as a witness. Therefore the circuit court was directed to conduct a further *in camera* review of her mental health records on remand, and tender to the defense attorneys the relevant portions of those documents.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. McCullough, 2015 IL App (2d) 121364 (No. 2-12-1364, 2/11/15)

1. Under Illinois Rule of Evidence 803(16) (the ancient document rule) statements in an

authenticated document that has been in existence 20 years or more may be admitted as an exception to the hearsay rule. If the author of the ancient document had personal knowledge of the substance underlying the assertions in the document, the document is admissible. Although there are no Illinois cases on point, federal courts interpreting an identical federal rule of evidence are split on whether the ancient document rule allows admission of all assertions in the document, even those that involve double hearsay. Some courts require a separate hearsay exception for each layer of hearsay contained in a document, while others allow the admission of all statements in a document.

Defendant was tried in 2012 for a kidnapping and homicide that occurred in the town of Sycamore in 1957. Defendant sought admission of FBI reports that were prepared during the 1957 investigation of the case and contained evidence of an alibi that had otherwise disappeared due to the death of the witnesses. The reports contained multiple layers of hearsay (FBI agents who had no personal knowledge of the events reporting what various witnesses had told them), and they relied to a large extent on statements of defendant or his family members. The reports established that defendant had not been in Sycamore at the time of the offense.

The Appellate Court held that the reports were not admissible. The court adopted the view that each layer of hearsay requires its own hearsay exception before it is admissible. Since all the statements in the reports contained multiple layers of hearsay, the ancient document rule did not allow their admission. The court also noted that one of the bases for the ancient document rule is that statements in an ancient document are usually written before a motive to fabricate arises. But here much of the alibi was based on the statements of defendant or his family, who had a motive to fabricate at the time the FBI reports were created.

The trial court's exclusion of the reports was affirmed.

2. Under Illinois Rule of Evidence 804(b)(3), an out-of-court statement that would subject a person to civil or criminal liability is admissible. Three conditions must be met before the statement can be admitted: (1) the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) the trustworthiness of the statement must be corroborated.

The trial court admitted the 1994 deathbed statement of defendant's mother that defendant "did it." The trial court agreed with the State's theory that the statement was against her penal interest since it showed that she had lied in 1957 when she told the FBI that defendant was at home at the time of the offense, and hence was subject to possible prosecution for obstruction of justice.

The Appellate Court held that the trial court erred in admitting the statement since it was not against the mother's penal interest. The court held that the statement itself must on its face be self-incriminating. The mother's statement, however, did not on its face incriminate her. Instead, to be incriminating, the State would have needed to introduce the inadmissible hearsay statement of what the mother told the FBI in 1957 and then speculate that (1) the State could have prosecuted her for obstruction of justice 37 years later as she lay dying of cancer, and (2) that she would have waived any statute of limitations bar.

Although the Appellate Court held that the statement should not have been admitted, it affirmed defendant's conviction on harmless error grounds.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

People v. Weinke, 2016 IL App (1st) 141196 (No. 1-14-1196, 3/1/16)

1. On the first day defendant appeared in court, the prosecutor asked the court for permission to conduct a video deposition of the victim to preserve her testimony, asserting that she had suffered critical injuries and it was unclear how long she would survive. Defendant objected to the request.

On the following day, the prosecutor filed a written motion pursuant to Supreme Court Rule 414 requesting that a video deposition be taken that afternoon due to the "substantial possibility" that the victim would be unavailable for trial. The motion contained no details or documentation, but the prosecutor stated that the victim was due for surgery a few days later and her injuries were very extensive. Defendant again objected stating that he was not prepared to cross-examine the victim. The prosecutor stated that based on her review of the medical records and conversations with the victim's physicians, she might not survive her

upcoming surgery.

The court granted the motion and scheduled the deposition that afternoon. Defendant again objected on the basis that he had no time to prepare. When the prosecutor again asserted that the victim might not survive much longer, the court stated that it was granting the motion based on the prosecutor's representation as to the severity of the victim's condition and the chance that she might not survive.

The deposition was taken that afternoon and the victim died two months later prior to trial. At trial, the State moved to admit the deposition. Defendant objected arguing that the lack of notice deprived him of an opportunity to effectively cross-examine the victim. Defendant also submitted the victim's medical records and contended that the prosecution had provided the court with inaccurate information about her condition by exaggerating the extent of her injuries and the seriousness of her condition, and by falsely claiming that its information had come from the treating physicians.

The trial court allowed the deposition into evidence and following a bench trial convicted defendant of first degree murder. The Appellate Court held that the deposition was improperly admitted.

2. First, the court held that as a matter of law the State failed to meet its burden under Rule 414 of providing the court with evidence that the deposition was necessary because there was a substantial possibility that the witness would be unavailable at trial. Ill. S. Ct. R. 414. The State's written motion was "perfunctory, cursory, and without any supporting documentation."

Instead, the State relied on its oral assertions about the victim's injuries and medical condition. But none of these assertions constituted evidence. They were simply assertions. The court thus found that even if the assertions had been accurate, they did not satisfy the rule's requirement that at least some evidence is needed to satisfy the movant's burden. Additionally, the court found that many of the State's assertions were "false, misleading, or both." The State seriously exaggerated the victim's injuries and her medical condition, as well as the source of its information.

Allowing the deposition to be taken before defendant had an opportunity to investigate the case and develop evidence gave the defense virtually no ability to fulfill its necessary adversarial function. Under these circumstances, granting the deposition was reversible error.

3. The court also found that the admission of the deposition violated defendant's right to confront witnesses under the federal and Illinois constitutions. Preexisting testimony is admissible if the witness is unavailable at trial and defendant had an adequate opportunity to effectively cross-examine the witness. To determine whether a defendant had an adequate opportunity for cross-examination, courts examine the motive and focus of the prior cross-examination, whether the cross was unlimited, and what counsel knew when conducting the examination.

The court found that here the motive was the same and that there was no limit placed on counsel's cross. But the focus of the cross would have been different at trial because counsel was not prepared to question whether the evidence supported defendant's guilt because he had no opportunity to prepare for the hastily convened deposition. Additionally, counsel was at a "severe informational disadvantage" due to his inability to prepare. Thus, since counsel did not have an adequate opportunity to cross-examine the witness, the use of the deposition at trial violated defendant's right to confrontation.

Defendant's conviction was reversed and remanded for a new trial.

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§19-10(e)
The "Completeness" Doctrine

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) When part of a statement is brought out by the State, the defendant is entitled to introduce additional portions of the statement when "necessary to prevent the jury from being misled by the portion of the statement introduced by the State" or "to prevent the jury

from receiving a misleading impression as to the nature of the statement." However, the defendant "has no right to introduce portions of a statement which are not necessary to enable the jury to properly evaluate the portions introduced by the State."

In this case, the trial judge properly excluded the remainder of a statement proffered by the defendant because the defendant did not urge that the portions introduced by the State were misleading and did not explain the reasons why the remainder should be admitted. "The trial court need not sua sponte scrutinize the proffered statements to determine if there may be a rationale to admit some small portion thereof."

People v. Manning, 182 Ill.2d 193, 695 N.E.2d 423 (1998) 1. Under the "curative admissibility" doctrine, once the defense has "opened the door" to a subject on cross-examination, the State may clarify matters brought out on cross-examination and rebut unfavorable inferences left by the cross-examination. The "curative admissibility" doctrine is not a "panacea," however; its application is limited "to those situations where its invocation is deemed necessary to eradicate undue prejudicial inferences which might otherwise ensue from the introduction of the original evidence." Where no "undue prejudicial inferences" exist, the doctrine does not apply.

Thus, where the State was not "unduly prejudiced" by the cross-examination of the decedent's wife, the "curative admissibility" doctrine was inapplicable.

2. The "completeness" doctrine, which allows an opponent to bring out an entire conversation where one party has elicited only a portion, applies only where there is prejudice to the party seeking to bring out the remainder of the conversation.

People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 (1982) When the State brought out part of a conversation between the defendant and the witness, it was improper to prohibit the defendant from bringing out the remainder of the same conversation. "[W]here a conversation is related by a witness the opposing party has a right to bring out all of the conversation on cross-examination." Thus, in "view of the possibility that the jurors would be misled into thinking that the defendant has said nothing else, we believe the trial court should have allowed [the witness] to testify to the defendant's statement."

People v. Patterson, 154 Ill.2d 414, 610 N.E.2d 16 (1992) The completeness doctrine allows the admission of portions of a statement which are necessary to place other, properly admitted portions of the statement in context. Where defendant was not attempting to introduce additional portions of statements introduced by the State, but completely separate statements, the doctrine did not apply. See also, People v. Ward, 154 Ill.2d 272, 609 N.E.2d 252 (1992) (the "completeness doctrine" applies only where admission of additional portions of a statement is required in order to place properly admitted portions of the document in proper context); Lawson v. G.D. Searle, 64 Ill.2d 543, 356 N.E.2d 779 (1976) (when one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury); People v. Andersch, 107 Ill.App.3d 810, 438 N.E.2d 482 (1st Dist. 1982) (the party offering the remaining portion of a statement is required to show that it is relevant to place the admitted portion in context).

People v. Perez, 101 Ill.App.3d 64, 427 N.E.2d 820 (1st Dist. 1981) Where defendant used a portion of a transcript of the complainant's testimony at an earlier hearing to impeach her, the State was properly allowed to utilize other testimony of the complainant in same transcript for rehabilitation.

People v. Davis, 130 Ill.App.3d 864, 474 N.E.2d 878 (4th Dist. 1985) Where the complainant was impeached by a prior inconsistent statement, only the portion of the statement that explained the impeachment, "by showing the correct context of the entire conversation," should have been admitted under the completeness doctrine. Furthermore, "[w]hile it may be said that the contents of the statement describing the shooting and

throwing of missiles is merely cumulative, the emphasis necessarily resulting from cumulative testimony may itself be prejudicial."

People v. Kaczmarek, 243 Ill.App.3d 1067, 613 N.E.2d 1253 (1st Dist. 1993) The "completeness doctrine" provides that where one party introduces part of a statement, the opposing party may introduce other parts of the statement to place the original portion in context.

People v. Pirrello, 166 Ill.App.3d 614, 520 N.E.2d 399 (2d Dist. 1988) The completeness doctrine required that the defendant be allowed to testify about the same conversation to which a State witness testified. "While this principle is usually applied so that when a single witness has testified to a part of a conversation, the opposing party is allowed to question the same witness as to the rest of the conversation, this court in [People v. Harman, 125 Ill.App.3d 338, 465 N.E.2d 1009 (2d Dist. 1984)] did not specify such a limitation."

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People v. Craigen, 2013 IL App (2d) 111300 (No. 2-11-1300, 9/27/13)

Illinois Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

This rule codifies in part the common-law completeness doctrine, which provides that if one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a true and correct meaning is conveyed to the jury.

The common-law doctrine applies to oral statements and in that respect is broader than the rule. But the rule is broader than the doctrine in that it allows a party to introduce a writing or recording not made at the same time as the admitted writing or recording. It also allows a party to require admission of any another part or any other writing or recording at the same time as introduction of a writing or recording by the opponent, so that the statements may be considered contemporaneously by the trier of fact.

The rule did not alter the other requirements for admission under the common-law doctrine. A recording or writing may be admitted only if required to prevent the jury from being misled, to place the omitted statement in context so that a true meaning is conveyed, or to shed light on the meaning of the admitted statement. Simply because a writing or recording is related to an admitted writing or recording, or pertains to the same subject matter, does not satisfy the requirements for admission.

A recorded statement made by defendant while in custody in Milwaukee, two-and-a-half months before a recorded statement he made when he was in custody in Clarksdale, Mississippi was properly denied admission under Ill. R. Evid. 106. The court rejected defendant's argument that the Milwaukee recording was admissible because his confrontational and defiant tone in the Milwaukee recording placed the Clarksdale recording in context, in that it would have allowed the jury to infer from his defeated tone in the Clarksdale recording that his Clarksdale statements were not voluntary.

This inference was too tenuous and speculative to satisfy the requirements for admissibility under Rule 106. Rule 106 is not a means to admit evidence that aids a defendant in proving his theory of the case. Defendant had not shown that his Clarksdale statement, standing alone, was misleading, and therefore Rule 106 did not provide an avenue for admission of the Milwaukee statement. The Milwaukee recording did not shed light on the Clarksdale recording or place it in context. It merely contradicted it.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

People v. Moore, 2012 IL App (1st) 100857 (No. 1-10-0857, 2/1/12)

1. Evidence of crimes for which a defendant is not on trial is inadmissible if relevant merely to establish the defendant's disposition or propensity to commit crime. Evidence of other crimes is objectionable not because it has little probative value, but because it has too much. Such evidence overpersuades the jury, which might convict the defendant only because it feels that defendant is a bad person who deserves punishment. The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal.

Given these concerns, when evidence of unrelated offenses is contained in an otherwise competent statement or confession, it must be deleted when the statement or confession is read to the jury, unless to do so would seriously impair its evidentiary value.

2. The completeness doctrine provides that where one party introduces part of an utterance or a writing the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury. The right to introduce an entire conversation or writing is not absolute, but depends on the relevancy of the additional parts that the party seeks to introduce. Otherwise inadmissible evidence may be admitted only where a defendant opens the door to such material and its exclusion would mislead the jury.

3. A videotape of a police interrogation of defendant contained references to: (1) a prior incident of domestic violence in which defendant punched a woman and broke her jaw after finding her with another man; defendant apparently pled guilty to this charge; (2) defendant's prior history of robberies; and (3) defendant's prior history as a drug dealer and membership in a street gang. This other-crime evidence was irrelevant and unfairly prejudicial. Had defense counsel objected to this evidence, it would have been excluded.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Ruback, 2013 IL App (3d) 110256 (No. 3-11-0256, 4/22/13)

Defendant's wife testified as a prosecution witness and denied that she participated with defendant in a sexual assault. The State introduced as substantive evidence her prior inconsistent statement to the police in which she implicated herself and defendant in the assault. The trial court excluded evidence that she denied the assault at the beginning of the same police interview.

1. Generally, the testimony of a witness may not be corroborated by the admission of a prior statement consistent with her trial testimony. There are two exceptions to this rule. A prior consistent statement may be introduced to rebut an express or implied charge that (1) the witness is motivated to testify falsely, or (2) her testimony is a recent fabrication. In those instances, evidence may be admitted that the witness made the same statement before the motive came into existence or before the time of the alleged fabrication. Even if the prior statement is inadmissible to rebut a charge that the witness was motivated to testify falsely because the prior statement was made during the time the improper motive is alleged to have existed, it can be admitted to rebut a charge of recent fabrication

The State implied that defendant's wife had a motive to falsify her exculpatory trial testimony because she was married to the defendant and had communicated with him a month prior to trial. Her prior consistent statement denying the sexual assault was not admissible to rebut that charge of motive to falsify, because the defense could not show that she did not have a motive to falsify when she initially denied the allegations. At the time of the police interview, she was married to the defendant and was herself a suspect.

Her initial statement to the police was also not admissible to rebut a charge of recent fabrication. The State made no charge of recent fabrication. The mere fact that a witness's testimony has been discredited or contradicted is insufficient to allow use of a prior consistent statement because such an expansion of the exception would swallow the rule. If the only requirement necessary to trigger the exception was the existence of an inconsistent statement prior to trial, the exception would negate the rule *in toto*.

2. Under the completeness doctrine, if one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the trier of fact. The remaining

part is admissible only when in fairness it is required to prevent the trier of fact from receiving a misleading impression as to the nature of the introduced statement. The remaining part must concern what was said on the same subject at the same time.

Defendant's wife's statements from the beginning of the police interview denying the sexual assault were not admissible under the completeness doctrine because they "do not explain why she later denied the allegations, or qualify her later statements; they merely contradict the prior inconsistent statement admitted into evidence by the State."

Schmidt, J., specially concurred. There is only one exception to the rule against admission of prior consistent statements. A prior consistent statement is admissible to rebut a charge that a witness lied only if a motive to falsify did not exist at the time of the prior statement.

A reasonable juror would have concluded that the State did charge that defendant's wife's testimony was a lie, but her prior statement was not admissible to rebut that charge because she had a motive to falsify at the time of the prior statement. The completeness doctrine challenge was forfeited because defendant did not argue it below. Even if error had occurred, it was harmless beyond a reasonable doubt.

Holdridge, J., specially concurred. The prior statement was admissible under the completeness doctrine. It was part of the same police interview, part of which the State introduced. The statement would have established the context of the statement that the jury did hear and would have qualified that statement in the context of the wife's overall credibility. But its exclusion was harmless beyond a reasonable doubt because the evidence of guilt was overwhelming and there was nothing in the entire statement that would have been of help to the defendant.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

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§19-10(f)
Testimony About Conversations To Show Police Investigation

People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146 (1988) For the purpose of showing the investigative procedure of the police, an officer may testify that he had a conversation with others (such as victims and witnesses) during his investigation. Such testimony is not hearsay, because the substance of the conversations are not disclosed and the evidence is not offered to prove the truth of matters in the conversations. Also, such testimony is admissible even though it might suggest that the nontestifying witness implicated the defendant in the crime.

The Court noted the distinction between testimony that a conversation occurred and testimony which reveals the substance of such conversation — the former testimony is admissible to show investigatory procedure, while the latter is hearsay and improper.

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) "[T]estimony recounting the steps taken in a police investigation is admissible and does not violate the sixth amendment, even if a jury would conclude that the police began looking for a defendant as a result of what nontestifying witnesses told them, as long as the testimony does not gratuitously reveal the substance of their statements and so inform the jury that they told the police that the defendant was responsible for the crime."

It was proper for a police officer and an Assistant State Attorney to testify that after talking with a codefendant, the police began looking for the defendant. The testimony did not disclose the substance of any statements of the codefendant and properly recounted the steps taken in the police investigation.

However, the prosecutor erred in closing argument by stating that the codefendant was "kind of helping" and gave "certain information" about the defendant, because such comments improperly suggested the content of the codefendant's statement. See also, People v. Jura, 352 Ill.App.3d 1080, 817 N.E.2d 968 (1st Dist. 2004) (there is a distinction between testimony that an officer merely spoke to a witness and then

took certain actions, and testimony which discloses the substance of the conversation; under the "investigatory procedure" exception to the hearsay rule, testimony must be limited to showing how the investigation was conducted, without introducing the substance of the out-of-court statements; before admitting statements under the "investigative procedure" exception, the trial court must determine whether: (1) the out-of-court statements are relevant to an issue which does not involve the truth of the matters asserted, and (2) the risk of unfair prejudice and possible misuse by the jury outweighs the legitimate evidentiary value of the statements; plain error occurred where three police officers gave detailed testimony concerning hearsay statements which led to defendant's arrest and the prosecutor relied on the hearsay in opening and closing statements).

People v. Johnson, 116 Ill.2d 13, 506 N.E.2d 563 (1987) At the defendant's trial for murder, the State presented testimony that two nontestifying codefendants made statements implicating the defendant in the crime. The Supreme Court held that the State's use of the above hearsay testimony violated the defendant's confrontation rights under the U.S. and Illinois Constitutions; "even if the evidence had nonhearsay uses and was therefore proper, the State abandoned those uses in closing argument . . . [when] the prosecutor invited the jury to consider [the hearsay] as substantive evidence of guilt."

The Court rejected the State's contention that the testimony was proper to explain the investigatory procedure followed by the police. Testimony recounting steps taken in the course of an investigation may be admissible without violating a defendant's confrontation rights, even though the officer's description of the case might suggest that nontestifying witnesses implicated the defendant. The testimony presented here went beyond that, however; the detectives did more than simply recount what had been done, and revealed that the codefendants "directly implicated the defendant in these crimes."

People v. Lewis, 165 Ill.2d 305, 651 N.E.2d 72 (1995) Although Illinois law recognizes a hearsay exception for evidence of investigative actions where such evidence is "necessary and important to a full explanation of the State's case," evidence suggesting unrelated crimes is not admissible merely to show how the investigation unfolded. Such evidence may be admitted only if it specifically connects the defendant to the crimes for which he is being tried. Because defendant's custody in another State had nothing to do with his involvement in this crime, the evidence should not have been admitted.

However, the error was harmless where the testimony was limited to the fact that defendant was in custody in another State and did not reveal the nature of the crime allegedly committed there.

People v. White, 192 Ill.App.3d 55, 548 N.E.2d 421 (1st Dist. 1989) Although a police officer's testimony was properly admitted to explain the officer's investigatory procedure, the prosecutor erred in closing argument by exceeding the limited purpose for which the evidence was admitted.

People v. Wilson, 168 Ill.App.3d 847, 523 N.E.2d 43 (1st Dist. 1988) Police officer testified that he had a conversation with an accomplice and then proceeded to gather information on the defendant. This testimony was proper since the officer did not reveal the contents of the conversation.

People v. Spears, 169 Ill.App.3d 470, 525 N.E.2d 877 (1st Dist. 1988) A police officer testified that during the investigation an unidentified person told him, "I think the one you are looking for is Larry Spears." While the officer could properly testify about having a conversation with an unidentified person, it was error to testify about the substance of the conversation.

People v. Mitran, 194 Ill.App.3d 344, 550 N.E.2d 1258 (2d Dist. 1990) Testimony admitted under the investigative procedure exception "must be limited to show how the investigation was conducted . . . [and] cannot be used to place into evidence the substance of any out-of-court statements or conversations for the purpose of establishing the truth of their contents."

People v. Billingsley, 184 Ill.App.3d 142, 539 N.E.2d 1302 (2d Dist. 1989) At the defendant's trial for residential burglary, a police officer testified that an informant implicated the defendant in a theft which occurred the night before the residential burglary. Based upon this information, the officer set up surveillance which resulted in defendant's arrest.

The Appellate Court held that the above testimony was not hearsay because it did not implicate the defendant in the crime charged and was not used to prove the truth of the matter asserted. Rather, the testimony was used to explain the officer's investigatory procedures — why he set up the surveillance.

People v. Hyche, 91 Ill.App.3d 559, 414 N.E.2d 1142 (1st Dist. 1980) Police officer testified that he responded to a radio call concerning a shot being fired and a woman screaming for help at a certain location. This testimony was held to be proper because it was admitted merely to preliminarily inform the jury concerning the investigatory procedure taken by the police, which brought them to the scene.

People v. Virgin, 302 Ill.App.3d 438, 707 N.E.2d 97 (1st Dist. 1998) The contents of a warrant may be admitted for the limited purpose of explaining the officers' conduct. Where the State used the evidence to prove that the defendant, and not his father, was the person who fit the warrant's description of the offender and therefore must have been the person who possessed cocaine, the evidence went beyond an explanation of investigatory procedure and was therefore improper.

People v. Edgecombe, 317 Ill.App.3d 615, 739 N.E.2d 914 (1st Dist. 2000) A police officer exceeded the scope of the hearsay exception for testimony concerning a police investigation where he repeated the contents of a radio dispatch concerning the stop of a vehicle which matched the complainant's description of the getaway car, including that the occupants fled and the complainant later identified the vehicle and one of the occupants. The exception authorizes only evidence necessary to establish the steps of the police investigation.

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People v. Hanson, 238 Ill.2d 74, 939 N.E.2d 238 (2010)

The Supreme Court affirmed defendant's convictions and death sentence:

1. The trial court did not err by admitting testimony by the sister of one of the decedents concerning a conversation which she had with the decedent about six weeks before the latter's death. In that conversation, the decedent said that defendant had threatened to kill her if she told their father that defendant had obtained credit in their parents' names.

The State admitted that the statements were hearsay, but argued that defendant had forfeited his right to challenge the evidence under the "forfeiture by wrongdoing" doctrine. Under that doctrine, statements are admissible against a party who, with the intent to prevent the witness from testifying, procures the absence of the declarant from trial. The State contended that defendant murdered the decedent with the intent of keeping her from going to the police or testifying against him.

Defendant did not dispute the finding that he acted with intent to make the decedent unavailable, but argued that the doctrine of forfeiture by wrongdoing does not permit nontestimonial hearsay to be admitted. In the alternative, defendant argued that if nontestimonial hearsay can be admitted under the forfeiture by wrongdoing doctrine, the trial court must first consider whether the statements are sufficiently reliable to be considered.

The court concluded that the forfeiture by wrongdoing doctrine is not merely a basis by which the defendant's constitutional right to confrontation may be extinguished. Instead, the doctrine also constitutes an exception to the hearsay rule which allows the admission of both testimonial and nontestimonial hearsay.

Furthermore, the reliability of the statements need not be considered in determining whether

statements are admissible under the forfeiture by wrongdoing doctrine. The court stressed that by intentionally preventing the declarant from testifying, the defendant forfeited his ability to challenge the reliability of the statements. "Requiring additional *indicia* of reliability would . . . undermine the equitable considerations at the center of the doctrine."

2. The trial court did not err by admitting a detective's testimony that while talking to the defendant, he stated that defendant's sister believed defendant had committed the murders.

A. Defendant did not waive the issue by cross-examining the witness about the statement after defense counsel's objection to admissibility was overruled. "When a circuit court makes an adverse evidentiary decision, defense counsel cannot be forced to choose between waiving an issue for appeal and allowing damaging testimony to go unanswered on cross-examination. Facing such a choice undermines counsel's ability to fully and vigorously pursue a client's interest."

B. Whether evidence is relevant and should be admitted is left to the discretion of the trial court, whose decision will not be overturned unless it is arbitrary, fanciful or unreasonable. Here, the trial court did not abuse its discretion by admitting the evidence.

1) The court rejected the argument that the testimony was improper opinion evidence. Neither the detective nor the sister testified about the sister's present opinion of defendant's guilt or innocence. Instead, the evidence concerned a conversation which occurred immediately after the offenses, when the sister reported to police that defendant might have been responsible.

2) The evidence was relevant in that it explained why the investigation had focused on the defendant, and answered defendant's earlier question to the officer about why he was being questioned.

In addition, the sister's belief was relevant to explain defendant's actions after talking to the police officer, including his unannounced return to Illinois from California and drive to Wisconsin, where he was arrested. The fact that defendant knew that his sister had shared her suspicions with the police made it more likely that he was attempting to flee.

3) The evidence was not hearsay. An out-of-court statement is admissible if offered for some purpose other than to establish the truth of the matter asserted. The evidence was not offered to prove that defendant was guilty, or even to prove that the sister thought he was guilty. Instead, it was intended to provide context for the investigation and explain defendant's state of mind when he returned to Illinois.

4) The evidence should not be excluded because the danger of unfair prejudice outweighed any probative value. The court noted that the sister was not an authority figure whose opinion was likely to be especially persuasive to the jury, the jury was not likely to believe that the sister was "uniquely knowledgeable" about defendant's role in the offense, and at no point did any witness testify that he or she believed defendant to be guilty.

(Defendant was represented by Assistant Defender Steve Clark, Supreme Court Unit.)

In re Jovan A., 2014 IL App (1st) 103835 (No. 1-10-3835, 2/13/14)

The Appellate Court reversed the minor's delinquency adjudication and remanded for further proceedings after finding that the trial judge improperly relied on inadmissible hearsay to establish the minor's guilt.

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless it falls within a recognized exception to the hearsay rule. One such exception permits a police officer to testify about information received during the course of an investigation in order to explain why he or she made an arrest or took steps in the investigation. Such testimony is not offered to show the truth of the matters asserted, but merely to show the steps which the officer performed.

However, the exception does not allow an officer to testify to information beyond what is necessary to explain his or her actions. Similarly, the officer may not testify about the content of any statements he received.

2. The exception for statements made in the course of an investigation has been applied only to testimony by law enforcement officers, and not to testimony by lay witnesses who conducted private

investigations. The court found that it need not consider the State's argument that the exception should be extended to lay witnesses because even if the exception did apply, the testimony in this case would have exceeded the scope of the exception. The witness testified not only to the steps which she took in her private investigation, but also to the content of the craigslist.org advertisement which led her to a bicycle which had been stolen a few minutes earlier.

3. A police officer testified that the lay witness told him that a stolen bicycle was being sold on craigslist.org. The officer testified that he viewed the website, found a telephone number, and obtained related names, addresses and car registration information. The officer also testified that when he arrested the respondent he called the phone number listed in the advertisement, and the respondent's cellular phone rang.

The Appellate Court concluded that because the detective was a police officer acting in the line of duty, the "course of an investigation" exception applied to the portions of his testimony stating that he viewed the advertisement, obtained information concerning a car, went to a particular address where he observed the car, and arrested the respondent. Such testimony qualified for the investigation exception because it explained the steps the detective took which resulted in the respondent's arrest.

However, the trial court improperly admitted other portions of the detective's testimony, including that the layperson told him that the bicycle was being sold on craigslist.org, the detective called the number listed in the advertisement, and the respondent's cellular phone rang. The court stressed that the investigation exception does not allow an officer to testify to the content of a statement, and that the content of the advertisement related directly to the essence of the dispute at trial - whether the respondent was the person who stole the bicycle. Furthermore, the content of the advertisement was not necessary to explain the course of the detective's investigation.

4. Erroneous admission of hearsay requires reversal unless the record shows that the error was harmless. To determine whether this standard has been satisfied, the reviewing court must ask whether there is a reasonable probability that the trier of fact would have been acquitted had the hearsay been excluded.

The court concluded that the erroneous admission of the hearsay was not harmless where, although there was some evidence that the bicycle in question was the one which had been stolen a few minutes earlier, the trial court's oral pronouncement showed that it relied not on the properly admitted evidence but entirely on the improper hearsay, which it considered for its truth. Under these circumstances, there was a reasonable probability that the trier of fact would have acquitted the respondent had the hearsay been excluded.

The court acknowledged that there is a presumption that a trial judge sitting as trier of fact considered only competent evidence. The court concluded that the presumption was overcome because the record affirmatively showed that the judge considered the hearsay for its truth when it found that the respondent had stolen the bicycle. The Appellate Court acknowledged that had the trial court based its finding solely on admissible evidence, reversal would not be required.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Boling, 2014 IL App (4th) 120634 (No. 4-12-0634, 3/12/14)

1. 725 ILCS 5/115-10 authorizes the admission of certain hearsay statements of a child in prosecutions for specified sex offenses, so long as adequate indicia of reliability are present and the child either testifies or is unavailable and the statements are corroborated. The court concluded that under the plain language of the statute, §115-10 is not limited to hearsay statements that directly describe the elements of the charged offenses. Instead, §115-10 authorizes admission of a "matter or detail pertaining to any act which is an element of an offense," including statements relating to the relationship between the child and defendant if such statements are relevant to explain the context in which the alleged acts occurred. Similarly, statements which relate steps defendant allegedly took to conceal his relationship with the child from others may be admitted under §115-10.

The court also concluded that hearsay statements by the complainant concerning defendant's apparent sexual abuse of another child may be admissible under §115-10. When determining whether such

statements are admissible, courts should consider: (1) the relationship of the declarant to the other child, (2) the proximity of the acts in time and place to the act allegedly performed upon the declarant, (3) the similarity of the acts performed on each child, and (4) whether there was a common perpetrator. Where the complainant believed that the second child, a cousin who was about the same age as the complainant, was being abused by defendant in the same room where the complainant had been abused, her statements and conclusions were admissible to corroborate her claims and to provide the jury with an understanding of the psychological aspects of the defendant's abusive relationship with the declarant. "In this sense, [the complainant's] statements described a matter or detail pertaining to the charged offenses."

2. 725 ILCS 5/115-13 authorizes the admission of statements of the complainant in a sex offense prosecution when such statements are made to medical personnel for purposes of medical diagnosis or treatment, insofar as those statements are reasonably pertinent to diagnosis or treatment. Section 115-13 permits details of sex acts to be admitted, including how, when, and where the act occurred and the identity of the perpetrator.

Thus, statements which the complainant made to a nurse/sexual assault examiner and which identified defendant as the attacker were admissible under §115-13. Furthermore, §115-13 authorized admission of statements concerning the defendant's threats to harm the complainant's pets if she told anyone about the abuse, because those statements were relevant to the declarant's state of mind and emotional condition.

However, §115-13 did not authorize admission of the declarant's statements that: (1) defendant apparently abused another person, and (2) the declarant told her mother about the abuse because she "heard that maybe it had happened to some other kids." These statements were not reasonably pertinent to the declarant's diagnosis or treatment.

3. A police officer may testify concerning steps taken in investigating a crime where such testimony is required to fully explain the State's case. However, out-of-court statements admitted to explain the course of an investigation are admissible only to the extent necessary to provide that explanation, and should not be admitted if they reveal unnecessary and prejudicial information. Furthermore, testimony about the steps of an investigation may not include the substance of conversations with non-testifying witnesses. In addition, evidence which would suggest that the defendant engaged in prior criminal activity is admissible only if it is relevant and specifically connects the defendant with the crime for which he is being tried.

Here, the court applied the principles of the "police investigation" hearsay exception although the witnesses in question - the mother and aunt of the complainant - were civilians rather than law enforcement agents. In applying the principles underlying the exception, the court noted that the two witnesses "conducted something akin to an investigation into defendant's suspected abuse" of the complainant.

However, the court concluded that the evidence went well beyond what was necessary to explain the decision to investigate information about the possible abuse, because both witnesses testified either directly or indirectly about the substance of conversations and suggested that defendant had been previously accused of sexual improprieties with children. The court rejected the State's argument that it elicited the testimony because it had a legitimate need to explain its case, noting that the prosecutor could have limited the evidence to showing that based upon information obtained from a third party, the women decided to have a discussion with the complainant about "good" and "bad" touches. Had the evidence been presented in such a manner, the exact information and its source would not have been revealed.

4. The court also noted that in prior cases, it suggested that a trial judge faced with the possibility of admitting evidence explaining the steps of a police investigation should conduct an *in camera* hearing to determine what statements will be permitted. **People v. Cameron,** 189 Ill.App.3d 998, 546 N.E.2d 259 (4th Dist. 1989). Such a hearing would have been appropriate here although the evidence concerned lay rather than police testimony. In addition, although defendant failed to raise a formal objection to the testimony, the trial court had ample warning through the §115-10 hearing that hearsay concerning the defendant's prior crimes would be elicited at trial. Under these circumstances, the trial court should have *sua sponte* exercised its discretion to hold an *in camera* hearing.

The court concluded:

> [Twenty-five] years after **Cameron**, the State continues to commit error by introducing unduly prejudicial out-of-court statements for the purported purpose of explaining the steps of an investigation. . . . The State's repeated abuse of this limited exception to the hearsay rule — in the face of repeated condemnation from the Appellate Court — shows a disrespect for the fundamental purpose of the hearsay rule. . . . [T]rial courts and courts of review should begin more closely scrutinizing (1) the State's purported need to offer hearsay statements to explain the steps of an investigation, as well as (2) the potential prejudice resulting from such evidence. In other words, the time is long overdue for trial courts to *routinely* be conducting "**Cameron** hearings."

5. Because the State's case in a prosecution for sex offenses against a child was based on the credibility of minor witnesses, the court found that the evidence was closely balanced. Thus, the plain error rule applied. Because defendant was denied a fair trial by the cumulative effect of several errors including the erroneous admission of hearsay evidence, allowing a prosecution witness to testify concerning the credibility of the complainant, and commenting in closing argument on the credibility of witnesses, the convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Shorty, 403 Ill.App.3d 625, 934 N.E.2d 647 (3d Dist. 2010)

An officer may testify that he had a conversation with someone to explain his investigatory procedure. The officer may not testify to the substance of that conversation where the substance relates directly to the matter in controversy at trial.

A police officer's testimony relating the substance of his conversation with an informant should not have been admitted to explain the officer's investigatory procedure because it went beyond that necessary for that purpose and related directly to the charges. The defendant was on trial for possession of heroin and possession of heroin with intent to deliver. The information that the officer disclosed was that an informant told him that defendant was taking a trip to Chicago to pick up a large quantity of heroin and that defendant had in fact obtained the heroin. Instructing the jury not to consider the evidence for its truth did not cure the error. The court concluded that the prosecutor elicited the evidence to place the testimony of the informant before the jury without subjecting the witness to cross-examination and impeachment.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Shorty, 408 Ill.App.3d 504, 946 N.E.2d 474 (3d Dist. 2011)

1. An officer may testify to his investigatory procedures, including the existence of conversations, but not the substance of the conversations, without violating the hearsay rule, even if the logical inference is that the officer took subsequent steps as a result of the substance of those conversations. The testimony may not be used to establish defendant's guilt, or go beyond what is necessary to explain the police conduct. This rule is not violated where the substance of the conversation is irrelevant to the matter in controversy.

The State went beyond what was necessary to explain the investigatory procedure, and the substance of the elicited conversations related directly to the matter in controversy: whether the defendant possessed the heroin. The prosecutor elicited that a confidential informant told the police that defendant would be going to Chicago to buy heroin; that defendant would be going to Chicago that evening to pick up a large quantity of heroin; and that defendant did in fact have the heroin. The Appellate Court characterized the hearsay testimony of the informant as nothing "more than a prosecutor's successful attempt to put on the not-so-confidential informant's testimony as to defendant's guilt without subjecting the witness to cross-examination and impeachment."

2. The court instructed that upon defense objection to the substance of information related to the

police, a hearing should be conducted outside the presence of the jury to determine the scope of the out-of-court statements and the need for the jury to hear them. This allows the court to decide how much of the substance of the conversation is necessary to explain why the police did what they did and exclude prejudicial testimony that the jury might use to decide defendant's guilt.

3. A limiting instruction to the jury did not cure the error, particularly where it was not given in each instance that hearsay was elicited. The error was harmless however, because there is no reasonable probability that the jury would have acquitted absent the error, as the evidence that the police saw defendant in possession of the bag containing the heroin was uncontradicted.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

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§19-11
Admissions: Exculpatory and False Exculpatory Statements

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) An admission is a statement or conduct from which guilt may be inferred, when taken in connection with other facts, but from which guilt does not necessarily follow. The defendant's statement that the murder victim had previously turned him over to the police "was relevant to show motive, and the jury could have inferred guilt when that statement was taken in connection with all the other evidence." Thus, the statement was an admission and not a violation of the rule against hearsay.

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) The State introduced the defendant's entire statement, which included not only an admission of guilt regarding the crimes on trial, but also a statement that he intended to murder another person. The Court held that the portion of the statement relating to defendant's intent to kill another person was not relevant and should have been redacted.

People v. Aughinbaugh, 36 Ill.2d 320, 223 N.E.2d 117 (1967) Defendant's silence may be introduced as a tacit admission where it occurred in the face of an accusation of guilt. However, such evidence should be received with caution and only when it affirmatively appears that the defendant was being asked about the crime on trial - for it is the assumption that one similarly situated would deny the imputation of guilt which renders admissible defendant's failure to do so. See also, People v. Harbold, 124 Ill.App.3d 363, 464 N.E.2d 734 (1st Dist. 1984) (where defendant was present during the conversation but did not adopt the declarant's statements, the statements were hearsay).

People v. Jones, 26 Ill.2d 300, 186 N.E.2d 314 (1962) The defendant may not introduce his own self-serving, and exculpatory hearsay denying commission of the offense.

People v. Kidd, 147 Ill.2d 510, 591 N.E.2d 431 (1992) Acknowledging that the issue was one of first impression, the Supreme Court held that statements made during dreams are not sufficiently trustworthy and reliable to be used as admissions. The Court remanded the cause for a new trial with instructions to review the conflicting testimony and determine whether defendant was asleep when he made the statements in question. If the trial judge concludes that defendant was probably sleeping, the statements are to be excluded.

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) The Supreme Court declined to decide whether the defendant should have been allowed to show that the State changed its theory of the crime between the first and second trials. There is no Illinois case on point concerning whether an attorney's admissions during argument at an earlier trial are admissible as admissions during a subsequent trial on the same matter.

Although the Court discussed federal precedent, it held that it need not resolve the issue because a new trial was required on other grounds.

People v. McDaniel, 164 Ill.2d 173, 647 N.E.2d 266 (1995) The "admission of a party opponent" exception to the hearsay rule does not apply to out-of-court statements made by agents of the State in a criminal case. Because governmental agents "are supposedly disinterested in the outcome" of criminal cases and are "unable to bind the sovereign," their statements "seem less the product of the adversary process and hence less appropriately described as admissions of a party."

People v. Burns, 99 Ill.App.3d 42, 424 N.E.2d 1298 (1st Dist. 1981) An admission by the defendant is admissible as substantive evidence of guilt. An admission is any statement or conduct by the defendant which, when considered with other facts in evidence, permits an inference of guilt.

People v. McDowell, 121 Ill.App.3d 491, 459 N.E.2d 1018 (1st Dist. 1984) Defendant's claim to have been in school at a relevant time, which was rebutted by attendance records, was an admission. Defendant's assertion, "when considered with other proof which showed it was erroneous, indicated a consciousness of guilt."

People v. Powell, 301 Ill.App.3d 272, 703 N.E.2d 934 (4th Dist. 1998) 1. In civil cases, "the law has long recognized that a party's silence when confronted with a statement made in his presence under circumstances that would normally call for a denial constitutes an admission." Although the "admission by silence" doctrine applies "under certain circumstances in criminal cases," its application is restricted. "[S]uch evidence should be received with caution and only when the conditions upon which it becomes admissible are clearly shown to exist."

2. The Seventh Circuit has made "a strong case" for the argument that the Constitution prohibits application of the "tacit admission" rule to the questioning of criminal suspects by police officers. (See U.S. ex rel. Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987)). However, the court declined "to go that far," holding that it is "possible - even if highly unlikely - that a scenario could arise in which a defendant's tacit admission might be probative."

3. Where the prosecution seeks to introduce an admission by silence it must establish, under the totality of the circumstances, that defendant heard the statement in question, understood it, had the opportunity to deny it, and failed to do so. The trial court must also determine that it is more likely than not that an innocent person would have denied the statement if he believed it to be untrue.

The trial court erred by admitting the defendant's refusal to answer police questioning whether he had committed crimes against his wife. Defendant's silence "was probative of nothing," as it "may have been motivated by nothing more than his prior experience or the advice of counsel." In addition, the trial judge failed to determine that under the circumstances, a innocent person would have been likely to deny the truth of the deputy's questions.

People v. Cihak, 169 Ill.App.3d 606, 523 N.E.2d 975 (1st Dist. 1988) To qualify as an admission by silence, it is essential that the accused heard the incriminating statement, that the statement was made under circumstances which allowed an opportunity for the accused to reply, and that a person similarly situated would ordinarily have denied the accusation. See also, People v. Spivey, 58 Ill.App.3d 677, 374 N.E.2d 1068 (1st Dist. 1978) (the mere presence of the defendant when an out-of-court statement is made does not constitute an exception to the hearsay rule).

People v. Smith, 122 Ill.App.3d 609, 461 N.E.2d 534 (3d Dist. 1984) Admissions by silence were properly admitted; defendant was present and failed to respond when his mother said he could not pass a lineup and his wife acknowledged defendant's guilt.

People v. Miller, 128 Ill.App.3d 574, 582 N.E.2d 83 (2d Dist. 1984) At defendant's trial for syndicated gambling, an undercover agent testified that defendant's father introduced defendant by saying, "This is my daughter, the one you call your bets into." The Appellate Court found that there was sufficient evidence for the jury to conclude that defendant heard the statement and that it was the type of statement that "would normally be denied or objected to by one who was innocent of any wrongdoing." However, "there is nothing in the record here to indicate whether defendant remained silent or denied the accusation." The absence of such proof by the State makes the statement inadmissible as an implied admission — it is not the defendant's responsibility to prove she denied the accusation.

People v. Long, 316 Ill.App.3d 919, 738 N.E.2d 216 (1st Dist. 2000) The trial judge erred by allowing the State to cross-examine defendant as to why she had not mentioned, before trial, alleged abuse and misconduct by the arresting officers. Impeachment through silence is generally permitted where the witness had an opportunity to make a statement and would have been expected to do so under the circumstances. Under Doyle v. Ohio, 326 U.S. 610 (1976), however, the State may not impeach a criminal defendant for exercising her constitutional right to remain silent after receiving Miranda warnings. Because defendant's failure to make claims of abuse to the police department may have been induced by Miranda warnings she received upon her arrest, impeachment was improper.

Similarly, defendant's failure to report the abuse to a governmental agency before trial was inadmissible if it would have been reasonable for the defendant to believe that such a report could be used against her in court. Furthermore, because a defendant does not waive her right to silence by testifying at a pretrial hearing, defendant could not be impeached with her failure to raise the claimed abuse during her testimony at the hearing on the motion to quash.

The court noted, however, that if the defendant chooses to testify at trial, and the trial judge finds that it would have been natural to mention the alleged abuse during the testimony at the pretrial hearing, defendant's trial testimony may be impeached with her pretrial testimony.

The court also stressed that Doyle is limited to situations in which the silence of the defendant is induced by governmental action. Thus, on retrial the defendant may be impeached with her failure to relate her claim of abuse to the media, if the trial court finds that under the circumstances it would have been natural for her to do so.

People v. Hoffstetter, 203 Ill.App.3d 755, 560 N.E.2d 1349 (5th Dist. 1990) A conversation in which a codefendant asked defendant "to get rid of Tina" (an occurrence witness) who the codefendant was "worried about," and in which defendant replied that he "wasn't worried about Tina," was not an implied admission by the defendant. Since the conversation did not indicate or even mention any details of the crimes on trial, it was "too vague to be considered an admission of defendant's guilt."

People v. Guiterrez, 105 Ill.App.3d 1059, 433 N.E.2d 361 (2d Dist. 1982) "False exculpatory statements" by the defendant are probative as evidence of consciousness of guilt.

People v. Harman, 125 Ill.App.3d 338, 465 N.E.2d 1009 (2d Dist. 1984) Defendant was properly prohibited from introducing evidence that he made an exculpatory statement to the police after his arrest. The State did not "open the door" to its introduction when a State witness made a single reference to defendant's statement to the police.

People v. Davis, 166 Ill.App.3d 1016, 520 N.E.2d 1220 (4th Dist. 1988) A written statement prepared by the police and signed by the defendant was admissible though defendant claimed he did not read it. Police officers testified that defendant did appear to read the statement.

People v. Mims, 204 Ill.App.3d 87, 561 N.E.2d 1101 (1st Dist. 1990) A document offered as a statement

of a defendant may be reliable and admissible even in the absence of the defendant's signature. However, a proper foundation - testimony that the document accurately reproduces the actual questions asked and the answers given - must be given.

Here, the foundation requirement was "uncertain" because the State's Attorney who prepared the statement from his notes admitted that he paraphrased what defendant said. In addition, it was error to allow the document to go to the jury room; "[o]ur caution stems from concern over the undue weight that jurors may accord the written word, especially when they must rely on their memories alone when considering oral testimony." The Court also said:

> "We question the probative value of an unsigned, incriminating statement, even when an attempt is made to establish a proper foundation for its reliability. A defendant may fail or refuse to sign such a document for a number of reasons, but surely one of them is that he does not agree that it accurately reflects what he has said. This danger is greatly reduced when his signature appears on the statement."

People v. Slabaugh, 323 Ill.App.3d 723, 753 N.E.2d 1170 (2d Dist. 2001) Defense witnesses could not be impeached with their guilty pleas to charges of obstructing a peace officer which arose from the same incident as the charges against the defendant. Obstructing a peace officer is a misdemeanor that does not involve dishonesty or false statement, and a guilty plea is neither a judicial admission nor a prior statement that is inconsistent with a witness's denial that he or she committed certain acts.

People v. Downin, 357 Ill.App.3d 193, 828 N.E.2d 341 (3d Dist. 2005) 1. Two printed versions of e-mails purportedly sent by the defendant to the complainant, and which contained admissions of guilt, had sufficient foundation to be admitted. Defendant argued that because the emails did not have any Internet provider address linking the email to the defendant, there was no way to tell whether they had been falsified.

2. The decision to admit a document is reviewed under an abuse of discretion standard. A finding that there is an adequate foundation to admit a document is merely a finding of sufficient evidence to justify presenting the evidence to the trier of fact; the opponent of the evidence is not precluded from contesting the genuineness of the document or the weight it should be given. In order to establish a sufficient foundation for the admission of the e-mails, the prosecution was required to show a rational basis upon which the factfinder could conclude that the messages had been sent by the defendant. The factors used to authenticate writings in general also apply to e-mail messages.

3. Among the methods of establishing authorship of a document is showing that the writing reflects knowledge of an obscure matter known to only a small group of individuals. The court found that there was a rational basis to believe that the e-mails were genuine where: (1) the defendant and complainant communicated by e-mail, (2) the complainant sent an e-mail at a police officer's request to the same e-mail address she had used in the past to contact the defendant, (3) the complainant testified that she received a response from the defendant's e-mail address to her e-mail address, and (4)that e-mail was responsive to the message the complainant had sent.

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People v. Gray, 406 Ill.App.3d 466, 941 N.E.2d 338 (1st Dist. 2010)

A guilty plea is an admission to the elements of the charged offense. It does not constitute an admission to collateral matters.

A defense witness pled guilty to illegal possession of a weapon, a charge related to the first degree murder and aggravated battery charges for which defendant was tried. The factual basis presented by the prosecutor at the plea hearing included a statement that the witness had given the gun to the defendant and

the defendant had fired shots that resulted in the death of the murder victim. After the witness testified at defendant's trial that defendant had not been the shooter, the prosecutor introduced the factual basis for the plea to impeach the testimony of the witness.

By pleading guilty to the gun charge, the witness admitted that she possessed a gun illegally. Her plea was not an admission that she gave the gun to the defendant or that he fired the gun, because those collateral facts had no bearing on the elements that the State had to prove to establish her guilt of the weapons offense. Neither at the time of the plea nor at the time of defendant's trial did the witness assent to the collateral matters presented by the prosecutor in the factual basis for the plea. Therefore, the factual basis did not constitute a judicial admission or a prior inconsistent statement that could be used to impeach the testimony of the witness.

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Sanchez, 392 Ill.App.3d 1084, 912 N.E.2d 361 (3d Dist. 2009)

1. Because the defendant's post-arrest silence is neither material nor relevant to proving or disproving a charged offense, Illinois evidentiary law prohibits the impeachment of a defendant with his or her post-arrest silence, regardless whether the silence occurred before or after **Miranda** warnings were given. Furthermore, constitutional error occurs where the defendant is impeached with post-arrest silence which occurred after **Miranda** warnings were given.

However, a defendant who gives exculpatory testimony that is manifestly inconsistent with statements he made after his arrest may be cross-examined about the inconsistency.

2. As a matter of plain error, the State committed reversible error by using post-arrest silence to impeach a defendant who did not testify. Because defendant's alibi defense was presented through the testimony of other witnesses, the State was entitled to impeach those witnesses. However, it had no basis to impeach a non-testifying defendant.

Defendant's convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Watson, 2012 IL App (2d) 091328 (No. 2-09-1328, 1/25/12)

A judicial confession is a voluntary acknowledgment of guilt during a judicial proceedings such as a plea of guilty, testimony at trial or testimony at some other hearing. To constitute a judicial confession, the statement must directly acknowledge guilt or directly and necessarily imply guilt.

1. Defendant's statements in allocution may be read to suggest his guilt, but may also be read as an expression of remorse for his life of crime generally, and not specifically to this offense. Therefore, they are too vague to be considered a judicial confession.

2. Statements made by defendant in his examination of witnesses at a hearing on his post-trial motion challenging the competency of his counsel did not qualify as judicial confessions. Defendant offered no guilty plea or personal testimony at that hearing. The evidence at that hearing revealed that defendant and his counsel disagreed about whether defendant should adopt the trial strategy of making a judicial confession at trial, and established that defendant entertained pleading guilty. But defendant ultimately did not make a judicial confession or plead guilty.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

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§19-12
Co-Conspirator Statements

U.S. v. Inaldi, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) Evidence of a nontestifying co-conspirator's

out-of-court statement, which comes within the co-conspirator exception to the hearsay rule, may be introduced without a showing that the declarant is unavailable to testify.

People v. Goodman, 81 Ill.2d 278, 408 N.E.2d 215 (1980) The statements of a co-conspirator are admissible against another co-conspirator, as an exception to the hearsay rule. For such a statement to be admissible: (1) the prosecution must make a *prima facie* showing that two or more persons, including the defendant, were engaged in a common plan to accomplish a criminal goal or to reach another end by criminal means, (2) the *prima facie* showing of conspiracy must be made by evidence independent of the statement being offered into evidence, and (3) the statement must have been made in furtherance of the conspiracy.

People v. Kliner, 185 Ill.2d 81, 705 N.E.2d 850 (1998) Under the co-conspirator exception, a declaration by one conspirator is admissible against all parties to the conspiracy, provided that the declaration was made during the pendency of the conspiracy and in furtherance of it. The co-conspirator's exception does not extend to statements which are merely narratives of past occurrences, however, or to statements that do not further any objectives of the conspiracy.

Statements relating to attempts to conceal a conspiracy are admissible under the co-conspirator's exception, because they further the conspiracy's objectives by helping the conspirators avoid punishment. In addition, efforts at concealment that are "sufficiently proximate in time" are considered to have occurred during the course of the conspiracy even if they occurred after the offense.

People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970) Statement made by an alleged co-conspirator at the time of his arrest was not a statement in furtherance of the conspiracy.

People v. Parmly, 117 Ill.2d 386, 512 N.E.2d 1213 (1987) Even if the co-conspirator exception includes statements made in furtherance of concealment or a cover-up of a crime, the statements in question here were not made in furtherance of concealment. The obvious motive of the declarant in stating that defendant fired a second shot was not to conceal the crime, "but to ensure that primary blame for the crime fell on the defendant." See also, People v. Byron, 164 Ill.2d 279, 647 N.E.2d 946 (1995) (statements were in furtherance of a conspiracy to both kill the decedent and obtain money from her heirs; statements made after the murder were "coolly calculated" to further the financial interests of the conspiracy and "inextricably intertwined" with the attempt to obtain money).

People v. Link, 100 Ill.App.3d 1000, 427 N.E.2d 589 (2d Dist. 1981) A conspiracy includes subsequent efforts at concealment. Thus, a co-conspirator's statement made within two days of the crime and directed at concealing his involvement was admissible under the co-conspirator exception.

People v. Hoffstetter, 203 Ill.App.3d 755, 560 N.E.2d 1349 (5th Dist. 1990)

A conspiracy includes "subsequent efforts at a concealment but only if the efforts are proximate in time to commission of the principal offense." A conversation which occurred six months after the crimes were committed was not proximate in time and did not occur during the conspiracy.

People v. Meagher, 70 Ill.App.3d 597, 388 N.E.2d 801 (3d Dist. 1979) It is not necessary for the admission of co-conspirator statements that all the conspirators be charged or tried, as long as a *prima facie* case of conspiracy is shown.

People v. Jackson, 49 Ill.App.3d 1018, 364 N.E.2d 975 (2d Dist. 1977) To be admissible under the co-conspirator exception, a statement need not be made in the presence of the defendant.

People v. Kiel, 75 Ill.App.3d 1030, 394 N.E.2d 883 (3d Dist. 1979) It is within the trial court's discretion

to receive evidence of a co-conspirator's statements before sufficient proof of the conspiracy has been given. Trial judge did not err here by admitting the statement where the State subsequently proved a *prima facie* case of conspiracy.

People v. Eddington, 129 Ill.App.3d 745, 473 N.E.2d 103 (4th Dist. 1984)For statements to be admissible under the co-conspirator exception to the hearsay rule, there must be a foundation consisting of independent proof of the conspiracy. In addition, the statements must be made during the pendency of the conspiracy. Here, there was no independent proof of the conspiracy and the statements were made more than three months after the murder and the declarant's arrest. See also, People v. Deatherage, 122 Ill.App.3d 620, 461 N.E.2d 631 (3d Dist. 1984) (testimony concerning certain statements of the co-defendant were improperly admitted under the co-conspirator exception where there was no evidence independent of the hearsay to establish a conspiracy; People v. Duckworth, 180 Ill.App.3d 792, 536 N.E.2d 469 (4th Dist. 1989) (co-defendant's statements were not admissible under the co-conspirator's exception where the sole evidence of a conspiracy, other than the statements, consisted of defendant's appearance at the mall where the drug sale was to occur).

People v. Miller, 128 Ill.App.3d 574, 582 N.E.2d 83 (2d Dist. 1984) At a trial for syndicated gambling, a statement by defendant's father introducing defendant as his daughter and stating that she was "the one you call your bets into" was properly introduced under the co-conspirator exception. The evidence established a *prima facie* case of conspiracy between defendant and her father, and the statement was made in furtherance of the conspiracy.

Cumulative Digest Case Summaries **§19-12**

People v. Denson, 2013 IL App (2d) 110652 (No. 2-11-0652, 5/23/13)

Under the Illinois Rules of Evidence, a statement is not hearsay if it is offered against a party and was made by the party's co-conspirator during the course and in furtherance of the conspiracy. Ill. R. Evid. 801(d)(2)(E). Thus co-conspirator's statements should no longer be characterized as an exception to the rule against hearsay. Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration. Statements made after the crime in an effort to conceal the crime or escape punishment further the objective of the conspiracy. A mere narrative of past occurrences that does not further any objective of the conspiracy is not admissible as a co-conspirator's statement.

Statements made by co-conspirators to an armed robbery that led to a murder were not mere restatements of what had occurred. The co-conspirators had called the witness to drive them to an apartment of one of the co-conspirators immediately after the murder had occurred because defendant "had to get on the highway." The co-conspirators still had the weapons in their possession and changed their destination because of the appearance of the police near the apartment. Explaining what happened and what led to their current predicament furthered the efforts to conceal their actions. Because the statements were made in an effort to conceal the crime and escape punishment, they were properly admitted as co-conspirators' statements.

A co-conspirator's statement that she was glad that she was unable to contact a person because she did not want to set him up for a robbery by the co-conspirators was not admissible as a statement by a co-conspirator. The fact that the statement was made to a non-conspirator did not alone make the statement inadmissible. But the statement was not made in furtherance of the conspiracy because it was a mere narrative of what the co-conspirator had done and what the plans were for later than evening.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

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§19-13
Dying Declarations

People v. Odum, 27 Ill.2d 237, 188 N.E.2d 720 (1963) Dying declarations are statements by the victim concerning the cause and circumstances of a homicide. To be admissible, such statements must be made while the decedent is under the fixed belief and moral conviction that death is impending and certain to follow almost immediately, without opportunity for repentance, and in the absence of all hope of avoidance, at a time when he has despaired of life and looks to death as inevitable and at hand.

People v. Scott, 52 Ill.2d 432, 288 N.E.2d 478 (1972) A necessary condition for the admission of a dying declaration is a showing that the declaration was intelligently made and understood by the person who witnessed it.

People v. House, 141 Ill.2d 323, 566 N.E.2d 259 (1990) The murder victim was set on fire and sustained severe burns over 40% of her body. She survived for about a month after the incident.

About 2½ hours after the incident, while undergoing treatment at the hospital, the victim gave a description of her attackers. The Supreme Court held that this statement was not admissible as a dying declaration because there was no showing that the declarant had been told she was going to die or believed she was going to die.

People v. Tilley, 406 Ill. 398, 94 N.E.2d 328 (1950) For a "dying declaration" to be admissible, it must appear that the declarant was sufficiently in possession of his mental faculties to understand what he was doing and able to give a true and correct account of the facts to which the statement relates.

People v. Stiff & Ragusa, 904 Ill.App.3d 1174, 328 N.E.2d 664 (5th Dist. 2009) 1. The dying declaration exception to the hearsay rule consists of the following elements: (1) the declaration pertains to the cause or circumstances of the death, (2) the declarant possesses sufficient mental faculties to give an accurate statement about the circumstances of his or her death, and (3) the declarant believes that death is imminent. The party seeking to admit a dying declaration must show that when the statement was made, the declarant possessed a fixed belief and moral conviction that certain death was impending.

2. Statements which an arson victim made to a friend just after the offense and to police officers two days later did not qualify as dying declarations. Although the victim had all of his mental faculties and the statements pertained to the circumstances which led to his death, there was no evidence that he believed his death was imminent. The court acknowledged that police officers, medical personnel, and at least some of the declarant's friends believed that he was certain to die; however, there was no evidence that the declarant had the same belief. See also, People v. Montague, 149 Ill.App.3d 332, 500 N.E.2d 592 (4th Dist. 1986) (statement was improperly admitted as a dying declaration where there was no indication that the victim believed that death was impending; victim was trying to leave the scene when police arrived and had to be told to settle down, and neither the police nor the victim made any mention of death).

People v. Webb, 125 Ill.App.3d 924, 466 N.E.2d 936 (1st Dist. 1984) Shooting victim's identification of defendant's photograph was properly admitted as a dying declaration.

People v. Lawson, 232 Ill.App.3d 284, 596 N.E.2d 1235 (4th Dist. 1992) 1. Before admitting statements under the dying declaration exception, the trial court must find beyond a reasonable doubt that:

a. the statements were made under the fixed belief and moral conviction that death was immediately

imminent,

b. the statements concerned the cause and circumstances of death, and

c. the declarant was in sufficient possession of his mental faculties to understand what he was doing and capable of giving a true and accurate accounting of the facts which the statement relates.

The trial court should examine all of the facts and circumstances surrounding the statements, including the nature of the wounds, to determine the declarant's state of mind.

2. The requirements of the dying declaration exception were satisfied in this case. The decedent had been shot nine times and was bleeding to death, and when discovered was conscious, coherent and crying out for help. Before naming defendant as the person who "did this," the decedent repeatedly stated he had been shot in the back and was dying. Decedent's insistence on being removed from the ravine did not necessarily indicate a lack of belief that death was imminent; almost anyone who believes he is dying will cling nonetheless to even a slim hope of recovery. Furthermore, because the statement was made while decedent was in a ravine bleeding from nine bullet wounds, the lack of specificity in the claim that defendant was "responsible" did not justify finding that defendant's responsibility might have involved something other than firing the fatal shots. See also, People v. Newell, 135 Ill.App.3d 417, 481 N.E.2d 1238 (1st Dist. 1985) (for statement to be admitted as a dying declaration, the declarant must have truly believed he was dying and that his death was imminent; however, "to require that the declarant should have lost every scintilla of a hope of recovery would be to require the impossible").

People v. Cobb, 186 Ill.App.3d 898, 542 N.E.2d 1171 (2d Dist. 1989) A statement made by the victim shortly after she was stabbed and shortly before she died was properly admitted as a dying declaration. The fact that the victim had a very high blood-alcohol content when she died did not show that she lacked sufficient mental faculties to comprehend what she was doing and give an accurate account of what had happened.

Furthermore, the victim's statement ("He killed me") was not too indefinite to be admitted where the defendant was the only male in the vicinity.

People v. Montague, 149 Ill.App.3d 332, 500 N.E.2d 592 (4th Dist. 1986) A police officer was allowed to testify that while at the crime scene awaiting an ambulance, the victim named the person who had shot him. The officer also testified that he told the victim he was "seriously injured," but the victim was never told or expressed any knowledge that he was dying.

The Appellate Court held that the above statement was improperly admitted as a dying declaration because there was no indication that the victim believed death was impending. The victim was trying to leave the scene when police arrived and had to be told to settle down, and neither the police nor the victim made any mention of death.

People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2d Dist. 2005) Relying on dicta in Crawford v. Washington, 541 U.S. 36 (2004), the Appellate Court held that Crawford does not apply to statements which qualify for the "dying declaration" exception to the hearsay rule. The court found that the U.S. Supreme Court's dicta in Crawford was "a strong indiction that the Court does not believe that admitting testimonial dying declarations violates the confrontation clause." See also, People v. Ingram, 382 Ill.App.3d 997, 888 N.E.2d 520 (1st Dist. 2008) (admission of statements which qualify for the dying declaration exception to the hearsay rule does not violate Crawford v. Washington, even where there was no opportunity for cross-examination, because such statements are not "testimonial" and because **Crawford** states that even "testimonial" dying declarations are admissible).

People v. Jenkins, 2013 IL App (4th) 120628 (No. 4-12-0628, 3/15/13)

1. The hearsay exception for dying declarations applies where: (1) at the time a hearsay statement was made the declarant believed that his or her death was imminent, and (2) the statement related to the cause or circumstances of what the declarant believed to be the impending death. The trial court did not act against the manifest weight of the evidence where it concluded that because there was no evidence the declarant believed his death to be imminent, a statement made in the hospital after the declarant came out of surgery for a gunshot wound did not qualify for the dying declaration. The court noted that no one asked the declarant whether he thought he was dying, and he never communicated a belief that his death was impending. Although the declarant might not have believed that his survival was assured, where he had lived through surgery and was still being treated the record did not contradict the trial court's conclusion that the declarant did not believe his death to be imminent.

2. The forfeiture by wrongdoing exception to the hearsay rule applies where a hearsay statement is offered against a party which has engaged or acquiesced in wrongdoing that was intended to, and did, procure the declarant's unavailability as a witness. The exception applies only where the party in question acted with the intent to make the declarant unavailable. The mere fact that certain actions resulted in the unavailability of the witness does not trigger the forfeiture by wrongdoing exception.

The court concluded that the trial judge did not act contrary to the manifest weight of the evidence by concluding that a defendant who shot the declarant during an armed robbery did not act with the intent to make the declarant unavailable as a witness. Under the "manifest weight of evidence" standard of review, a party seeking to overturn the trial judge's finding must do more than merely argue that inferences which favor its position could be drawn from the evidence. "Even if one *may* or *can* reasonably infer that defendant had the intent to procure [the declarant's] unavailability as a witness, it does not follow that the opposite inference, that defendant lacked such an attempt, is unreasonable or against the manifest weight of the evidence." The court also noted that the factual representations made in the State's brief were not included in its offer of proof at trial. Given the State's offer of proof in the lower court, the trial judge did not act against the manifest weight of the evidence by finding that the forfeiture by wrongdoing exception did not apply.

3. The court concluded that the manifest weight of the evidence standard applied because the contentions between the parties were factual: (1)whether the evidence was such that the trial court could infer only that the declarant believed his death to be imminent at the time of the statement, and (2) whether the evidence was such that the trial court could infer only that defendant acted with the intent to make the declarant unavailable as a witness. The *de novo* standard of review would apply only if the issues concerned legal disputes about the applicability of the hearsay exceptions in light of uncontested facts.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

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§19-14
Spontaneous Declarations; Corroborative Complaints; Statements Under 725 ILCS 5/115-10

§19-14(a)
Spontaneous Declarations (Excited Utterances)

People v. Robinson, 217 Ill.2d 430, 838 N.E.2d 930 (2005) To qualify as a spontaneous declaration, the following three factors are required: (1) an occurrence sufficiently startling to produce a spontaneous, unreflecting statement, (2) the absence of time to fabricate, and (3) a statement that relates to the circumstances of the startling occurrence.

People v. Williams, 193 Ill.2d 306, 739 N.E.2d 455 (2000) 1. A statement may be admitted as a spontaneous declaration where: (1) there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, (2) there is an absence of time for the declarant to fabricate, and (3) the statement relates to the circumstances of the startling event. In determining whether the spontaneous declaration exception applies, courts consider the totality of the circumstances, including the time elapsed between the event and the statement, the nature of the startling event, the mental and physical condition of the declarant, and the presence or absence of any self-interest.

The fact that a statement is volunteered may indicate admissibility under the spontaneous declaration exception, although the mere fact that the statement was in response to questioning does not necessarily destroy spontaneity. In determining whether the spontaneous declaration exception applies, it is more important whether the statement was made under the influence of the startling event than whether a particular amount of time passed between the event and the statement.

2. Statements which a seven-year-old made between six and eleven hours after witnessing two murders were properly admitted as spontaneous declarations. Where child declarants are involved, similar delays have not precluded application of the spontaneous declaration exception. In addition, the child fell into a "fitful" sleep during which he cried out and from which he awakened crying, refused an offer of food, and spoke in a "frantic voice" while appearing to be scared. Such evidence established that the child was still under the effect of the startling events at the time of the statements.

The court rejected the argument that because witnesses described the child as "worried," a substantial period of reflection must have occurred. The court found that the child was fearful and anxious, and that his "very simplified" recounting of the events established that the statements were made without reflection.

People v. Sutton, 233 Ill.2d 89, 908 N.E.2d 50 (2009) 1. The "spontaneous declaration" exception permits the admission of a hearsay statement where: (1) there is an occurrence that is sufficiently startling to produce a spontaneous and unreflecting statement, (2) there is no time for the declarant to fabricate a statement, and (3) the statement relates to the circumstances of the occurrence. The "totality of the circumstances" test is used to determine whether a hearsay statement is admissible under the "spontaneous declaration" exception. Several factors are considered, including the passage of time, the mental and physical condition of the declarant, the nature of the startling event, and the presence or absence of self-interest. The period of time which may pass without affecting the spontaneity of the statement varies from case to case; the critical question is whether the statement was made while the excitement of the startling event "predominated."

2. Statements to police officers at the scene of the crime and in an ambulance while being taken to the hospital clearly qualified for the "spontaneous declaration" exception. Police officers arrived on the scene in response to calls that a man was pounding on doors and ringing doorbells, and found the declarant staggering and bleeding from the head. He told officers that he had been shot and robbed and that his girlfriend had been shot. The statement in the ambulance was made about 20 minutes later, as the declarant was being treated for his wounds and receiving oxygen. Under these circumstances, it was unreasonable to believe that the witness spent the time between the event and the statements fabricating the statements. See also, People v. Stiff & Ragusa, 391 Ill.App.3d 494, 904 N.E.2d 1174 (5th Dist. 2009) (where the victim was doused with gasoline and set on fire and the defendant's statements related to the circumstances of the occurrence, the first two requirements of the spontaneous declaration exception were satisfied; although the record was silent as to the exact amount of time which passed between the startling event and the victim's statements, in view of his injuries the victim's full attention would have been focused on obtaining medical help rather than on fabricating a statement; in addition, the lapse of time was likely insignificant where the victim traveled only 295 feet to get help and the injuries appeared to have been recently inflicted; statements were admissible).

People v. Shum, 117 Ill.2d 317, 512 N.E.2d 1183 (1987) The commission of a crime, particularly a sex offense or one involving force or violence, constitutes a "startling occurrence." See also, People v. House,

141 Ill.2d 323, 566 N.E.2d 259 (1990) (declarant saw two murders and was set on fire); People v. Nevitt, 135 Ill.2d 423, 553 N.E.2d 368 (1990) (sex offense); People v. Fields, 71 Ill.App.3d 888, 390 N.E.2d 369 (1st Dist. 1979) (armed robbery).

People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 (1978) In regard to the "absence of time to fabricate" requirement, the "pertinent point is whether there was a lack of sufficient time to allow an opportunity for reflection and invention." See also, People v. Shum, 117 Ill.2d 317, 512 N.E.2d 1183 (1987) ("the time factor is an elusive element and will vary with the facts of the case").

People v. House, 141 Ill.2d 323, 566 N.E.2d 259 (1990) "Time is one factor, albeit an elusive one, whose significance will vary with the facts of each case." Other factors that are considered include "the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self-interest."

People v. Leonard, 83 Ill.2d 411, 415 N.E.2d 358 (1980) The decedent's statement ("He's got a gun") was properly admitted as a spontaneous declaration. The statement was corroborated by several witnesses who saw the nearly contemporaneous struggle over the gun between defendant and the decedent; thus, the circumstantial evidence was sufficient to corroborate the existence of an occurrence sufficiently startling to produce a spontaneous and unreflecting statement. See also, People v. Nevitt, 135 Ill.2d 423, 553 N.E.2d 368 (1990) (there was "ample circumstantial evidence demonstrating the meaning of the child's declaration ['teacher Tony bit my ding dong'] in relation to the occurrence").

People v. Zwart, 151 Ill.2d 37, 600 N.E.2d 1169 (1992) The Supreme Court rejected the State's argument that statements made five weeks after an incident of alleged sexual abuse could be admitted as "spontaneous declarations." Even if the trial court's factual findings were rejected and it was assumed that the statements occurred within five days of the abuse, the required spontaneity was absent where the victim had been interviewed at least three times before she first claimed to have been abused. See also, People v. Kinnett, 287 Ill.App.3d 709, 679 N.E.2d 481 (2d Dist. 1997) (statements made five and eight weeks after alleged incident were not spontaneous); People v. Victors, 353 Ill.App.3d 801, 819 N.E.2d 311 (2d Dist. 2004) (statements were not spontaneous where the declarant had been questioned for approximately five minutes by a backup officer before making the statements in question).

People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991) Statements which an abducted woman made in a telephone conversation to her father were not admissible as spontaneous declarations where the complainant admitted fabricating much of the conversation so that her father would become suspicious and question her. The complainant "obviously had enough time to reflect on the situation, conceive a fabrication, and execute that fabrication in making her phone call." In addition, the complainant's statements were made in response to a "series of leading questions" by the father. See also, People v. Patterson, 154 Ill.2d 414, 610 N.E.2d 16 (1992) (writings which defendant made while left alone in a police interview room for one hour were not spontaneous, as defendant clearly had time to reflect.)

People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 (1978) The Supreme Court discussed the distinctions between a "spontaneous declaration" and a "corroborative complaint" in a sex offense case, and held that the complainant"s statement to a police officer, after she had discussed the incident with two other people, did not come within the spontaneous declaration exception. However, the statement was admissible as a "corroborative complaint."

People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146 (1988) Where a shooting victim had been locked in a car trunk for 6½ hours, the spontaneity of his statement was not destroyed by officer's question, "[W]ho did this to you?" The time factor in regard to spontaneous declarations "is an elusive element and will vary with the

facts of the case." Here, the response was the declarant's "first opportunity to speak with anyone" after a period of confinement, in a seriously wounded condition, with a corpse. "We believe it is inconceivable . . . that [the declarant] would have spent the time under these conditions to attempt to fabricate a story or statement about the event." See also, People v. Nevitt, 135 Ill.2d 423, 553 N.E.2d 368 (1990) (five-hour-delay and question "what's wrong" did not destroy spontaneity of statement by three-year-old to his mother; circumstances show that the statement was reliable and the product of the event rather than deliberation); People ex rel. Hatch v. Elrod, 190 Ill.App.3d 1004, 547 N.E.2d 1264 (1st Dist. 1989) (statement by shooting victim after being locked in car trunk and made while being wheeled into emergency room).

People v. House, 141 Ill.2d 323, 566 N.E.2d 259 (1990) A 2½ hour delay did not render physical descriptions by victim of crime inadmissible as spontaneous declaration; given the nature of events, the declarant's physical condition, and the absence of any motive to fabricate, the statements were sufficiently spontaneous to be admitted where the victim had not only seen her sister and another woman killed, but had herself been set on fire and suffered such serious burns that "deep facial tissue was exposed and her clothing and skin had to be "cut" away to permit treatment. The Court found it "inconceivable" that the victim had spent the time between the incident and her statements reflecting on the experience or fabricating a story to tell police.

The Court rejected the contention that a declarant cannot make a spontaneous declaration to a person after having spoken previously to another. "No such per se rule exists. . . . The fact that the declarant may have previously spoken to another is merely a factor to consider in determining admissibility."

People v. Taylor, 48 Ill.2d 91, 268 N.E.2d 865 (1971) Testimony about complaint of rape victim was not admissible as either a spontaneous declaration or a corroborative complaint. The complaint was made in response to questions, and "had the questions not been asked the statement would not have been made."

People v. Sullivan, 366 Ill.App.3d 770, 853 N.E.2d 754 (1st Dist. 2006) Declarant of spontaneous declaration may be eyewitness or bystander, and need not be the victim of the crime. See also, People v. McNeal, 88 Ill.App.3d 20, 410 N.E.2d 480 (4th Dist. 1980) (testimony about out-of-court statement may be introduced as a spontaneous declaration though the identity of the declarant is unknown).

People v. Meras, 284 Ill.App.3d 157, 671 N.E.2d 746 (1st Dist. 1996) 1. To be an excited utterance, a statement must concern an occurrence or event sufficiently startling to cause a spontaneous and unreflecting statement. In addition, there must be an absence of time to fabricate and a relationship between the statement and the circumstances of the occurrence. Each statement is to be judged on the totality of the circumstances; among the factors to be considered are the passage of time, the nature of the startling event, the mental and physical condition of the declarant, the distance the decedent traveled before making the declaration, the presence or absence of self-interest, any intervening circumstances and the nature and circumstances of the statement itself.

Spontaneity is not destroyed merely because the statement was made in response to a question; the central question is whether the declarant had time for "reflection and invention."

2. The totality of the circumstances established the requirements for admission as an excited utterance. The declarant had been severely beaten, and the statement identifying defendant was made only minutes after the beating and immediately after the decedent regained consciousness and while he was still lying in a pool of blood. Reliability was also enhanced because the declarant was unconscious until just before making the statement and obviously "did not have the opportunity to reflect on the beating or to fabricate a story."

People v. Miller, 58 Ill.App.3d 156, 373 N.E.2d 1077 (4th Dist. 1978) The trial court did not err in admitting

testimony concerning the spontaneous declaration of a 13-year-old (the alleged victim of indecent liberties) even though the child was later found to be incompetent to testify.

People v. Jacobs, 51 Ill.App.3d 455, 366 N.E.2d 1064 (4th Dist. 1977) It was reversible error to allow the alleged rape victim's mother and boyfriend to testify about statements made by the victim concerning the incident. The statements did not come within the "spontaneous declaration" exception to the hearsay rule where the alleged victim said nothing at the scene - a mobile home where she was babysitting - waited until she returned home with her mother, and made a statement only after being questioned. Also, the alleged victim was not crying or visibly upset.

People v. Woith, 126 Ill.App.3d 817, 467 N.E.2d 614 (4th Dist. 1984) Statements were not admissible as spontaneous declarations where, after the incident, the victim sat on the couch trying to calm herself and finished doing some dishes before walking to her cousin's house, where she made the statements. In addition, the victim did not make the statements immediately upon arriving at the cousin's house.

People v. Brown, 170 Ill.App.3d 273, 524 N.E.2d 742 (2d Dist. 1988) The complainant testified that after she was sexually assaulted in her automobile, she drove the defendant back to town, dropped him off, followed defendant in an attempt to get his license number, and drove around for 10 to 15 minutes "debating what she should do." She then stopped at a gas station and called police. When an officer arrived about 10 minutes later, the complainant gave the detailed statement.

Because the complainant's own testimony showed that she "had the chance to reflect on what had occurred and that she did indeed reflect" before calling police, the statement was inadmissible hearsay.

People v. Washington, 127 Ill.App.3d 365, 468 N.E.2d 1285 (1st Dist. 1984) Shooting victim's statement identifying defendants as his assailants was admissible as a spontaneous declaration where it was made 10 minutes after he was severely wounded. The trial court properly found that the victim did not have time to fabricate though he made a phone call and went to an apartment during the 10-minute-period.

People v. Burgos, 184 Ill.App.3d 474, 540 N.E.2d 456 (1st Dist. 1989) Stabbing victim's statement, about 10 to 15 minutes after the incident and upon being found in a hallway and bleeding profusely, was a spontaneous declaration. The fact that the statement was made in response to general questions ("who did this" and "who stabbed you") did not make it inadmissible.

People v. Smith, 127 Ill.App.3d 622, 469 N.E.2d 634 (1st Dist. 1984) The statements of a stabbing victim, made to police about five minutes after the incident, were properly introduced as spontaneous declarations. However, statements subsequently made while the victim was being questioned by an officer were not spontaneous - in these statements the victim described the incident step by step, requiring him to "reflect upon the events that transpired and organize them in his mind."

People v. Alexander, 11 Ill.App.3d 782, 298 N.E.2d 355 (1st Dist. 1973) Statements made five minutes after the occurrence, while complainant was crying and visibly upset, were spontaneous declarations. See also, People v. Kilgore, 39 Ill.App.3d 1000, 350 N.E.2d 810 (5th Dist. 1976) (20 minutes after incident); People v. Collier, 66 Ill.App.3d 1007, 384 N.E.2d 497 (2d Dist. 1978) (within minutes of the incident); People v. Jones, 108 Ill.App.3d 880, 439 N.E.2d 1011 (4th Dist. 1982) (15 minutes); People v. Watson, 107 Ill.App.3d 691, 438 N.E.2d 453 (3d Dist. 1982) (in hospital emergency room).

People v. VanScyoc, 108 Ill.App.3d 339, 439 N.E.2d 95 (4th Dist. 1982) The defendant was convicted of the aggravated battery of a child he was babysitting, based primarily on out-of-court statements of two other children admitted as spontaneous declarations. The Appellate Court held that the statements were improperly

admitted because they were made three to four hours after the incident and during a period when the children were not upset or startled. Thus, the spontaneity necessary for a spontaneous declaration was lacking "both because of lapse of time and a lack of showing that the children were still startled from the event purportedly witnessed by them."

Cumulative Digest Case Summaries **§19-14(a)**

People v. Abram, 2016 IL App (1st) 132785 (No. 1-13-2785, 3/7/16)

At defendant's trial for possession of a controlled substance with intent to deliver, the trial court admitted an audio recording of hearsay statements made by a police officer during a chase of defendant's car. During the chase, defendant threw packages of cocaine out the window. The recording contained communications by a pursuing officer to headquarters and other officers, and described defendant's actions during the chase.

1. The court concluded that the hearsay statements on the tape were not admissible under the "present sense impression" hearsay exception. Although such an exception is recognized under the Federal Rules of Evidence, neither Illinois courts nor the Illinois Rules of Evidence recognize it.

2. However, the trial court did not abuse its discretion by finding that the hearsay statements qualified as excited utterances. A statement is admissible as an excited utterance where it relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by the event or condition. The exception rests on the theory that an event may be so startling that it temporarily stills the capacity for reflection and produces statements that are free of conscious fabrication. Thus, what makes a statement presumptively trustworthy as an excited utterance is the presence of a sudden, startling event which deprives the declarant of an opportunity to reflect. In determining whether a statement qualifies as an excited utterance, courts consider the totality of the circumstances including the time elapsed between the event and the utterance, the nature of the event, the declarant's mental and physical condition, and the presence of self-interest.

Here, the statements clearly related to police efforts to apprehend defendant and were made contemporaneously with the events described. Thus, the critical question was whether the pursuit of a suspect by police is a sufficiently startling event to permit the officer's statements to be admitted as excited utterances.

Although the officer's voice was relatively calm throughout the recording and the officer testified that he was part of an operation which was routinely sent to high crime areas in the city to interdict violent crimes, the court noted that he also testified that at the time of the pursuit he did not know whether a second person was in defendant's car or whether defendant was armed. The court concluded that under these circumstances, it could not be said that the trial court erred by concluding that the statements qualified as excited utterances.

Defendant's conviction was affirmed.

People v. Connolly, 406 Ill.App.3d 1022, 942 N.E.2d 71 (3d Dist. 2011)

1. Statements are admissible under the excited-utterance exception to the hearsay rule where there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate the statement, and a statement relating to the circumstances of the occurrence. The critical inquiry with respect to time is whether the statement was made while the declarant was still affected by the excitement of the event. That the statement was made in response to inquiry does not necessarily destroy spontaneity.

An act of domestic violence is sufficiently startling to render inoperative the normal reflective thought processes of a victim. Statements made within a few minutes of an act of domestic violence also do not allow time for reflection while the emotional upset resulting from the event continues. Therefore the trial

court did not abuse its discretion in concluding that the totality of circumstances supported the conclusion that defendant's wife's statements were excited utterances, even though made in response to police questioning.

2. An out-of-court statement made to a law enforcement official is not testimonial when the circumstances objectively indicate that the primary purpose of any questioning was to address an ongoing emergency. Factors to be considering in deciding whether the interrogation was to meet an ongoing emergency are: (1) whether the purpose was to determine a past fact or ascertain an ongoing event; (2) whether the situation could be described as an emergency; (3) whether the nature of the questions focused on the present or on the past; and (4) the level of formality involved.

The statements by defendant's wife were not testimonial because the statements were made while the police addressed an ongoing emergency. Defendant's neighbor called the police when she observed defendant and his wife screaming and yelling at each other as defendant held their son. The police arrived on the scene five to seven minutes after the dispatch and spoke with defendant's wife who appeared nervous, upset, and agitated. Defendant's wife reported that defendant had battered her, had set their son in the street, and then had left with the son. The police questioned other witnesses to assess the ongoing situation, and then proceeded to locate defendant and the child, who was returned to the wife.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. Dobbey, 2011 IL App (1st) 091518 (No. 1-09-1518, 8/19/11)

1. A hearsay statement is admissible under the excited utterance or spontaneous declaration exception where: (1) there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) there is an absence of time for the declarant to fabricate the statement; and (3) the statement relates to the circumstances of the occurrence.

A statement made by a shooting victim qualified for admission as an excited utterance or spontaneous declaration. The statement was made after the declarant was mortally wounded in a shooting while a passenger in a car. The driver was also injured. A backseat passenger drove the car to a gas station to call for help. This scenario was sufficiently startling to produce a spontaneous and unreflecting statement. Only a matter of minutes elapsed between the shooting and the statement, and the statement was made as the declarant was lying on the ground experiencing the physical effects of the shooting to his chest, before he had time to reflect on the event. As the statement identified the defendant as the shooter, the statement related to the circumstances of the shooting.

2. Testimonial statements may be admitted into evidence against an accused only when: (1) the witness is unavailable to testify; and (2) the defendant had a prior opportunity to cross-examine the witness. A statement is testimonial when its primary purpose is to establish or prove past events potentially relevant to a later criminal prosecution. Statements are not testimonial when the circumstances of the encounter, as well as the statement and the actions of the witness and the police, objectively indicate that the primary purpose of the interrogation is to assist the police to meet an ongoing emergency. **Michigan v. Bryant**, __ U.S. __, 131 S.Ct. 1143, ___ L.Ed.2d ___ (2011).

Bryant did not address whether this same test applies where statements are made to nonofficial individuals. Nonetheless, the court applied this same analysis, and concluded that the statement of a shooting victim was not testimonial, even though it was made to a witness who was present during the shooting but did not see the shooter. The statement was made when the declarant and the witness were in an exposed public gas station, prior to the arrival of emergency personnel, as the declarant was being dragged from their vehicle after suffering a gunshot wound to the chest. The primary purpose of the statement was to respond to an ongoing emergency. Although they had driven a few blocks from the scene, it was possible that the shooter had followed them and still posed a threat. The declarant was mortally wounded and in serious pain and could not have had as his primary purpose to establish or prove past events relevant to a future prosecution. The informality of the encounter and the absence of solemnity shows that the declarant would not have been alerted to the possible future prosecutorial use of his statements.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

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§19-14(b)
Corroborative Complaints

People v. Damen, 28 Ill.2d 464, 193 N.E.2d 25 (1963); People v. Davis, 10 Ill.2d 430, 140 N.E.2d 675 (1957) A witness may properly testify about a statement made by an alleged rape victim if such statement constitutes a corroborative complaint. The following rules apply to corroborative complaints:

1. Such a statement or complaint is admissible only in rape cases. See also, People v. Romano,306 Ill. 502, 138 N.E. 169 (1923) (not admissible in indecent liberties cases); People v. Gillman, 91 Ill.App.3d 53, 414 N.E.2d 240 (2d Dist. 1980) (not admissible in contributing to sexual delinquency of minor cases); People v. Evans, 173 Ill.App.3d 186, 527 N.E.2d 448 (1st Dist. 1988) (admissible in an aggravated criminal sexual assault case); People v. Woith, 126 Ill.App.3d 817, 467 N.E.2d 614 (4th Dist. 1984) (did not apply to indecent liberties case).

2. The complaint must have been made without inconsistent or unexplained delay. See also, People v. Secret, 72 Ill.2d 371, 381 N.E.2d 285 (1978) (admissible when made the morning after the incident and as soon as practicable); People v. Ristau, 363 Ill. 538, 2 N.E.2d 933 (1936) (admissible when made the morning after the incident); People v. Williams, 146 Ill.App.3d 767, 497 N.E.2d 377 (1st Dist. 1986) (admissible when made the morning after the incident); People v. Evans, 173 Ill.App.3d 186, 527 N.E.2d 448 (1st Dist. 1988) (admissible when made two hours after the incident); People v. Fuelner, 104 Ill.App.3d 340, 432 N.E.2d 986 (1st Dist. 1982) (not admissible when made on the evening of the day after the incident); People v. Russell, 177 Ill.App.3d 40, 531 N.E.2d 1099 (2d Dist. 1988) (statement made at the police station several hours after the incident, and after victim previously denied to a police officer that a rape occurred, was not admissible).

3. The complaint must not be made in response to questioning other than general questions. See also, People v. Taylor, 48 Ill.2d 91, 268 N.E.2d 865 (1971) (inadmissible where made in response to questioning); People v. Harris, 134 Ill.App.3d 705, 480 N.E.2d 1189 (1st Dist. 1985) (inadmissible where made in response to questioning); People v. Evans, 173 Ill.App.3d 186, 527 N.E.2d 448 (1st Dist. 1988) (general questions such as "what's wrong" or "did he do something to you" did not make the complaint inadmissible).

4. Because the complaint is admissible only to corroborate the complainant's testimony, the exception is inapplicable unless the declarant testifies at trial. People v. Furlong, 392 Ill. 247, 64 N.E.2d 460 (1945); People v. Merideth, 152 Ill.App.3d 304, 503 N.E.2d 1132 (2d Dist. 1987).

5. Testimony about a corroborative complaint must be limited to the fact that a complaint was made, and may not include details of the occurrence or the name or description of the perpetrator. See also, People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 (1978); People v. Russell, 177 Ill.App.3d 40, 531 N.E.2d 1099 (2d Dist. 1988); People v. Maberry, 193 Ill.App.3d 250, 549 N.E.2d 974 (4th Dist. 1990); People v. Brown, 170 Ill.App.3d 273, 524 N.E.2d 742 (2d Dist. 1988).

People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 (1978) The Supreme Court discussed the distinctions between a "spontaneous declaration" and a "corroborative complaint" in a rape case, and held that the complainant"s statement to a police officer, after she had discussed the incident with two other people, did not come within the spontaneous declaration exception but was admissible as a "corroborative complaint."

It was error for the testimony about the corroborative complaint to include any of the details regarding the crime, including the identity of the assailant. However, such improper hearsay was not reversible error in this case.

People v. Secret, 72 Ill.2d 371, 381 N.E.2d 285 (1978) Where rape complainant testified that she arrived at defendant's apartment about 2:00 a.m., was raped three times, and was afraid to leave the apartment until she was sure that defendant had fallen asleep, her report of the rape to police at 7:00 a.m. was properly admitted as a "corroborative complaint." The Court discussed the distinctions between a "spontaneous declaration" and a "corroborative complaint," and noted there is no definite time limit within which a corroborative complaint must be made. In this case, however, the complaint was made as soon as practicable. See also, People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991) (statement could not qualify as a prompt complaint where it was made before the alleged rape and in response to a series of questions).

People v. Taylor, 48 Ill.2d 91, 268 N.E.2d 865 (1971) Testimony about complaint of rape victim was not admissible as either a spontaneous declaration or a corroborative complaint. The complaint was made in response to questions, and "had the questions not been asked the statement would not have been made."

People v. Fuelner, 104 Ill.App.3d 340, 432 N.E.2d 986 (1st Dist. 1982) The complainant's statement that she had been raped was not admissible as either a spontaneous declaration or corroborative complaint, since it was not made until the evening of the day after the incident.

People v. Jacobs, 51 Ill.App.3d 455, 366 N.E.2d 1064 (4th Dist. 1977) It was reversible error to allow the alleged rape victim's mother and boyfriend to testify about statements made by the victim concerning the incident. The testimony concerning the statement was not admissible under the "corroborative statement" exception where the testimony went beyond showing the mere fact of a complaint, and contained details of the occurrence.

People v. Andino, 99 Ill.App.3d 952, 425 N.E.2d 1333 (2d Dist. 1981) The defendants, inmates of a county jail, were convicted of deviate sexual assault against another inmate. The complainant testified that 14 hours after the incident, he made a complaint to jail officials. A jail officer was allowed to testify that the complainant made the above complaint and that it was in accord with his trial testimony.

The Appellate Court held that the jail official's testimony was improperly admitted since it was hearsay and did not come within any of the hearsay exceptions. The complainant's statement was not a spontaneous declaration since it was not made until 14 hours after the incident. Also, the statement was not a corroborative complaint since such complaints are admissible only in rape cases and may only include the fact of the complaint and not details of the incident.

People v. Russell, 177 Ill.App.3d 40, 531 N.E.2d 1099 (2d Dist. 1988) 1. Statements the complainant made five to six and 30 hours after the incident did not qualify as corroborative complaints. Under the corroborative complaint rule, "only the fact of a complaint is admissible and not, as here, the complete details of the alleged offense, or the name of the accused."

2. Even had the testimony been properly limited, it was inadmissible because the complainant's statements "were not made as soon as was practicable under the circumstances of this case." The complainant did make a prompt and spontaneous complaint to a woman who lived in an apartment that was near the scene, but then denied to the responding officer that there had been a rape. She also declined to make a report. The complainant returned home for five to six hours, and then drove to a friend's place of employment, where "in response to an inquiry [she] said she had been raped." The complainant's "inconsistent delay in making a complaint to the authorities, or anyone else, during this period will preclude admission" of her statement under the corroborative complaint exception."

Similarly, the complainant's later statements to a different police officer did not qualify as corroborative complaints.

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§19-14(c)
Statements Under 725 ILCS 5/115-10

Under 725 ILCS 5/115-10, testimony about certain statements by the alleged victims of child sexual abuse is admissible as an exception to the hearsay rule. Section 5/115-10 applies where the declarant is under the age of 13 or is an "institutionalized severely or profoundly mutually retarded person," and requires the trial court to find that the statements in question are sufficiently reliable. In addition, the child must either testify or there must be corroborative evidence of the act that is the subject of the statement.

People v. Williams, 193 Ill.2d 306, 739 N.E.2d 455 (2000) The trial judge did not err by admitting, under §115-10, statements made by a seven-year-old.

1. The trial judge did not err by finding that the statements, which concerned the murders of the decedent's mother and sister, pertained to acts which were an element of an offense committed against the child. The declarant was the victim of an aggravated kidnapping, which requires evidence of secret confinement of a child under the age of 13 without the consent of his parent or guardian. The court concluded that the statements indicated how the child came to be confined by the defendant and established that the confinement was without the mother's consent.

2. In addition, the child's denial that he took medication pertained to an act which formed the basis of an offense against the child, because after claiming that the mother had left medication defendant gave the child a substance which caused him to gag and vomit.

People v. Lofton & Stewart, 194 Ill.2d 40, 740 N.E.2d 782 (2000) 1. A defendant is entitled to attend a hearing on a 725 ILCS 5/115-10 motion to admit hearsay statements by the child victim of specified sexual offenses.

2. A criminal defendant may waive the right to attend a critical hearing, but must do so knowingly and voluntarily. Here, there was no indication that defendant waived his right to attend the §115-10 hearing.

People v. Bowen, 183 Ill.2d 103, 699 N.E.2d 577 (1998) 1. It is not error to admit a videotape of a statement that is admissible under §115-10. Section 115-10 authorizes admission of hearsay testimony concerning a child's out-of-court statements about acts of sexual abuse, without specifically referring to the form that such testimony can take.

2. It is not error to admit a videotaped statement even where the complainant is available and has testified at trial. §115-10 provides that reliable statements may be admitted where the child either: (1) testifies at trial, or (2) is unavailable but there is corroborative evidence of the act in question.

3. The court rejected defendant's claim that the videotape was unreliable because it contained some suggestive questioning. The court failed to discern any improper questioning, and the statement's reliability was buttressed by the fact that it was only the second comprehensive interview by authorities, the child had made prior consistent statements to her mother and to a caseworker, and there was no evidence of any motive to fabricate on the part of the minor, her family, police officers or DCFS investigators.

People v. Holloway, 177 Ill.2d 1, 682 N.E.2d 59 (1997) Section 115-10 was intended to apply only where the hearsay statement in question was made before the complainant reached the age of 13, and not where the alleged offense occurred before age 13 but the statement was made after the complainant reached that age. The Court found that in enacting the statute, the legislature had two concerns: (1) "the ability of the victim to understand and articulate what happened during the incident," and (2) "the reluctance many victims have relating the details of the incident at trial." Thus, the concern was not "the age of the victim when the assault occurs," but the inability of a youthful victim to adequately testify.

People v. Zwart, 151 Ill.2d 37, 600 N.E.2d 1169 (1992) The statements of a three-year-old were

insufficiently reliable to be admitted under §115-10 where the complainant had been interviewed by at least three people - a police officer, a DCFS caseworker and a hospital counselor - before making the statements. As the proponent of the hearsay, the State bore the burden of establishing that the statements were not the result of "adult prompting or manipulation." Because the State failed to introduce any evidence concerning the three intervening interviews, it failed to establish that the statements were accurate reflections of actual occurrences rather than the result of suggestive interviewing techniques. Such a possibility was especially troubling in this case because the complainant's age made her particularly susceptible to outside suggestion and because she was found incompetent to testify and could not be questioned about the interviews.

The timing of the statements also made their reliability suspect. The first statement was not made until some five weeks after the alleged abuse, and the complainant initially denied having been abused when questioned by a counselor at the hospital. Although delay in reporting sexual abuse or initial denials do not automatically render a statement unreliable, those factors are significant in this case because the first claims of abuse were made only after "substantial adult intervention." See also, People v. Wittenmyer, 151 Ill.2d 175, 601 N.E.2d 735 (1992) (the trial court's finding that statements were reliable under Ch. 38, §115-10 was supported by the evidence where the detective did not ask leading questions, the answers were in the complainant's own words, and there was no evidence of coercion or intimidation; there is no requirement that a statement can be admitted only if it was recorded or attended by a defense representative); People v. McMillan, 231 Ill.App.3d 1022, 597 N.E.2d 923 (1992) (affirming trial court's ruling that the minor's out-of-court statements to a DCFS worker were insufficiently reliable to be admitted.)

People v. Mitchell, 155 Ill.2d 344, 614 N.E.2d 1213 (1993) 1. In a jury trial, it is error to admit statements under §115-10 without first holding a reliability hearing outside the presence of the jury.

2. The trial court committed plain error by failing to instruct the jury according to §115-10(c), which requires that the jury be instructed concerning the factors to consider in weighing the statements. See also, People v. E.Z., 262 Ill.App.3d 29, 633 N.E.2d 1022 (2d Dist. 1994) (trial judge erred by admitting a statement under §115-10 without first holding a hearing to determine whether the time, content and circumstances guaranteed the statement's reliability, and by failing to instruct the jury about the factors to consider in deciding the weight and credibility of the child's statements).

People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005) 1. The court rejected defendant's argument that testimony admitted under 725 ILCS 5/115-10 violates Crawford v. Washington, 541 U.S. 36 (2004). The court noted that the Confrontation Clause does not bar admission of a statement so long as the declarant is present in court to defend or explain it. Thus, Crawford does not apply to testimony admitted under §115-10 because the statute requires the child to be available to testify and therefore subject to cross-examination. (In finding that §115-10 requires that the child be available to testify at the proceeding, the court referred to §115-10(b)(2)(A), which states that the evidence is admissible if the child testifies at the proceeding. The court did not discuss 115-10(b)(2)(B), which holds that even if the child does not testify, the evidence is admissible if the child is unavailable and there is corroborative evidence.)

2. The circumstances of the statements provided sufficient indicia of reliability to be admitted under §115-10. The court rejected arguments that the 7-year-old complainant used language and exhibited a level of knowledge of sexual activity that would be unusual for a child of her age, noting that she had been exposed to "an appalling environment of prostitution and drug use."

The court also acknowledged testimony that defendant's natural father told her to say "bad things" about the defendant, and that the complainant spent a significant amount of time in the natural father's custody. The court found that such evidence did not establish lack of reliability because the complainant readily admitted that the natural father had prompted her to speak ill of the defendant, but expressly denied that he had told her to falsely claim that defendant had sexually abused her. The court also noted that the trial judge had the advantage of observing the witnesses before concluding that the accusations against defendant were not a result of the natural father's directions.

Although there was evidence suggesting that the complainant tended to confuse the defendant and her natural father, that evidence arose only at trial and therefore could not have been considered by the trial judge at the pretrial reliability hearing. In addition, at trial defendant failed to renew his objection after that evidence was admitted, the minor repeatedly referred to defendant by his first name rather than as her father (reducing the likelihood of a mistaken identification), and the minor did not vacillate concerning the identity of her abuser.

3. The court noted, however, that some of the statements occurred during an interview by a DCFS investigator and a detective, who did not videotape the interview despite the availability of videotaping equipment. The court stated, "While we believe the lack of a contemporaneous video recording does not render the interview unreliable . . ., we once again strongly admonish law enforcement personnel and social workers to record those interviews whenever possible."

People v. West, 158 Ill.2d 155, 632 N.E.2d 1004 (1994)

725 ILCS 5/115-10 does not require the trial judge to state specific reasons for finding that a statement is sufficiently reliable to be admitted.

People v. Back, 239 Ill.App.3d 44, 605 N.E.2d 689 (4th Dist. 1992) 1. There is no requirement that the complainant testify at the hearing to determine whether out-of-court statements about sexual abuse are sufficiently reliable to be admitted. Although §115-10 requires that the child must testify or that the statements must be corroborated, that provision refers to testimony at trial and not at the pretrial hearing.

2. There is no requirement that the first person to whom the child complained must testify at the reliability hearing so that it can be determined whether later statements were tainted by the response to the first statement. Under §115-10, reliability depends on the content, circumstances and timing of the statements which the State seeks to admit. There is no requirement of testimony by persons who heard statements that the State does not seek to admit.

3. The trial court's ruling (that statements were reliable) was not contrary to the manifest weight of the evidence. The complainant's failure to make a complaint until after the defendant moved out of her house merely reflects the fact that a child is likely to fear making reports of sexual assault while she is living with the perpetrator. In addition, the interviewers did not use leading questions and the complaints were made in language that would be expected from a 10-year-old child.

People v. Fowler, 240 Ill.App.3d 442, 608 N.E.2d 390 (1st Dist. 1992) Defendant was convicted of the aggravated criminal sexual assault of a seven-year-old girl. The Appellate Court ordered a new trial because the testimony of a state trooper and a social worker exceeded the scope of Ch. 38, §115-10(b)(1).

1. The social worker testified that complainant did not tell her mother about the incidents of abuse for several months because she was afraid she would get in trouble, and that such fear is typical of child sexual abuse victims, particularly girls of the complainant's age. The Court held that such testimony was beyond the scope of §115-10, which creates a hearsay exception only for complaints and details concerning acts of sexual abuse.

2. It was improper to permit the trooper to testify not only about what complainant told him, but also about her physical gestures during the interview. Rather than providing details included in the complainant's statement, such testimony was based on the trooper's interpretation of her physical actions.

Because the improper testimony constituted plain error which denied defendant a fair trial, the conviction was reversed and remanded for a new trial.

People v. Burnett, 239 Ill.App.3d 582, 607 N.E.2d 317 (3d Dist. 1993) 1. Although there was no pre-trial reliability hearing before statements were admitted under §115-10, at a bench trial the judge is presumed to have considered only admissible evidence. Therefore, the judge in this case may be presumed to have considered the time, content and circumstances of the complainant's statements even though he did not

articulate specific findings. In addition, the judge specifically stated that the State's evidence, especially the complainant's testimony, was "clear and convincing." Under these circumstances, the failure to hold a separate reliability hearing was not reversible error. See also, People v. Carter, 244 Ill.App.3d 792, 614 N.E.2d 452 (1st Dist. 1993) (failure to hold reliability hearing is reversible error in a jury trial).

2. Although the State failed to give specific notice of its intention to introduce the complainant's statements, it "substantially complied" with the notice requirements of §115-10 where in discovery it disclosed the witnesses and reports containing the substance of their testimony. Compare, People v. Carter, 244 Ill.App.3d 792, 614 N.E.2d 452 (1st Dist. 1993) (furnishing normal discovery does not comply with special notice rules of §115-10).

People v. Embry, 249 Ill.App.3d 750, 619 N.E.2d 246 (4th Dist. 1993) 1. Section 115-10 authorizes admission of hearsay evidence under two circumstances - where the declarant testifies at trial, or where she fails to testify but there is corroborative evidence of the act which is the subject of her statement. Where the State in good faith expects the declarant to testify at trial, it is not required to present its corroborating evidence at the initial reliability hearing. If the declarant then fails to testify, the corroborating evidence may be presented at a supplementary reliability hearing.

Thus, the trial judge did not err by ruling before trial that there was insufficient evidence to justify admission of the evidence if the declarant failed to testify, but changing that ruling after corroborating evidence had been presented at trial.

2. The trial judge did not err by finding that the reliability of the six-year-old declarant's statements was sufficiently corroborated by defendant's pretrial statements. At the time of his arrest, defendant told a police officer that the six- and four-year-old girls had been the aggressors in the incident, had tried to watch him undress, and had pulled down his pants and grabbed his penis while he lay on the floor beside them. In addition, he claimed that the four-year-old had asked to lick defendant's penis and tried to put his penis in her mouth, and that the six-year-old had encouraged her sister in these actions.

The Court rejected the argument that corroborative evidence under §115-10 is limited to physical evidence or eyewitness testimony. The Court also concluded that defendant's statements "characterizing the victims as aggressors" clearly corroborated the six-year-old's hearsay statements.

3. However, the Court also cautioned that the State invited a mistrial by introducing the hearsay statements before calling the declarant to see whether she would testify. If the declarant refuses to testify after the hearsay statements have been admitted, and the State cannot present adequate corroborative evidence, the statements will have been improperly placed before the jury.

4. The Court also held that §115-10(a) does not authorize admission of hearsay concerning the sexual abuse of a victim other than the declarant. Thus, the trial court erred by concluding that §115-10 authorized admission of the six-year-old declarant's hearsay statements concerning sexual acts committed against her four-year-old sister. See also, People v. Peck, 285 Ill.App.3d 14, 674 N.E.2d 440 (4th Dist. 1996) (statements concerning acts against second complainant); People v. Kinnett, 287 Ill.App.3d 709, 679 N.E.2d 481 (2d Dist. 1997) (acts on different dates).

However, the statements concerning the four-year-old were properly admitted on another basis. Because the six-year-old declarant was also the victim of a separate sexual offense by the defendant, her statements about acts committed against her sister were admissible as "components of the contemporaneous and ongoing series of events" constituting an offense perpetrated against herself.

People v. Kelly, 185 Ill.App.3d 43, 540 N.E.2d 1125 (3d Dist. 1989) Testimony regarding a child-victim's complaint is admissible under §115-10 even though the complaint was not made promptly after the incident. Evidence of delay affects the weight of the testimony rather than its admissibility.

People v. Rushing, 192 Ill.App.3d 444, 548 N.E.2d 788 (4th Dist. 1989) Testimony concerning the details of the sexual acts contained in the child's complaint is permissible even though the child's trial testimony did

not include such detail. Section 115-10 does not require every detail in the prior complaint to be corroborated by the child's testimony at trial.

Testimony regarding the child's complaint properly included the statement that after committing the sexual acts, defendant told the child not to tell anyone or he would kill her parents. "Due to the contemporaneous nature of the threat with the acts and the challenges made to [the child's] credibility, the threat has become integrally intertwined with the offense."

People v. Johnson, 296 Ill.App.3d 53, 693 N.E.2d 1224 (1st Dist. 1998) The trial court erred by admitting the complainant's hearsay statements about defendant's alleged sexual conduct in Ohio, which was not a part of the charge. Section 115-10 specifically authorizes only hearsay testimony concerning a complaint of an "act or matter or detail pertaining to any act which is an element of the offense" being prosecuted.

People v. Simpkins, 297 Ill.App.3d 668, 697 N.E.2d 302 (4th Dist. 1998) The trial court abused its discretion by finding that statements were reliable, because the circumstances surrounding the statements were "particularly troubling." Approximately one month before the complainant implicated defendant, she was interviewed by the same investigator regarding the alleged sexual abuse of a sibling by a grandfather. The State failed to introduce any evidence regarding the substance of statements made by the complaint in the earlier interview - the investigator testified only that he could not recall what questions he had asked.

The court held that under People v. Zwart, 151 Ill.2d 37, 600 N.E.2d 1169 (1992), where the State seeks to introduce statements under §115-10 it must: (1) establish the content of any previous interview of the complainant, and (2) show that the prior interview did not taint the statement which the State seeks to introduce.

There was not a sufficiently strong showing of reliability to overcome the State's failure to show the content of the prior interview. First, the statements which the State sought to introduce were not made spontaneously, but occurred in response to questioning about reports of sexual and physical abuse. Second, the complainant made inconsistent statements to various witnesses, and recanted her allegations a few months before the reliability hearing. Third, the statements were first made several months after the alleged incidents, and a motive to fabricate was suggested by the complainant's statement that she had lied about the alleged abuse because she was mad at the defendant. Under these circumstances, the statements were not shown to be reliable.

Cumulative Digest Case Summaries **§19-14(c)**

In re Brandon P., 2014 IL 116653 (No. 116653, 5/22/2014)

1. The court agreed with the State's concession that out-of-court statements made by the three-year-old complainant to a police officer were "testimonial" for purposes of the confrontation clause. Statements to police are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is establish past events potentially relevant to criminal prosecution.

Here, the primary purpose of the interview was to establish events for a potential criminal prosecution. Thus, statements made during the interview were testimonial.

2. The court agreed with the State's concession that the three-year-old was unavailable to testify for purposes of 725 ILCS 5/115-10. Under §115-10, "unavailable" witnesses include children who are unable to testify because of fear. **People v. Stechly**, 225 Ill. 2d 246 (2007).

The record here shows that the complainant was unavailable because of her fear and youth. She could barely answer the trial court's preliminary questions, and froze when the State began its direct examination. The trial court, defense counsel, and the prosecutor all agreed that the complainant was unavailable. Under these circumstances, the trial court did not abuse its discretion by finding that the witness was unavailable for purposes of §115-10.

(Respondent was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Kitch, 239 Ill.2d 452, 942 N.E.2d 1235 (2011)

1. The defense has an adequate opportunity to cross-examine a witness to satisfy the Sixth Amendment where the witness testifies on direct examination in sufficient detail to establish the element of each charged offense.

Defendant was charged with multiple counts of predatory criminal sexual assault of his stepdaughter and stepson and aggravated criminal sexual abuse of his stepson. It was undisputed that defendant was over the age of 17 and that the victims were under the age of 13 when the offenses occurred. Although it may have been unclear from the testimony of the victims when every act of sexual penetration or sexual conduct occurred, the State was not required to prove the dates of commission, only to provide some way to differentiate between the various counts. The direct-examination testimony of the stepdaughter and stepson established separate acts of sexual penetration or conduct as charged by the State during the relevant time period. Therefore their testimony provided enough detail to allow for effective cross-examination within the meaning of the Sixth Amendment.

2. A statute is unconstitutional on its face only if no set of circumstances exist under which it would be valid.

Section 115-10 of the Code of Criminal Procedure, 725 ILCS 5/115-10 allows admission of a child victim's hearsay statements under two scenarios: (1) the court finds the statement reliable and the child testifies at trial, or (2) the child does not testify, the court finds the statement reliable, and the allegation of sexual abuse is independently corroborated.

The confrontation clause places no restriction on the admission of hearsay testimony under scenario one above since the declarant testifies at trial and is present to defend or explain that testimony. Where the child does not testify under scenario two above, testimonial statements are admissible under **Crawford v. Washington**, 541 U.S. 36 (2004), only if the defendant had a prior opportunity to cross-examine the declarant.

That under both scenarios the statement must also meet the additional reliability requirement set forth in **Ohio v. Roberts**, 448 U.S. 56 (1980), that was repudiated in **Crawford**, is not problematic. This requirement only provides the defendant with additional protection over and above that provided by the confrontation clause. It does not affect the constitutionality of § 115-10 because the hearsay testimony must still satisfy **Crawford**'s constitutional requirements in addition to the statutory requirement of reliability. The evidentiary question of whether hearsay testimony satisfies a statutory exception such as § 115-10 is separate from, and antecedent to, the issue of whether admitting the testimony satisfies the confrontation clause. Therefore, the fact that § 115-10 does not incorporate the limitations on admissibility imposed by **Crawford** does not affect its constitutionality.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Sargent, 239 Ill.2d 166, 940 N.E.2d 1045 (2010)

725 ILCS 5/115-10 authorizes the trial court to admit hearsay statements made by minor declarants who are the victims of specified sex offenses, if the court finds that the statements provide sufficient guarantees of trustworthiness. If such hearsay is admitted, the court "shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, the court shall consider the age and maturity of the child, . . . the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." (725 ILCS 5/115-10(c))

The court acknowledged that the trial court erred by failing to instruct the jury in accordance with §115-10, but held that defense counsel waived the issue by failing to request an instruction and present the issue in the post-trial motion. Furthermore, the plain error rule did not apply.

First, the evidence was not closely balanced. Second, the jury was given an instruction based on the general IPI instruction concerning the credibility of witnesses (Crim. No. 1.02), and therefore was aware of

many of the principles specified by §115-10.

The court stressed that it was not suggesting that courts have discretion to tender instructions based on general IPI instructions instead of the IPI instruction implementing §115-10 (IPI Crim. No. 11.66), but only that under the circumstances of this case the failure to comply with §115-10 did not constitute plain error.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Boling, 2014 IL App (4th) 120634 (No. 4-12-0634, 3/12/14)

1. 725 ILCS 5/115-10 authorizes the admission of certain hearsay statements of a child in prosecutions for specified sex offenses, so long as adequate indicia of reliability are present and the child either testifies or is unavailable and the statements are corroborated. The court concluded that under the plain language of the statute, §115-10 is not limited to hearsay statements that directly describe the elements of the charged offenses. Instead, §115-10 authorizes admission of a "matter or detail pertaining to any act which is an element of an offense," including statements relating to the relationship between the child and defendant if such statements are relevant to explain the context in which the alleged acts occurred. Similarly, statements which relate steps defendant allegedly took to conceal his relationship with the child from others may be admitted under §115-10.

The court also concluded that hearsay statements by the complainant concerning defendant's apparent sexual abuse of another child may be admissible under §115-10. When determining whether such statements are admissible, courts should consider: (1) the relationship of the declarant to the other child, (2) the proximity of the acts in time and place to the act allegedly performed upon the declarant, (3) the similarity of the acts performed on each child, and (4) whether there was a common perpetrator. Where the complainant believed that the second child, a cousin who was about the same age as the complainant, was being abused by defendant in the same room where the complainant had been abused, her statements and conclusions were admissible to corroborate her claims and to provide the jury with an understanding of the psychological aspects of the defendant's abusive relationship with the declarant. "In this sense, [the complainant's] statements described a matter or detail pertaining to the charged offenses."

2. 725 ILCS 5/115-13 authorizes the admission of statements of the complainant in a sex offense prosecution when such statements are made to medical personnel for purposes of medical diagnosis or treatment, insofar as those statements are reasonably pertinent to diagnosis or treatment. Section 115-13 permits details of sex acts to be admitted, including how, when, and where the act occurred and the identity of the perpetrator.

Thus, statements which the complainant made to a nurse/sexual assault examiner and which identified defendant as the attacker were admissible under §115-13. Furthermore, §115-13 authorized admission of statements concerning the defendant's threats to harm the complainant's pets if she told anyone about the abuse, because those statements were relevant to the declarant's state of mind and emotional condition.

However, §115-13 did not authorize admission of the declarant's statements that: (1) defendant apparently abused another person, and (2) the declarant told her mother about the abuse because she "heard that maybe it had happened to some other kids." These statements were not reasonably pertinent to the declarant's diagnosis or treatment.

3. A police officer may testify concerning steps taken in investigating a crime where such testimony is required to fully explain the State's case. However, out-of-court statements admitted to explain the course of an investigation are admissible only to the extent necessary to provide that explanation, and should not be admitted if they reveal unnecessary and prejudicial information. Furthermore, testimony about the steps of an investigation may not include the substance of conversations with non-testifying witnesses. In addition, evidence which would suggest that the defendant engaged in prior criminal activity is admissible only if it is relevant and specifically connects the defendant with the crime for which he is being tried.

Here, the court applied the principles of the "police investigation" hearsay exception although the

witnesses in question - the mother and aunt of the complainant - were civilians rather than law enforcement agents. In applying the principles underlying the exception, the court noted that the two witnesses "conducted something akin to an investigation into defendant's suspected abuse" of the complainant.

However, the court concluded that the evidence went well beyond what was necessary to explain the decision to investigate information about the possible abuse, because both witnesses testified either directly or indirectly about the substance of conversations and suggested that defendant had been previously accused of sexual improprieties with children. The court rejected the State's argument that it elicited the testimony because it had a legitimate need to explain its case, noting that the prosecutor could have limited the evidence to showing that based upon information obtained from a third party, the women decided to have a discussion with the complainant about "good" and "bad" touches. Had the evidence been presented in such a manner, the exact information and its source would not have been revealed.

4. The court also noted that in prior cases, it suggested that a trial judge faced with the possibility of admitting evidence explaining the steps of a police investigation should conduct an *in camera* hearing to determine what statements will be permitted. **People v. Cameron,** 189 Ill.App.3d 998, 546 N.E.2d 259 (4th Dist. 1989). Such a hearing would have been appropriate here although the evidence concerned lay rather than police testimony. In addition, although defendant failed to raise a formal objection to the testimony, the trial court had ample warning through the §115-10 hearing that hearsay concerning the defendant's prior crimes would be elicited at trial. Under these circumstances, the trial court should have *sua sponte* exercised its discretion to hold an *in camera* hearing.

The court concluded:

> [Twenty-five] years after **Cameron**, the State continues to commit error by introducing unduly prejudicial out-of-court statements for the purported purpose of explaining the steps of an investigation. . . . The State's repeated abuse of this limited exception to the hearsay rule — in the face of repeated condemnation from the Appellate Court — shows a disrespect for the fundamental purpose of the hearsay rule. . . . [T]rial courts and courts of review should begin more closely scrutinizing (1) the State's purported need to offer hearsay statements to explain the steps of an investigation, as well as (2) the potential prejudice resulting from such evidence. In other words, the time is long overdue for trial courts to *routinely* be conducting "**Cameron** hearings."

5. Because the State's case in a prosecution for sex offenses against a child was based on the credibility of minor witnesses, the court found that the evidence was closely balanced. Thus, the plain error rule applied. Because defendant was denied a fair trial by the cumulative effect of several errors including the erroneous admission of hearsay evidence, allowing a prosecution witness to testify concerning the credibility of the complainant, and commenting in closing argument on the credibility of witnesses, the convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Lara, 2011 IL App (4th) 080983-B (No. 4-08-0983, revised op. 9/29/11)

1. The Appellate Court reiterated that 725 ILCS 5/115-10, which admits certain hearsay statements concerning acts against a child under the age of 13 or a mentally retarded person if the trial judge finds that the statements are sufficiently reliable, is not facially unconstitutional under **Crawford v. Washington**. The court also noted that the Illinois Supreme Court rejected arguments identical to those made by the defendant in **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2010).

2. The trial court did not abuse its discretion by finding that a five-year-child's videotaped statement to a police officer was sufficiently reliable to be admitted under §115-10. In determining whether hearsay is sufficiently reliable to be admitted, the trial court must examine the totality of the circumstances including such factors as the child's: (1) spontaneity and consistent repetition of the incident, (2) mental state, (3) use

of terminology unexpected of a child of similar age, and (4) lack of motive to fabricate. Because the officer asked open-ended questions and did not attempt to lead the child in her answers, the statement described conduct with which a typical four or five-year-old child would not be familiar, the child gave detailed testimony about defendant's actions, the record showed no motive for fabrication, and the officer who was interviewing the declarant did not believe she had been coached, the trial court did not abuse its discretion by finding that the statement was reliable.

The court rejected the argument that contradictions between the pretrial statement and the child's testimony at trial made the former too unreliable to be admitted. First, the testimony "was not so much inconsistent with the videotaped statement as it was less complete," at least partially because during her testimony neither party asked the child specific questions about statements she made before trial.

Furthermore, the jury was able to assess the child's credibility, and might well have concluded that the pretrial statement was more complete and believable because it occurred closer to the events in question.

Defendant's conviction for predatory criminal sexual assault was affirmed.

(Defendant was represented by Assistant Defender Arden Lang, Springfield.)

People v. Lard, 2013 IL App (1st) 110836 (No. 1-11-0836, 6/28/13)

1. The confrontation clause authorizes the admission of testimony from a prior proceeding where the witness is unavailable at trial and the defense had an adequate opportunity to effectively cross-examine at the prior hearing. An adequate opportunity for effective cross-examination exists where the motive and focus of the cross-examination at the time of the initial proceeding are the same as or similar to the motive and focus during the subsequent proceeding.

In addition, 725 ILCS 5/115-10.4 authorizes the admission of prior statements where the witness is deceased at the time of trial. Factors to be considered in determining whether to admit prior testimony under §115-10.4 include the materiality, probative value, and trustworthiness of the prior testimony, the interests of justice, and the prior opportunity for cross-examination. Here, defendant claimed that the opportunity for cross-examination at a preliminary hearing was inadequate to justify admission of a deceased police officer's testimony under either §115-10.4 or the confrontation clause.

2. The confrontation clause does not require that counsel have an opportunity at the preliminary hearing to ask about every fact that might be relevant at trial. Thus, the opportunity to cross-examine may have been adequate at the earlier hearing even where discovery materials disclose new information which is relevant to cross-examination. What matters is that at the preliminary hearing defense counsel had a "fair opportunity" to inquire into the witness's observation, interest, bias, prejudice, and motive. Furthermore, to the extent that a witness at the preliminary hearing testifies to facts showing probable cause to believe that the defendant committed an offense, the defense has a motive to test the witness's credibility, powers of observation, and ability to recall.

Because defense counsel cross-examined the officer at the preliminary hearing and asked about his powers of observation and recall, just as would have been done at trial, the court concluded that the preliminary hearing testimony was properly admitted. Although at trial the defense had access to discovery that had not been available at the prior hearing, defendant did not show how he would have benefitted from additional cross-examination based on information gleaned from the discovery.

The court also rejected the argument that cross-examination was limited at the preliminary hearing because defense counsel represented both defendant and a co-defendant. Defendant presented no evidence that the co-defendants had antagonistic defenses or that counsel was concerned that questioning which would have benefitted one defendant would have hurt the other.

Defendant's conviction for residential burglary was affirmed.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Learn, ___ Ill.App.3d ___, 919 N.E.2d 1042 (2d Dist. 2009)

725 ILCS 5/115-10 authorizes the admission of hearsay evidence of certain sex offenses against a

child, where the trial court finds that the statements are sufficiently reliable and the child either testifies or is unavailable to testify and there is corroborative evidence of the act in question. The Appellate Court concluded that the four-year-old complainant did not "testify," as that term is defined under §115-10, where she admitted that a person by the name of the defendant existed only after some ten pages of questioning and gave no information about the defendant other than that he was the husband of the complainant's aunt and that the witness did not like him. When the child was asked about going to the police station and whether she had been asked questions there, she began to cry. After a short recess, the State informed the court that it had no more questions.

1. A child witness is considered "unavailable" if he or she is unwilling or unable to testify because of fear, unable to communicate in the courtroom setting, or declared incompetent because she is incapable of expressing herself so as to be understood. It makes no difference whether the witness becomes unavailable before or after taking the witness stand.

The court rejected the argument that mere presence in court and willingness to answer general questions that do not concern the offense are sufficient to qualify as "testimony." Instead, if a particular witness is the only person other than the hearsay witnesses who could accuse the defendant of actions constituting the offense, she is considered to have "testified" within the meaning of §115-10 only if he or she testifies about the offense.

Because the child in this case did not testify at all about the charge and barely acknowledged the matters on which she was questioned, she did not "testify" as contemplated by §115-10. Because the complainant was "unavailable" to testify under §115-10, her hearsay statements could not be admitted under that section.

2. The court rejected the argument that any problem within the child's testimony was cured by the trial court's willingness to overrule any State objections with respect to the scope of any cross-examination by the defense. To cross-examine the complainant, defendant would be required to first elicit testimony about the alleged event, and then attempt to challenge and refute the testimony he had elicited. "[I]n the absence of accusatory testimony, there would seem to be very few, if any, answers that defense counsel would seek to elicit."

3. Whether out-of-court statements of an unavailable witness may be admitted at trial depends on whether the statements are "testimonial" in nature. Testimonial hearsay of a witness who does not testify at trial is inadmissible unless the witness is "unavailable" to testify and the defendant had a prior opportunity for cross-examination.

The court found that the child's statements to two police officers were clearly "testimonial," as they were made during police interrogations which were intended to establish or prove past events potentially relevant to criminal prosecutions. Since the child did not testify and the defendant had no prior opportunity for cross-examination, the trial court erroneously admitted the testimony by the officers.

The court concluded, however, that the minor's statements to her father were non-testimonial. Where a statement is not the product of law enforcement interrogation, the proper focus in determining whether the statement is testimonial is the intent of the declarant and whether the objective circumstances would lead a reasonable person to conclude that their statement could be used against the defendant. Where the declarant is a child, the child's age may be an objective circumstance to be taken into account in determining whether a reasonable person under the circumstances would have understood that her statement could be available for use at a later trial.

The court concluded that it would not be reasonable to expect a four-year-old to understand that her statements would be available for use at trial, where the child did not initially accuse the defendant and did not appear to realize that defendant's actions were inappropriate.

4. Where a child does not testify at trial, §115-10 allows introduction of certain hearsay if there is corroborative evidence of the act which is the subject of the statement. Here, there was no corroborative evidence of any act; the only evidence presented concerned various recitations of the child's out-of-court statements. Thus, the statements were not admissible under §115-10.

5. Finally, the court noted that it was error to allow a police officer who heard the minor's statements

only through the testimony of an interpreter to testify at trial concerning the substance of those remarks. Because §115-10 mandates that the testifying witness hear the child's remarks personally, only the interpreter who heard the child's remarks could testify concerning those remarks.

Defendant's conviction was reversed and the cause was remanded for a new trial.

People v. Martin, 408 Ill.App.3d 891, 946 N.E.2d 990 (2d Dist. 2011)

1. Under 725 ILCS 5/115-10.1, an out-of-court statement may be admitted if it: (1) is inconsistent with the declarant's testimony at trial, (2) is the subject of cross-examination of the declarant, (3) was made under oath or described an event of which the witness had personal knowledge, and (4) was written or signed by the witness, acknowledged under oath, or recorded electronically.

The prior statement need not directly contradict the trial testimony in order to be admitted. Instead, the term "inconsistent" includes evasive answers, silence, or changes in position. "One of the policies underlying §115-10.1 . . . is to protect parties from 'turn coat' witnesses who back away from a former statement made under circumstances indicating that it was likely to be true." (**People v. Tracewski**, 399 Ill.App.3d 1160, 927 N.E.2d 1271 (4th Dist. 2010)).

2. The trial court properly applied §115-10 to admit a written statement of the complainant, who claimed at trial that she had been drinking on the night of the offense and did not recall any incident with the defendant. In the written statement, which had been prepared at the request of the arresting officers, the complainant stated that defendant grabbed her arm while she was driving and then hit her in the face. At trial, the complainant did not recall talking to police on the night of the offense. However, she identified the document as being in her handwriting.

The court concluded that the written statement contradicted the complainant's claim that she was unable to recall the incident, and noted that the trial court found that the complainant was being evasive at trial. Furthermore, the written statement explained events which were within the witness's personal knowledge when the statement was made, and the witness acknowledged making the statement by identifying the handwriting. Finally, the complainant was subject to cross-examination because she testified and responded to defense counsel's questions, although she was unable to recall the event. "[A] witness who appears and is able to testify is not unavailable for cross-examination simply because he or she cannot recall some events."

3. Under **Crawford v. Washington**, a testimonial statement by an unavailable witness is inadmissible unless the defendant had a prior opportunity for cross-examination. However, where the declarant appears for cross-examination at trial, the Confrontation Clause does not restrict use of her prior testimonial statements.

The court found that the factors leading to the conclusion that the complainant was available for cross-examination under §115-10 apply equally to the **Crawford** inquiry. Thus, **Crawford** is satisfied where a witness appears, answers questions, and is cross-examined, even if she is unable to remember some events.

Because the witness's out-of-court statement was properly admitted, defendant's convictions for aggravated battery and domestic battery were affirmed.

(Defendant was represented by Panel Attorney Thomas Brandstrader, Chicago.)

People v. Oats, 2013 IL App (5th) 110556 (No. 5-11-0556, 8/6/13)

1. Under 725 ILCS 5/115-10(a) and (b)(3), hearsay statements concerning sexual acts perpetrated against minors under the age of 13 may be admitted under certain circumstances. Before such hearsay is admitted, the trial court must conduct a hearing outside the presence of the jury and find that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. The State has the burden of proving that statements are reliable and not the result of prompting or manipulation.

Reliability is determined by the totality of the circumstances. Among the factors to be considered are the spontaneity and consistent repetition of the statement, the mental state of the child in giving the statement, the use of terminology that would be unexpected by a child of comparable age, and any lack of

motive to fabricate.

2. The court concluded that hearsay statements were not unreliable merely because the first time the children were interviewed, the audio portion of the recording process malfunctioned and only the video portion was preserved. The court stressed that the State presented detailed testimony that the minors were treated in a manner that protected against suggestiveness, second interviews were conducted when it was discovered that the audio had not been recorded in the first interview, and two witnesses testified that the second interviews were substantially the same as the first. The court also noted that there was no prompting or suggestiveness in the second interviews. Under these circumstances, the statements were not rendered unreliable by the inadvertent failure to properly record the first interviews. Thus, the trial court did not err by admitting the statements into evidence.

People v. Orengo, 2012 IL App (1st) 111071 (No. 1-11-1071, 12/18/12)

"In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13," evidence of out-of-court statements made by the child is admissible as an exception to the hearsay rule under certain specified circumstances. 725 ILCS 5/115-10.

A discharge hearing is conducted pursuant to 725 ILCS 5/104-25 to determine whether to acquit a defendant of the charges when there has been a finding of unfitness. The discharge hearing is not a criminal prosecution. The defendant may not be convicted at the hearing. If the evidence is sufficient to establish his guilt, he is found not not guilty. But the purpose of the hearing is the same as that of a criminal trial—to test the sufficiency of the State's evidence of defendant's guilt of the charged crime. The standard of proof is the same. It follows that, unless otherwise noted in §104-25, the rules of evidence governing a criminal proceeding apply at a discharge hearing.

Subsection (a) of §104-25 provides that hearsay or affidavit evidence may be admitted at a discharge hearing "on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, court and business records, and public documents." 725 ILCS 5/104-25(a).

The statute's silence on the admission of hearsay evidence on primary matters does not reflect the legislature's intent to bar such evidence. Subsection (a) does not evidence the legislature's intent to provide greater protection of a defendant's rights at a discharge hearing than at a criminal trial. Such an interpretation of subsection (a) would be inconsistent with the Illinois Supreme Court's interpretation in **People v. Waid,** 221 Ill. 2d 464, 851 N.E.2d 1210 (2006), which upheld the constitutionality of subsection (a) against due process and confrontation clause challenges.

Therefore, it was not error to admit hearsay evidence as provided by §115-10 at defendant's discharge hearing.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011)

1. Generally, statements made prior to trial are inadmissible for the purpose of corroborating trial testimony or rehabilitating a witness. Prior consistent statements may be admitted, however, in two circumstances: (1) where there is a charge that the witness has recently fabricated the testimony; or (2) where the witness has a motive to testify falsely. In either circumstance, the statement must have been made before the alleged fabrication or motive to lie arose.

A note that the complaining witness wrote to her friend containing details consistent with her trial testimony was not admissible as a prior consistent statement. The defense did suggest that the complainant had a motive to lie, but that motive arose before the note was written.

2. Certain statements by the complainant are admissible in the prosecution of certain offenses perpetrated against a child under the age of 13, but the out-of-court statements must have been made before the complainant attained 13 years of age or within three months after the commission of the offense, whichever is later. 725 ILCS 5/115-10(b)(3). The note containing the statements at issue was written after

the complainant turned 14, and did not qualify as a statement made within three months of the date of the commission of the offense, as the State never clearly established the date of the last sexual act between defendant and complainant.

Top

§19-15
Prior Inconsistent Statements

§19-15(a)
As Impeachment

People v. Smith, 78 Ill.2d 298, 399 N.E.2d 1289 (1980) Before a witness may be impeached by a prior inconsistent statement, a foundation must be established by directing the attention of the witness to the time, place, circumstances and substance of the statement. This foundation is necessary to avoid unfair surprise and give the witness an opportunity to explain.

The foundation requirements were not substantially satisfied where the witness was asked only whether he had talked to a particular person about defendant's case - the witness was not alerted to the substance of the conversations or statements.

People v. Sanders, 56 Ill.2d 241, 306 N.E.2d 865 (1974) It is improper to allow a rebuttal witness to testify about a prior statement made by a defense witness without first alerting the latter to the circumstances and substance of the statement. See also, People v. Almo, 108 Ill.2d 54, 483 N.E.2d 203 (1985) (defendant properly precluded from asking a police officer about the prior statements of a witness who had not been asked about such statements).

People v. Dixon, 28 Ill.2d 122, 190 N.E.2d 793 (1963) In order to lay a foundation for impeachment by prior inconsistent testimony at an earlier trial, it is not necessary that the "exact questions" be read to the witness.

People v. Shatner, 174 Ill.2d 134, 673 N.E.2d 258 (1996) A party who is attempting to impeach a witness with a prior inconsistent statement must present the testimony of the person to whom the inconsistent statement was made. A witness may not be impeached with the written statement of the person to whom the inconsistent statement was allegedly made.

People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 (1983) Where defense counsel asked a witness whether she ever told anyone "you expected to receive a reward for testifying in this case," and when she responded "No" asked whether she ever told "Carol Griffin you were going to receive a reward for your testimony in this case," the trial judge erred by excluding Griffin's testimony due to an insufficient foundation. The witness was "properly alerted to or warned of her prior inconsistent statement by the questions that had been asked on cross-examination."

The court added that if the trial court believed that a proper foundation had not been made, it abused its discretion by refusing to allow defense counsel to recall the witness in order to perfect the foundation.

People v. Redd, 135 Ill.2d 252, 553 N.E.2d 316 (1990) At trial, the State asked a witness about a statement he allegedly made to a neighbor soon after the incident. The witness declined to answer the questions, asserting his Fifth Amendment privilege. As impeachment, the State then called the neighbor, who testified about the statement.

The Supreme Court stated that it was error to "impeach" the witness with his prior statements after

he asserted his Fifth Amendment privilege, because he neither admitted nor denied making the prior statement:
"The purpose of impeaching evidence is to destroy the credibility of a witness, not to establish the truth of the impeaching evidence." Thus, a witness who does nothing but raise a Fifth Amendment privilege asserts nothing except that he believes he has reasonable grounds to fear incriminating himself. "The only credibility issue . . . concerns whether or not [the witness] was being truthful" in that assertion, an issue that is for the court rather than the jury to decide. Because the witness did not testify, it was error to allow him to be impeached by statements he allegedly made concerning the defendant.

People v. Henry, 47 Ill.2d 312, 265 N.E.2d 876 (1970) A witness may be impeached with his failure to state a particular fact in a prior statement. The failure to state a particular fact, when it would have been natural or likely to assert it, amounts to an assertion of the nonexistence of the fact and is admissible to discredit testimony as to such fact. See also, People v. Batchelor, 202 Ill.App.3d 316, 559 N.E.2d 948 (1st Dist. 1990) (same); People v. Conley, 187 Ill.App.3d 234, 543 N.E.2d 138 (1st Dist. 1989) (impeachment by omission is permissible where: (1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person would normally have made the statement).

People v. Williams, 22 Ill.2d 498, 177 N.E.2d 100 (1961) Even where a witness admits making a prior inconsistent statement, the opposing party may introduce evidence of the statement. See also, People v. Bradford, 106 Ill.2d 492, 478 N.E.2d 1341 (1985) (same).

People v. Moore, 54 Ill.2d 33, 294 N.E.2d 297 (1973) If a witness is asked and denies making a prior inconsistent statement, "it is incumbent upon the cross-examiner to offer evidence that such a statement was in fact made."

People v. Bush, 29 Ill.2d 367, 194 N.E.2d 308 (1963) When a witness testifies that he does not remember making the prior inconsistent statement, evidence of such statement may be introduced as impeachment. See also, People v. Purrazzo, 95 Ill.App.3d 886, 420 N.E.2d 461 (1st Dist. 1981) (proof that the prior statement was made is required when the witness claims he doesn't remember making the prior statement).

People v. Hicks, 28 Ill.2d 457, 192 N.E.2d 891 (1963) A witness should be allowed to explain prior inconsistent statements and to show the circumstances under which they were made. Also, all of the prior statements may be brought out to qualify or explain the inconsistency and rehabilitate the witness.

People v. Paradise, 30 Ill.2d 381, 196 N.E.2d 689 (1964) To lessen the risk that the jury might consider a prior inconsistent statement as substantive evidence, the jury should "be clearly cautioned and instructed to limit its consideration of such evidence for its proper purpose."

People v. Whitehead, 35 Ill.2d 501, 221 N.E.2d 256 (1966) Trial court's refusal to allow co-defendant to testify about alleged inconsistent testimony of complainant at preliminary hearing, after sufficient foundation, was reversible error.

People v. Bryant, 94 Ill.2d 514, 447 N.E.2d 301 (1983) "This Court has repeatedly condemned prosecutorial efforts to impart substantive character to prior inconsistent statements under the guise of impeachment. Moreover, statements made outside the defendant's presence which relate his confession of guilt or innocence are not competent evidence even for impeachment purposes if likely to prejudice the jury."

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) 1. Under Supreme Court Rule 238(a), a witness can be impeached with a prior inconsistent statement only where her testimony damages the position of the

impeaching party. There is no justification for impeaching the credibility of a witness who merely fails to support a party's position, because such impeachment merely brings inadmissible hearsay to the attention of the jury. In addition, because parties can in certain circumstances introduce inconsistent out-of-court statements as substantive evidence, the rule that impeachment is permitted only where a witness's testimony affirmatively damages the impeaching party's case must be "rigorously enforced."

"Damage" to a party's case does not occur where a witness is asked about a fact "which would be favorable to the examiner if true," but gives an answer that does not affirmatively help the questioner's case. Such testimony, while disappointing, causes no harm to the proponent's case, which is no better or worse off than if the witness had not testified at all.

The Court rejected the State's argument that the witness's neutral testimony damaged its case in the eyes of the jury because it contradicted the State's opening argument as to her testimony. "[I]mpeachment is designed to challenge the credibility of a witness" and is not a "means of rehabilitating counsel's arguments to the jury."

2. The State also improperly attempted to use the impeachment substantively in closing argument. The Court rejected the State's argument that the error was cured by the jury instructions, which said that evidence received for a limited purpose could not be considered for any other purpose and that prior inconsistent statements could be considered only to determine credibility. Where there is no proper purpose for which testimony can be admitted, an instruction purporting to limit the jury's consideration to a proper purpose cannot cure the "fundamental error."

People v. Bradford, 106 Ill.2d 492, 478 N.E.2d 1341 (1985) 1. A "court's witness may be impeached by a prior inconsistent statement when the witness' testimony damages the position of the impeaching party." The impeaching party may also introduce evidence of the prior statements even though the witness admits making them. However, "lengthy or repeated references to prior inconsistent statements may indicate attempts by the prosecution to give the force of substantive evidence to the statements."

2. The State did not improperly use prior inconsistent statements by calling three witnesses to testify that the witness previously made three voluntary statements that were inconsistent with her trial testimony. Not only did the prosecution refrain from using additional witnesses who were available, but "[c]onsidering that [the witness] made inconsistent statements on three separate occasions, the prosecution's bringing out the statements was within the limited purpose of impeaching testimony."

The Court also found that two remarks by the prosecution in closing argument were not attempts to have the jury regard the doctor's testimony as substantive evidence, and that the jury was instructed that the prior inconsistent statements could be used only for determining credibility.

People v. Manning, 185 Ill.App.3d 597, 541 N.E.2d 797 (3d Dist. 1989) 1. A prior statement may be introduced as impeachment only after a proper foundation is laid by confronting the defendant with the time, place and circumstances of the prior statements and allowing him to admit or deny making the statements. This the State failed to do; "[a]lthough the defendant was asked a few general questions about what he told the police on cross-examination, he was not confronted with the prior statement and given the opportunity to admit or deny making the allegedly inconsistent statement."

2. For prior statements to be properly used as impeachment, the statements "must be materially inconsistent with and tend to discredit the witness' testimony." Here, the answers defendant gave in his prior statement were not materially inconsistent with his trial testimony.

3. Finally, in closing argument the prosecutor improperly asked the jury to consider the defendant's prior statement as substantive evidence.

People v. McIntosh, 70 Ill.App.3d 188, 388 N.E.2d 142 (1st Dist. 1979) A proper foundation for impeachment is typically laid by directing the witness's attention to the time, place, substance and recipient of the statement. However, a proper foundation may be laid, without confronting the witness with the

contents of his prior statement, when the witness denies having any conversation with the person to whom the statement was allegedly made or about the subject matter involved.

People v. Lewis, 75 Ill.App.3d 259, 393 N.E.2d 1098 (1st Dist. 1979) No sufficient foundation was laid where witness did not deny the prior statement, but only stated that it did not sound like his statement, and was not given an opportunity to explain.

People v. Suerth, 97 Ill.App.3d 1005, 423 N.E.2d 1185 (1st Dist. 1981) Where defense counsel was not aware of the prior statement when he cross-examined the declarant, he should have been allowed to recall the witness in order to lay a foundation so a police officer could testify to the statement.

People v. Smith, 127 Ill.App.3d 622, 469 N.E.2d 634 (1st Dist. 1984) Where the State introduced spontaneous declarations of one of the stabbing victims, who was deceased at the time of trial, the defense should have been allowed to present the contrary statement of the deceased. "Where a statement of an absent declarant is properly admitted into evidence under one of the hearsay exceptions, the opposing party may impeach such statement with a prior inconsistent statement by the [same] declarant."

People v. Coleman, 205 Ill.App.3d 567, 563 N.E.2d 1010 (4th Dist. 1990) Where a State witness testified about certain statements made by the sex offense complainant, and such statements were admitted as substantive evidence, the defendant should have been allowed to question the witness about subsequent, inconsistent statements by the same complainant. Because the victim-declarant "is, in essence, allowed to testify through her earlier out-of-court statement, it is only appropriate [to allow] 'impeachment' of this 'testimony' by" inconsistent out-of-court statements which she made. The court added:

> "Of course, as the trial court indicated, once defendant is allowed to show inconsistencies in the subsequent statement, the State is allowed to present evidence of the rest of the statement to show that it is not, in fact, inconsistent. However, the determination of whether it is inconsistent, what weight to give it, and how it would impact the earlier statement are all appropriately left to the trier of fact."

People v. Hanson, 83 Ill.App.3d 1108, 404 N.E.2d 801 (2d Dist. 1980) The trial court erred by prohibiting the defendant from attempting to rehabilitate a witness after the witness had been impeached with the fact that she lied to the police. It is "well settled" that a witness who is impeached with a prior inconsistent statement is allowed to explain the inconsistency.

People v. Glass, 94 Ill.App.3d 69, 418 N.E.2d 454 (2d Dist. 1981) The State erred by using a defense witness's post-arrest silence to impeach him. Although the use of a witness's post-arrest silence does not involve constitutional considerations, as does use of the defendant's post-arrest silence (see Doyle v. Ohio, 426 U.S. 610 (1976)), the witness's post-arrest silence was not sufficiently inconsistent with the trial testimony to warrant admission as impeachment. Because the defense witness had been advised by his attorney not to talk to the police after his arrest, his silence was "insolubly ambiguous." See also, People v. Homes, 274 Ill.App.3d 612, 654 N.E.2d 662 (1st Dist. 1995) (plain error to impeach witness with post-arrest silence; State could not establish "threshold inconsistency" where there were many reasons, including possible reliance on constitutional rights, why the witness might not have spoken).

People v. Currie, 84 Ill.App.3d 1056, 405 N.E.2d 1142 (1st Dist. 1980) A police officer may not be impeached by the contents of a police report that he did not prepare or sign.

People v. Johnson, 138 Ill.App.3d 980, 486 N.E.2d 433 (5th Dist. 1985) Under People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 (1982), a party may not impeach its own witness by prior inconsistent statements unless the witness's testimony has damaged, rather than merely failed to support, the position of the impeaching party. "The reason for this is simple: No possible reason exists to impeach a witness who has not contradicted any of the impeaching party's evidence, except to bring inadmissible hearsay to the attention of the jury." See also, People v. McMurtry, 279 Ill.App.3d 865, 665 N.E.2d 450 (1st Dist. 1996) (error to allow State to impeach its own witness; testimony in question actually favored the State and did not damage its case; plain error rule applied because error "surely" could have affected outcome of case); People v. Miller, 302 Ill.App.3d 487, 706 N.E.2d 947 (1st Dist. 1998) (under Supreme Court Rule 238(a), a party may impeach its own witness with a prior inconsistent statement only if the witness's testimony has damaged that party's case; impeachment is improper where testimony merely fails to support the case of the party that called the witness); People v. Moore, 301 Ill.App.3d 728, 704 N.E.2d 80 (3d Dist. 1998) (to impeach a witness with a prior inconsistent statement, the impeaching party must confront the witness with the place, circumstances and substance of the earlier statement and allow her an opportunity to explain the inconsistency; although the Federal Rules of Evidence permit a witness to be recalled to explain the inconsistency after extrinsic evidence of the prior inconsistent statement has been introduced, Illinois law requires that the impeaching party establish an adequate foundation before attempting to introduce the inconsistent statement).

People v. Vinson, 90 Ill.App.3d 6, 412 N.E.2d 1062 (3d Dist. 1980) It was improper for the State to lay a foundation for impeachment and then fail to produce any evidence of the alleged impeaching statements. Because the error was not harmless, the cause was reversed and remanded for a new trial.

People v. Hood, 229 Ill.App.3d 202, 593 N.E.2d 805 (1st Dist. 1992) Reversible error occurred where the State attempted to impeach an eyewitness with a police report that was not a substantially verbatim account of her statement.

People v. Robinson, 368 Ill.App.3d 963, 859 N.E.2d 232 (1st Dist. 2006) A criminal defendant is entitled to impeach witnesses on matters that are not collateral. Thus, the trial court erred by refusing to allow the defendant to cross-examine the arresting officer on prior inconsistent testimony to the grand jury.

People v. Eggert, 324 Ill.App.3d 79, 754 N.E.2d 474 (2d Dist. 2001) IPI Crim. 4th No. 3.11, which instructs the jury concerning impeachment by prior inconsistent statements, is properly given where the inconsistency between statements arises from omissions as well as where there are directly conflicting statements. The trial court abused its discretion by failing to give IPI No. 3.11 where the arresting officer's written police report failed to mention two items about which he testified - that defendant was weaving across lanes of traffic and refused to take field sobriety tests.

Cumulative Digest Case Summaries **§19-15(a)**

People v. Blakely, 2015 IL App (3d) 130719 (No. 3-13-0719, 11/25/15)

1. A prior inconsistent statement may be admitted for impeachment if a witness's testimony affirmatively damages the case of the party which presented the testimony. A case is affirmatively damaged when it is worse off than it would have been had the witness not testified and where the testimony positively assists the opposing party's case.

The court rejected the State's contention that under **People v. Leonard**, 391 IL App (3d) 926, 911 N.E.2d 403 (3rd Dist. 2009), a professed lack of memory regarding a prior statement may be damaging to a party's case. The court questioned whether **Leonard** actually made such a holding, and noted Appellate Court authority which explicitly states that a witness's lack of memory does not affirmatively damage a

party's case. In any event, Illinois Supreme Court precedent holds that affirmative damage to a party's case does not occur where the party interrogates a witness about a fact which would be favorable if true, but receives a reply which is "merely negative" in its effect on the examiner's case.

2. The State claimed that defendant was driving at the time of a fatal accident, and "huffed" compressed air just before he lost control of the car. A sheriff's deputy testified that at the hospital after the accident, a back seat passenger said that just before the crash the passengers told defendant "you shouldn't be doing that." The witness testified that he did not remember making the alleged statement in the hospital.

The Appellate Court concluded that the witness's statement in the hospital was not admissible as impeachment, because there was no basis in the record to believe that the State's case was affirmatively damaged. However, the court also concluded that the improper impeachment constituted harmless error in view of the substantial evidence of guilt.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Gray, 406 Ill.App.3d 466, 941 N.E.2d 338 (1st Dist. 2010)

A guilty plea is an admission to the elements of the charged offense. It does not constitute an admission to collateral matters.

A defense witness pled guilty to illegal possession of a weapon, a charge related to the first degree murder and aggravated battery charges for which defendant was tried. The factual basis presented by the prosecutor at the plea hearing included a statement that the witness had given the gun to the defendant and the defendant had fired shots that resulted in the death of the murder victim. After the witness testified at defendant's trial that defendant had not been the shooter, the prosecutor introduced the factual basis for the plea to impeach the testimony of the witness.

By pleading guilty to the gun charge, the witness admitted that she possessed a gun illegally. Her plea was not an admission that she gave the gun to the defendant or that he fired the gun, because those collateral facts had no bearing on the elements that the State had to prove to establish her guilt of the weapons offense. Neither at the time of the plea nor at the time of defendant's trial did the witness assent to the collateral matters presented by the prosecutor in the factual basis for the plea. Therefore, the factual basis did not constitute a judicial admission or a prior inconsistent statement that could be used to impeach the testimony of the witness.

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Morris, 2013 IL App (1st) 110413 (No. 1-11-0413, 11/15/13)

Before his trial for first degree murder, defendant successfully moved for suppression of a video statement which he made following his arrest. The suppression was based on a violation of **Miranda.** There was no allegation that the statement was involuntary.

In the suppressed confession, defendant admitted throwing a metal pole or dumbbell at the decedent. In addition, an eyewitness testified that he saw defendant throw the dumbbell, and a search of defendant's car after the offense disclosed a dumbbell.

The defendant filed a motion *in limine* asking that the trial court prohibit the State from introducing evidence of the confession as impeachment. Defense counsel stated that defendant would not testify, but that the defense would call as expert witnesses medical personnel who treated defendant at the Cook County Jail. The expert witnesses would testify that they diagnosed defendant with "Hill-Sachs deformity," a shoulder condition that would have prevented defendant from throwing the dumbbell.

The trial court denied the motion *in limine*. Although defense counsel represented in an offer of proof that the experts would testify that they based their diagnosis on physical observations of defendant and examination of x-rays rather than by relying on defendant's statements, the trial court ruled that the State could use the suppressed confession to impeach the experts concerning defendant's physical ability to throw a dumbbell. After the motion *in limine* was denied, the defendant elected not to call the experts to testify.

On appeal, defendant argued that the trial court erred by ruling that defendant's suppressed

confession could be used to impeach expert defense witnesses concerning their diagnoses of defendant and their opinions of his ability to throw a dumbbell.

1. The court rejected the State's argument that the issue was not properly before the court because the defendant failed to call the experts after his motion *in limine* was denied. Under **Luce v. U.S.**, 469 U.S. 38 (1984) and its progeny, a defendant who fails to testify waives any issue concerning the denial of a motion *in limine* to bar use of his prior convictions as impeachment.

The court concluded that **Luce** does not apply here. First, the trial court made a definitive ruling that the expert witnesses could be impeached with defendant's statements, and the State made clear that it would impeach the experts if they testified. Second, the ruling did not turn on factual considerations, but involved a legal issue - whether an expert witness's testimony may be impeached with a defendant's suppressed statement. Third, the record was sufficient to permit the court to consider the issue. Under these circumstances, the issue was properly before the court although defendant did not call the experts to testify.

2. On the merits, the court concluded that the trial court abused its discretion by denying the motion *in limine*. An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, unreasonable, or would not be adopted by any reasonable person.

Under the exclusionary rule, evidence seized in violation of a defendant's constitutional rights is generally inadmissible at trial. However, an exception to the exclusionary rule permits the admission of illegally obtained evidence for the limited purpose of impeaching the credibility of the defendant's testimony at trial.

In **James v. Illinois**, 493 U.S. 307 (1990), the U.S. Supreme Court declined to extend this exception to permit use of a defendant's suppressed statement to impeach the testimony of witnesses other than the defendant, finding that such use would not promote the truth-seeking function of a criminal trial and would significantly undermine the deterrent effect of the exclusionary rule. The **James** court also noted that the threat of being prosecuted for perjury is sufficient to deter false testimony by a witness who is not the accused, and that impeachment with a third party's statement is unnecessary. Furthermore, allowing impeachment of witnesses other than the accused with a suppressed statement might chill some defendants from presenting a defense through the testimony of others.

3. However, the court concluded that the error was harmless beyond a reasonable doubt because the defendant's offer of proof was weak, counsel never outlined exactly what the experts' opinions would be, and defendant was tried on an accountability theory under which he need not have thrown the dumbbell in order to be convicted. In addition, whether defendant threw the dumbbell was at best a minor part of the State's case, and three eyewitnesses identified defendant as participating in the offense. Under these circumstances, defendant would have been found guilty beyond a reasonable doubt even had the medical experts testified that he was unable to throw the dumbbell.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Simpson, 2013 IL App (1st) 111914 (No. 1-11-1914, 6/19/13)

The court concluded that defense counsel was ineffective where he failed to object when the prosecution played a videotape in which a witness stated that defendant had confessed to the offense. The court noted that had an objection been raised, the recording would have been inadmissible.

First, because the witness did not affirmatively damage the State's case where he testified only that he could not recall what defendant had said, the videotape was inadmissible as impeachment. Second, the videotape was inadmissible under 725 ILCS 5/115-10.1, which authorizes the admission of a prior inconsistent statement which "narrates, describes, or explains an event or condition of which the witness had personal knowledge." In order for an out-of-court statement to satisfy the "personal knowledge" requirement, the witness must have actually seen the event which formed the subject matter of the statement. Here, the out-of-court statements were used as evidence that the defendant repeatedly struck the decedent with a bat. Because the witness admitted that he had no personal knowledge whether defendant struck the decedent and was merely repeating what he claimed defendant had said, the "personal knowledge" requirement was not

satisfied.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Wilson, 2012 IL App (1st) 101038 (No. 1-10-1038, 3/16/12)

In audio taped and written statements to police, defendant's uncle recounted statements which defendant made about an incident which led to first degree murder and armed robbery charges against the defendant. At trial, the uncle claimed that he did not remember his statements. The State then sought to admit the uncle's audio taped and written statements as substantive evidence.

1. Under 725 ILCS 5/115-10.1, a prior inconsistent statement may be offered as substantive evidence if several requirements are met, including that the witness is subject to cross-examination, the statement narrates or describes an event "of which the witness had personal knowledge," and the statement: (1) was written or signed by the witness, (2) acknowledged by the witness under oath at a trial or hearing, or (3) accurately recorded electronically. The court rejected the State's argument that the "personal knowledge" requirement is satisfied where the witness has personal knowledge that the declarant made the hearsay statement which is sought to be admitted, but lacks personal knowledge of the event described in that statement.

The court found three reasons to reject the State's position. First, precedent based on an "unusually detailed legislative history" establishes that the General Assembly intended to require personal knowledge of the underlying event, and not mere knowledge that the declarant made a hearsay statement.

Second, the personal knowledge requirement assures that the statement is reliable by affording the defendant an adequate opportunity for cross-examination and because it is less likely that a witness with personal knowledge of the underlying event will repeat a statement that he knows to be untrue. Construing the personal knowledge requirement to apply only to the making of the statement would undermine both factors, because the opportunity for effective cross-examination would be compromised and because the witness would have no independent knowledge whether the statement is true.

Finally, the State's interpretation of the personal knowledge requirement would render that requirement meaningless, because a witness who testifies about a hearsay statement necessarily has knowledge that the statement was made.

Thus, the trial court erred by admitting the portions of the uncle's audio taped and written statements recounting defendant's hearsay statements, because the uncle had no personal knowledge of the incident other than what the defendant stated.

2. The court rejected the State's argument that even if the prior inconsistent statements were not admissible substantively, they should have been admitted as impeachment. Although prior inconsistent statements may be admitted as impeachment, the State may impeach its own witness only if the witness's testimony affirmatively damaged the State's case. To be subject to impeachment, the testimony must do more than merely disappoint the State by failing to incriminate the defendant. Instead, the testimony must give "positive aid" to the defense.

The mere fact that a witness claims a lack of memory does not affirmatively damage the State's case. Thus, impeachment was not justified by the uncle's claim that he could not remember the statements.

3. The court acknowledged that the State's case is damaged by a witness's claim that someone other than the defendant committed the offense. Where the witness was not "seriously" confessing to having committed the offense, however, and was simply trying to avoid testifying against the defendant, no damage was done to the State's case. Thus, impeachment was not justified.

4. The court concluded, however, that the erroneous admission of the prior inconsistent statements was harmless where the uncle made nearly identical statements in his grand jury testimony, which was properly admitted at trial. Defendant's convictions for first degree murder and armed robbery were affirmed.

(Defendant was represented by Assistant Defender Katherine Donahoe, Chicago.)

Top

§19-15(b)
As Substantive Evidence

People v. Orange, 121 Ill.2d 364, 521 N.E.2d 69 (1988) 1. 725 ILCS 5/115-10.1, which authorizes the admission of prior statements that are inconsistent with a witness's testimony at trial so long as the witness is subject to cross-examination and made or acknowledged the prior statement under oath, does not violate the separation of powers doctrine. The legislature has the "power to prescribe new and alter existing rules of evidence or to prescribe methods of proof"; the fact that the Court has previously refused to allow the substantive use of prior inconsistent statements did not preclude the legislature from doing so.

2. A prior statement that is consistent with a witness's trial testimony, but inconsistent with a prior statement introduced under §115-10.1, is not admissible. "To be admissible as substantive evidence under [§115-10.1], the prior statement must be inconsistent with the witness' trial testimony."

People v. Flores, 128 Ill.2d 66, 538 N.E.2d 481 (1989) The State was properly allowed to introduce the grand jury testimony of its witness as substantive evidence under §115-10.1, although at trial the witness claimed he did not remember the prior testimony. See also, People v. Young, 170 Ill.App.3d 969, 524 N.E.2d 982 (1st Dist. 1988) (prior inconsistent statement was admissible under §115-10.1 though the witness denied making the statement). Compare, People v. Yarbrough, 166 Ill.App.3d 825, 520 N.E.2d 1116 (5th Dist. 1988) (prior statement not admissible under §115-10.1 where the witness did not remember making the statement).

People v. Redd, 135 Ill.2d 252, 553 N.E.2d 316 (1990) 1. A witness's assertion of the Fifth Amendment privilege is not inconsistent with prior out-of-court statements, and thus does not satisfy the inconsistency requirement of §115-10.1(a). The Court rejected the State's contention that the assertion of the Fifth Amendment privilege should be treated as a "memory loss" for purposes of §115-10.1(a). When a witness asserts the privilege, "he is not claiming to be unable to recollect prior affirmations of asserted facts" or asserting "a gap in his recollection"; rather, he is only asserting that "the answers to questions posed may tend to incriminate him." See also, People v. Cooper, 210 Ill.App.3d 427, 569 N.E.2d 144 (1st Dist. 1991) (prior statements or grand jury testimony are admissible as substantive evidence under §115-10.1 if inconsistent with the declarant's trial testimony, but a refusal to testify on Fifth Amendment grounds, even if invalid, is not inconsistent with prior statements). Compare, People v. Lee, 243 Ill.App.3d 745, 612 N.E.2d 922 (3d Dist. 1993) (witness's "alleged memory loss" and refusal to answer questions was not tantamount to an assertion of Fifth Amendment rights; witness did not explicitly exercise his Fifth Amendment rights, and never suggested that his refusal to answer was based on a fear of self-incrimination; furthermore, the pretrial statement contained no incriminating statements).

2. In addition, the witness's assertion of his Fifth Amendment privilege "prevented defendant an opportunity to cross-examine [him] in any meaningful manner," as is required by §115-10.1.

3. The State contended that because the witness asserted his Fifth Amendment privilege, he was "unavailable" as a witness, making his grand jury testimony admissible under the "residual exception" to the hearsay rule in Federal Rule of Evidence 804(b)(5) (for hearsay statements that contain "circumstantial guarantees of trust worthiness"). The Supreme Court rejected this contention. "We decline to adopt the residual exception to the hearsay rule set out in Rule 804(b)(5)." "If a prior inconsistent statement is to be admitted in Illinois in a criminal trial as substantive evidence against a defendant, the statement must meet the requirements set out by the General Assembly in section 115-10.1." See also, People v. Olinger, 176 Ill.2d 326, 680 N.E.2d 321 (1997) (Illinois does not recognize the residual hearsay exception).

People v. Hallbeck, 227 Ill.App.3d 59, 590 N.E.2d 971 (2d Dist. 1992) A party seeking to admit a prior inconsistent statement must lay a proper foundation by asking the witness whether he made the statement;

such a foundation is required whether the inconsistent statement is introduced as impeachment or as substantive evidence.

People v. Lawrence, 268 Ill.App.3d 327, 644 N.E.2d 19 (1st Dist. 1994) Only the "inconsistent" portions of an out-of-court statement may be admitted under 725 ILCS 5/115-10.1. In addition, an entire statement cannot be deemed "inconsistent" with the declarant's testimony merely because it omits information included in the testimony; an "inconsistency" does not exist merely because "certain evidence is omitted from an earlier statement" but is subsequently "found to be relevant and testified to at trial."

People v. Radovick, 275 Ill.App.3d 809, 656 N.E.2d 235 (1st Dist. 1995) 1. Section 115-10.1 authorizes the admission of prior statements that are inconsistent with a witness's testimony at trial, provided that the witness is subject to cross-examination and made the prior statement under oath. However, §115-10.1 allows only "inconsistent" statements to be admitted; "wholly irrelevant or unfairly prejudicial evidence" must be excluded.

2. Under the "plain language" of 115-10.1, the trial judge should have redacted grand jury testimony to exclude portions that implicated the defendant in other murders and concerned matters about which the declarants had not been questioned at trial. The trial court was instructed that if the issue arises again at defendant's new trial, "only those portions of the grand jury transcripts which can reasonably be characterized as 'inconsistent' with trial testimony" may be admitted.

People v. Cooper, 188 Ill.App.3d 971, 544 N.E.2d 1273 (5th Dist. 1989) A prior statement that defendant said he had just robbed the victim was not admissible under §155-10 - subsection (c)(2) of §115-10 authorizes admission only if the statement narrates, describes, or explains "an event or condition of which the witness had personal knowledge." The "personal knowledge required by the statute is not that which is acquired by being told something, even if an admission; rather, it means the witness whose prior inconsistent statement is being offered into evidence must actually have perceived the events which are the subject of that statement."

Since the witness's prior statement was not based on his perception of the robbery itself, the statement was not admissible as substantive evidence. See also,People v. Coleman, 187 Ill.App.3d 541, 543 N.E.2d 555 (4th Dist. 1989) (§115-10.1(c)(2) requires that the witness-declarant must have personally observed the underlying events (i.e., the crimes); simply overhearing incriminating statements by a defendant is insufficient; however, statements were admissible under §115-10.1(c)(1), which authorizes admission of statements "made under oath at a trial, hearing, or other proceeding"); People v. Morales, 281 Ill.App.3d 695, 666 N.E.2d 839 (1st Dist. 1996) (the "personal knowledge" requirement of 725 ILCS 5/115-10.1 is satisfied only when the declarant personally observed the events that are the subject matter of the statement; admission is not authorized where a witness merely testifies as to what another person claims to have done). See also, People v. Thomas, 178 Ill.2d 215, 687 N.E.2d 892 (1997) (Supreme Court acknowledged Appellate Court caselaw interpreting "personal knowledge" requirement, but declined to reach issue).

People v. Hastings, 161 Ill.App.3d 714, 515 N.E.2d 260 (1st Dist. 1987) A police officer's oral testimony that certain statements were made by a witness did not satisfy the requirement of ¶115-10.1(c)(2)(A) that the "statement is proved to have been written or signed by the witness." See also, People v. Young, 170 Ill.App.3d 969, 624 N.E.2d 982 (1st Dist. 1988) (statement signed by the witness was admissible); People v. Edwards, 167 Ill.App.3d 324, 521 N.E.2d 185 (2d Dist. 1988) (signed statements were admissible).

People v. Lee, 335 Ill.App.3d 1102, 781 N.E.2d 310 (1st Dist. 2002) The court rejected the State's argument that §115-10.1 is satisfied if the witness was available for cross-examination at some other "trial or hearing," and that admission of testimony from a prior trial is therefore authorized even if the witness is not available for cross-examination at defendant's trial. Thus, §115-10.1 did not authorize admission of evidence

substantively where the declarant was deceased at the time of defendant's trial.

People v. Zurita, 295 Ill.App.3d 1072, 693 N.E.2d 887 (2d Dist. 1998) 1. To be "inconsistent" within the meaning of §115-10.1, the prior statement need not directly contradict the declarant's trial testimony. Instead, a prior statement that "has a tendency to contradict the [witness's] trial testimony" is "inconsistent" for purposes of the statute. "Inconsistencies may be found in evasive answers, silence, or changes in position," as well as where the witness claims to be unable to recollect a matter that was included in the prior statement.

A statement is also inconsistent where it omits significant matters that would reasonably have been expected to be mentioned if true. Finally, whether a prior statement is inconsistent with trial testimony is left to the sound discretion of the trial court.

2. There were "critical inconsistencies" between testimony and statements where an out-of-court statement lacked any reference to defendant participating in the crime, while the trial testimony gave a detailed description of defendant's alleged conduct. The witness's "sudden memory of the defendant's participation . . . certainly appears to be a change of position tending to contradict" his prior statement. See also, People v. Grayson, 321 Ill.App.3d 397, 747 N.E.2d 460 (4th Dist. 2001) (to justify the substantive use of prior inconsistent statements under 725 ILCS 5/115-10.1, the proponent of the evidence must establish a foundation similar to that required to admit prior inconsistent statements as impeachment; thus, while the witness is on the stand he must be confronted with his prior statement, directed to its time, place, circumstances and substance, and given an opportunity to explain the inconsistency).

People v. Wetzell, 308 Ill.App.3d 886, 721 N.E.2d 643 (1st Dist. 1999) The trial judge erred by denying a defense request to use arrest and case reports both as impeachment and substantively. The officer's "written, signed arrest and case reports . . . fit perfectly within" 725 ILCS 5/115-10.1, which permits the substantive use of prior inconsistent statements which: (1) explain an event within a witness's personal knowledge, and (2) are written or signed by the witness. Furthermore, allowing the jury to use the reports as impeachment did not "minimize the prejudice caused by excluding substantive use."

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People v. Wilson, 331 Ill.App.3d 434, 771 N.E.2d 996 (2d Dist. 2002) A witness is "unavailable" under 725 ILCS 5/115-10.2, which authorizes the admission of certain hearsay concerning a material fact where a witness "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so," where the witness appeared under subpoena, was ordered by the court to remain in the courthouse for jury selection so he could be called to testify the same morning, stated that he was "willing to get locked up in order to look out for the future, my family," and could not be found when called to testify. The court distinguished People v. Drum, 321 Ill.App.3d 1005, 748 N.E.2d 344 (4th Dist. 2001), in which the trial court found that witnesses were unwilling to testify based upon vague representations by their attorneys. Here, the witness "made manifest his refusal to testify" by "unambiguously [telling] the court that he was not going to testify" and that he was "willing to be incarcerated and accept the consequences for failing to testify," and by leaving the courthouse despite the judge's order to remain.

People v. Simpson, 2015 IL 116512 (No. 116512, 1/23/15)

Generally, out-of-court hearsay is inadmissible as substantive evidence. Under 725 ILCS 5/115–10.1, however, a prior inconsistent statement may be admitted substantively if it "narrates, describes, or explains an event or condition of which the witness had personal knowledge," and the declarant is subject to cross-examination concerning the statement.

The court concluded that the "personal knowledge" provision requires that the witness had personal knowledge of the events described in the prior inconsistent statement. The court rejected the State's argument that §115–10.1 is satisfied where the witness merely heard a statement about an event that he did not witness.

Here, the witness told police that defendant admitted striking the decedent several times with a baseball bat. At trial, however, the witness said that he had no recollection of making such a statement. The court concluded that the State could introduce a videotape of the witness making the prior statement only if it could show that the witness had personal knowledge of the actual incident and not just that defendant had made the statement. Because the State lacked such evidence, the prior statement was inadmissible.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Brothers, 2015 IL App (4th) 130644 (Nos. 4-13-0644, 4-13-0650 cons., 9/18/15)

1. Under 725 ILCS 5/115-10.1(c)(2), a prior consistent statement is admissible as substantive evidence only if narrates, describes, or explains an event that the witness has personal knowledge of, and (A) the statement has been written or signed by the witness; (B) the witness acknowledged making the statement under oath at a hearing or trial where a party wants to introduce the statement; or (C) the statement has been accurately recorded.

Before a prior inconsistent statement may be admitted under subsection (B), the proponent must lay a proper foundation by conducting an "acknowledgment hearing" outside the presence of the jury, where the witness is presented with the prior consistent statement and given an opportunity to acknowledge under oath that she made it. If the witness acknowledges making the statement, it is admissible as substantive evidence; otherwise it is inadmissible.

2. Here the State merely asked the witness whether she had talked to police officers about the incident. The State never asked the witness to acknowledge under oath that she had made any specific statement. The Appellate Court held that although the witness acknowledged talking to police officers about the incident, "her testimony came nowhere close to" laying a proper foundation for admission of the prior inconsistent statements as substantive evidence. Their admission was thus error.

Since the prior statements were the only evidence presented regarding one of defendant's convictions (for aggravated criminal sexual assault), the court remanded for a new trial on that count. The court however found that the remaining evidence was overwhelming on the other counts, and thus affirmed those convictions.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)

1. Statements made to a testifying witness by a third party describing events of which the witness has no firsthand knowledge are inadmissible as substantive evidence pursuant to the prior-inconsistent-statement exception to the hearsay rule provided by 725 ILCS 5/115-10.1(c)(2). Therefore, a statement made by Fillyaw to a prosecution witness admitting that he had kicked in a door and shot three people was inadmissible under the personal-knowledge limitation of §115-10.1(c)(2).

2. Admission of a nontestifying co-defendant's admission inculpating the defendant in the offense violates not only a defendant's federal constitutional right to confrontation, but also Illinois hearsay rules. Therefore, Fillyaw's statement implicating Parker in the commission of the offense was inadmissible against Parker. Although the jury was instructed to give separate consideration to each defendant, that any evidence limited to one defendant should not be considered as to the other, and that a statement made by one defendant may not be considered as to the other, it was given no contemporaneous instruction to disregard the statement

when considering Parker's guilt. These instructions were insufficient to remedy the state law error; only complete redaction of all references to Parker would suffice.

The admission of this evidence was plain error. Because the error implicated defendant's due process and confrontation clause rights, it necessarily affects substantial rights and satisfies the second prong of the plain-error analysis. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

3. The mental health history of a witness may be relevant if it relates to the credibility of the witness. Witness Deshae R.'s psychiatric diagnosis, treatment with psychotropic medications, and experience with hallucinations may be relevant to her credibility as a witness. Therefore the circuit court was directed to conduct a further *in camera* review of her mental health records on remand, and tender to the defense attorneys the relevant portions of those documents.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Hobson, 2014 IL App (1st) 110585 (No. 1-11-0585, 3/12/14)

725 ILCS 5/115-10.1(c)(2) provides that a prior inconsistent statement that was not made under oath in a legal proceeding constitutes hearsay, and is inadmissible as substantive evidence unless it describes an event or condition of which the declarant had personal knowledge. Where neither of two witnesses whose statements were introduced by the State had seen the shooting in question, they lacked the personal knowledge required to allow substantive use of their prior statements that they had overheard statements about the shooting. The court rejected the State's argument that Illinois courts have misinterpreted §115-10.1(c)(2) by requiring personal knowledge of the actual event in question, and not merely personal knowledge that defendant and others made statements about the shooting. The court noted that the State's theory would render the personal knowledge requirement superfluous, because in any event one cannot testify about a hearsay statement that he did not personally witness.

(Defendant was represented by Assistant Defender Autumn Fincher, Chicago.)

People v. McCarter, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2864, 6/24/11)

1. A requirement for admission of a prior inconsistent statement of a witness as substantive evidence is that the statement "narrates, describes, or explains an event or condition of which the witness had personal knowledge." 725 ILCS 5/115-10.1(c)(2). Statements of secondhand accounts of events are inadmissible hearsay.

Although some portions of a witness's prior statement admitted at defendant's trial recounted events of which she had personal knowledge, other parts contained statements made by a co-defendant describing the events at which the witness was not present and of which the witness had no personal knowledge, including that the co-defendant took $3000 from the deceased. Those portions of the statement were inadmissible hearsay.

2. While a witness may testify to statements made to her by the defendant, a witness may not offer her personal opinion of the meaning of those statements. Therefore, while the State could admit evidence that defendant told a witness, "It's going down," and that he was going to "take care of business," it could not admit the witness's opinion as to what she thought defendant meant by these statements.

Because these inadmissible statements provided the only evidence that a robbery took place, the court concluded that defense counsel was ineffective in failing to object to the evidence, thus also satisfying the second prong of the plain-error rule. "Based on plain error [the court] exercised [its] duty to set aside the armed robbery conviction where reasonable doubt remains of defendant's guilt."

(Defendant was represented by Assistant Defender Jessica Fortier, Chicago.)

People v. Santiago, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011)

1. Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. A defendant is entitled to have his guilt or innocence determined based on the evidence against him without being prejudged according to what has happened to another. **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978).

The court held that this rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

2. Nor was it error to elicit evidence of the sentences that the co-defendants received. The jury was not informed of the sentences for the improper purpose of suggesting that defendant faced a comparable sentence if convicted, but to emphasize the doubtful explanation offered by the co-defendants for their decision to plead guilty.

3. It was also not error for the prosecutor to elicit evidence that defendant was not present when the co-defendant pleaded guilty. This evidence was offered to provide a plausible explanation for the co-defendant's contrary testimony at trial, i.e., that defendant's absence at the plea hearing made it easier for the co-defendant to testify to defendant's guilt, and defendant's presence at trial made it difficult for the co-defendant to repeat that testimony.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Simpson, 2013 IL App (1st) 111914 (No. 1-11-1914, 6/19/13)

The court concluded that defense counsel was ineffective where he failed to object when the prosecution played a videotape in which a witness stated that defendant had confessed to the offense. The court noted that had an objection been raised, the recording would have been inadmissible.

First, because the witness did not affirmatively damage the State's case where he testified only that he could not recall what defendant had said, the videotape was inadmissible as impeachment. Second, the videotape was inadmissible under 725 ILCS 5/115-10.1, which authorizes the admission of a prior inconsistent statement which "narrates, describes, or explains an event or condition of which the witness had personal knowledge." In order for an out-of-court statement to satisfy the "personal knowledge" requirement, the witness must have actually seen the event which formed the subject matter of the statement. Here, the out-of-court statements were used as evidence that the defendant repeatedly struck the decedent with a bat. Because the witness admitted that he had no personal knowledge whether defendant struck the decedent and was merely repeating what he claimed defendant had said, the "personal knowledge" requirement was not satisfied.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Sykes, 2012 IL App (4th) 100769 (No. 4-10-0769, 4/4/12)

A prior statement of a witness is admissible as substantive evidence if: (a) it is inconsistent with his testimony at trial, (b) the witness is subject to cross-examination concerning the statement, and (c) the statement either: (1) is made under oath at a trial, hearing or other proceeding, or (2) narrates, describes or explains an event or condition of which the witness had personal knowledge, and A) the statement is proved to have been written or signed by the witness, or B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission of the statement is sought, or

at a trial, hearing or other proceeding, or C) the statement is proved to have been accurately recorded by a tape recorder, video recorder, or similar electronic means of sound recording. 725 ILCS 5/115-10.1.

The term "acknowledged" in the statute is not a term of art, having only one precise meaning. Whether a witness's testimony constitutes an acknowledgment of the prior statement within the meaning of the statute is a matter left to the trial court's sound discretion.

The trial court did not abuse its discretion in implicitly finding that two prosecution witnesses acknowledged the making of their prior statements. One witness acknowledged the statement by responding, "No, that would not be inaccurate," when asked if it would be inaccurate if a police officer wrote down that she testified that it was defendant Sykes raising his arms and firing four shots in the air, even though when the prosecutor asked the follow-up question, "So that would be what you told that officer?" she responded, "Probably. I don't remember what happened that night."

The second witness acknowledged her prior statement when she answered, "Yes," to the question, "If a police officer put in his report that you witnessed Sykes raise one of his arms and fire approximately four shots, would that be true?" The witness also immediately clarified that she did not say that it was defendant when the prosecutor followed up with the question, "So that's what you told the officer?"

Once the statutory threshold for admissibility under §115-10.1(c)(2)(B) was crossed, everything else that followed – namely, the attempts by the witnesses to disavow their prior inconsistent statements – was surplusage and utterly without effect regarding the admissibility of those prior statements as substantive evidence. The disavowals by the witnesses of their prior statements simply constituted a matter for the trier of fact to consider when deciding which statements of the witnesses, if any, were credible.

Turner, J., specially concurring, concluded that with respect to the second witness, the complete context of her answers did not show an acknowledgment of the prior statement. In his view, "the majority's loose interpretation of what constitutes an acknowledgment is incongruous with the reliability safeguards the statute incorporates." However, he agreed that defendant's conviction should be affirmed because the evidence was not so closely balanced that the error alone threatened to tip the scales of justice against defendant.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Vannote, 2012 IL App (4th) 100798 (No. 4-10-0798, 6/4/12)

1. A prior inconsistent statement of a witness may be admitted as substantive evidence if it meets the requirements of 725 ILCS 5/115-10.1.

To be admitted, the statement must be inconsistent with the trial testimony of the witness, but it need not directly contradict the testimony to be considered inconsistent within the meaning of the statute. The term "inconsistent" includes evasive answers, silence, and changes in position.

A statement can be admitted if it is "proved to have been accurately recorded by a tape recorder, videotape recording, or other similar electronic means of sound recording." 725 ILCS 5/115-10.1(c)(2)(C). A partially-recorded statement is admissible unless the unrecorded portion is so substantial as to render the recording untrustworthy as a whole.

2. The child witness against the defendant testified that he could not recall what occurred on the date of the alleged offense. His statement recorded the day after the incident was thus inconsistent with his trial testimony and admissible pursuant to §115-10.1.

Although 31 to 35 seconds of the 12-minute recording were missing, the missing portion was at the beginning of the interview when background questions were asked. The statements made by the witness at the beginning of the recording were repeated, and similar statements were made in response to non-leading questions during the remainder of the interview. Another witness also corroborated the statements. Therefore, the unrecorded portions of the statement were not so substantial as to render the recording untrustworthy as a whole.

3. No confrontation-clause problem exists simply because a witness's memory precludes him from being cross-examined to the extent the examiner would have liked. Because the witness was available for

cross-examination and was cross-examined, there was no violation of defendant's constitutional right to confrontation despite the witness's claim of no memory of the events.

Cook, J., dissented.

The recorded statement of the child witness was testimonial evidence and inadmissible due to the absence of an opportunity to cross-examine. Although a gap in the recollection of a witness does not necessarily preclude the opportunity for effective cross-examination, there was more than a gap here. The witness had no recollection of the events or of the recorded examination. Unlike an adult witness who can be discredited by his lack of memory, a child's inability to remember does not discredit the witness. Due to normal developmental limitations, child witnesses are susceptible to forgetting details when there is substantial delay between the event and the request to recall it at trial. The State was able to take advantage of the witness's inability to recall by portraying him to the jury as emotionally distraught. Although the witness was able to answer "yes" or "no" to questions by the defense, a jury may conclude in such circumstances that the answers are those of the interrogator, and the prosecutor argued to the jury that the witness's answers on cross-examination were in fact worthless.

The recorded statement was also inadmissible because it was not proved to have been accurately recorded. The recording device had a known malfunction that had caused it to skip on previous recordings. The most important part of the interview, which preceded the witness's statement that defendant touched him, was missing, providing no answers to the question of whether the examination was leading or open-ended.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Wiggins & Swift, 2015 IL App (1st) 133033 (No. 1-13-3033 & 1-13-3107, Supp. Op. 11/3/15)

725 ILCS 5/115-10.1 permits the use of prior inconsistent statements as substantive evidence, but requires that the trial court admit only those portions which are actually inconsistent. Here, the trial judge erred by permitting the prosecution to read to the jury all of a prior statement where only a portion of that statement was inconsistent with the declarant's testimony at trial.

The court concluded that the cumulative effect of several errors, including the improper admission of a prior inconsistent statement, denied a fair trial. The conviction was reversed and the cause remanded for a new trial.

People v. Wilson, 2012 IL App (1st) 101038 (No. 1-10-1038, 3/16/12)

In audio taped and written statements to police, defendant's uncle recounted statements which defendant made about an incident which led to first degree murder and armed robbery charges against the defendant. At trial, the uncle claimed that he did not remember his statements. The State then sought to admit the uncle's audio taped and written statements as substantive evidence.

1. Under 725 ILCS 5/115-10.1, a prior inconsistent statement may be offered as substantive evidence if several requirements are met, including that the witness is subject to cross-examination, the statement narrates or describes an event "of which the witness had personal knowledge," and the statement: (1) was written or signed by the witness, (2) acknowledged by the witness under oath at a trial or hearing, or (3) accurately recorded electronically. The court rejected the State's argument that the "personal knowledge" requirement is satisfied where the witness has personal knowledge that the declarant made the hearsay statement which is sought to be admitted, but lacks personal knowledge of the event described in that statement.

The court found three reasons to reject the State's position. First, precedent based on an "unusually detailed legislative history" establishes that the General Assembly intended to require personal knowledge of the underlying event, and not mere knowledge that the declarant made a hearsay statement.

Second, the personal knowledge requirement assures that the statement is reliable by affording the defendant an adequate opportunity for cross-examination and because it is less likely that a witness with personal knowledge of the underlying event will repeat a statement that he knows to be untrue. Construing

the personal knowledge requirement to apply only to the making of the statement would undermine both factors, because the opportunity for effective cross-examination would be compromised and because the witness would have no independent knowledge whether the statement is true.

Finally, the State's interpretation of the personal knowledge requirement would render that requirement meaningless, because a witness who testifies about a hearsay statement necessarily has knowledge that the statement was made.

Thus, the trial court erred by admitting the portions of the uncle's audio taped and written statements recounting defendant's hearsay statements, because the uncle had no personal knowledge of the incident other than what the defendant stated.

2. The court rejected the State's argument that even if the prior inconsistent statements were not admissible substantively, they should have been admitted as impeachment. Although prior inconsistent statements may be admitted as impeachment, the State may impeach its own witness only if the witness's testimony affirmatively damaged the State's case. To be subject to impeachment, the testimony must do more than merely disappoint the State by failing to incriminate the defendant. Instead, the testimony must give "positive aid" to the defense.

The mere fact that a witness claims a lack of memory does not affirmatively damage the State's case. Thus, impeachment was not justified by the uncle's claim that he could not remember the statements.

3. The court acknowledged that the State's case is damaged by a witness's claim that someone other than the defendant committed the offense. Where the witness was not "seriously" confessing to having committed the offense, however, and was simply trying to avoid testifying against the defendant, no damage was done to the State's case. Thus, impeachment was not justified.

4. The court concluded, however, that the erroneous admission of the prior inconsistent statements was harmless where the uncle made nearly identical statements in his grand jury testimony, which was properly admitted at trial. Defendant's convictions for first degree murder and armed robbery were affirmed.

(Defendant was represented by Assistant Defender Katherine Donahoe, Chicago.)

Top

§19-16
Prior Consistent Statements

Tome v. U.S., 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995) Federal Rule of Evidence 801(d)(1)(B), which provides that a prior consistent statement is not hearsay where "offered to rebut an express or implied charge . . . of recent fabrication or improper influence or motive," authorizes only the admission of prior consistent statements made before the alleged fabrication or motive came into existence. Although Rule 801 does not specifically contain a temporal requirement, Congress intended to continue the common law requirement that prior consistent statements are relevant only if made before the fabrication or motive arose.

People v. Powell, 53 Ill.2d 465, 292 N.E.2d 409 (1973) Evidence that a witness made a prior statement which is consistent with his testimony is generally inadmissible. However, evidence of a prior consistent statement is admissible when: (1) it is charged that testimony of the witness is of recent fabrication or that the witness has some motive for testifying falsely, and (2) the prior consistent statement was made before the time of the alleged fabrication or before the motive to testify falsely came into existence.

People v. DePoy, 40 Ill.2d 433, 240 N.E.2d 616 (1968) A prior consistent statement may not be introduced merely because the decedent has been impeached with prior inconsistent statements. See also, People v. Manley, 104 Ill.App.3d 478, 432 N.E.2d 1103 (1st Dist. 1982).

People v. Clark, 52 Ill.2d 374, 288 N.E.2d 363 (1972) Prior consistent statement was not admissible where the motive to fabricate existed when the statement was made. Compare, People v. Titone, 115 Ill.2d 413, 505 N.E.2d 300 (1986) (prior statement properly admitted).

People v. Emerson, 97 Ill.2d 487, 455 N.E.2d 41 (1983) Prior consistent statements may be introduced to corroborate trial testimony when it is charged that the witness's testimony is a recent fabrication, or where there is a motive to testify falsely and the prior consistent statement was made when such motive did not exist. Where the motive (the witness's alleged debt to the defendant) existed when the prior statements were made, the statements were inadmissible.

The defense did not open the door to the prior statements by attempting to impeach the witness; the impeachment was designed to show that one of the perpetrators had not participated in certain conduct during the offense, and was "not directed to the identity of the assailants." Consequently, it "did not open the door to a gratuitous corroboration of . . . testimony concerning the identity of [the] attackers."

The Court also noted that in closing argument the prosecutor made reference to the prior statements on at least four occasions. "This was improper and erroneously emphasized the corroborative effect" of a statement which should not have been admitted. See also, People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) (error to admit prior consistent statement made where motive to fabricate (desire to help relatives) existed when prior statement was made; however, issue was waived because not included in post-trial motion); People v. Orange, 121 Ill.2d 364, 521 N.E.2d 69 (1988) (trial judge properly excluded a letter written after the writer decided to exonerate the defendant; same motive existed at trial and when the letter was written). Compare, People v. Harris, 123 Ill.2d 113, 526 N.E.2d 335 (1988) (prior testimony to grand jury properly admitted to rehabilitate impeached witness where defense failed to show that motive to fabricate existed at time of grand jury proceedings).

People v. Tisdel, 201 Ill.2d 210, 775 N.E.2d 921 (2002) 1. Prior out-of-court statements may be admitted to corroborate trial testimony on the same subject only if: (1) the prior consistent statement is used to rebut a charge or inference that the witness is motivated to testify falsely or that his in-court testimony is a recent fabrication, or (2) the out-of-court statement is one of identification.

2. The court overruled People v. Hayes, 139 Ill.2d 89, 564 N.E.2d 803 (1990), which held that the trial court erred by admitting testimony that before identifying the defendant, a witness viewed pictures of other persons and failed to make an identification. Hayes held that such statements concern "non-identification" rather than "identification," and that the second exception to the general rule therefore did not apply.

Here, the court concluded that Hayes' limitation of the "statements of identification" exception was "flawed," and that the exception should be construed to include the "entire identification process," including "non-identification" procedures.

People v. Walker, 335 Ill.App.3d 102, 779 N.E.2d 268 (2d Dist. 2002) A prior consistent statement is admissible only to rebut a charge or inference that the declarant is motivated to testify falsely or that her testimony is of recent fabrication, so long as the prior statement was made before the motive or alleged fabrication arose. Although the prior statement was admissible to rebut defendant's allegations that the witness had a motive to lie, it should not have been admitted for the truth of the matters asserted.

The court rejected the State's argument that the prior consistent statement was admitted only non-substantively. Although the trial court failed to expressly permit substantive use of the statement, the State sought to admit it as substantive evidence and argued to the jury that it "tells the truth." In addition, in response to the jury's request the trial court sent the statement to the jury room without an instruction limiting the purpose for which it could be considered. Under such circumstances, the jury likely believed it could use the statement for any purpose, including substantively. The court also noted that the prior statement made

allegations that the witness had not included in her testimony.

People v. Terry, 312 Ill.App.3d 984, 728 N.E.2d 669 (1st Dist. 2000) Although prior consistent statements are admissible to rebut an inference of recent fabrication, admissibility depends on a showing that the consistent statements were made before there was a motive to fabricate. Where the statements were made after the declarant had been arrested and questioned for two days, "which may have meant that he was a suspect," there was a motive to place the blame on the defendant. Thus, the prior statements were inadmissible.

People v. Miller, 302 Ill.App.3d 487, 706 N.E.2d 947 (1st Dist. 1998) A prior consistent statement is admissible to rebut a charge of recent fabrication only if it was made before the alleged motive to fabricate arose. A charge of recent fabrication does not arise merely because evidence is introduced to contradict a witness's testimony or because the witness is impeached; "[i]f courts were to admit prior consistent statements whenever there was any questioning or contradiction of a witness' testimony, the exception would swallow the rule." See also, People v. Wetzell, 308 Ill.App.3d 886, 721 N.E.2d 643 (1st Dist. 1999) (prior consistent statement is not admissible merely because a witness's testimony has been impeached).

People v. Davis, 130 Ill.App.3d 41, 473 N.E.2d 387 (1st Dist. 1984) Testimony about a robbery complainant's prior consistent statements was improper due to insufficient foundation; if the defense raised an inference of fabrication or motive to testify falsely, such inference also existed when the prior consistent statements were made. See also, People v. Borges, 127 Ill.App.3d 597, 469 N.E.2d 321 (1st Dist. 1984) (alleged motivation to lie existed at the time of the prior statements); People v. Smith, 139 Ill.App.3d 21, 486 N.E.2d 1347 (1st Dist. 1985) (same).

People v. Tidwell, 88 Ill.App.3d 808, 410 N.E.2d 1163 (2d Dist. 1980) A prior consistent statement may not be used to corroborate or bolster in-court testimony unless: (1) it is charged that the in-court testimony is a recent fabrication, in which case the prior consistent statement may be used to refute that contention, or (2) it is contended that the witness has a positive motive for testifying falsely, in which case a prior consistent statement may be used to show that the witness told the same story when no such motive existed or could have been foreseen.

Because neither of the above exceptions were present, the trial court erred by allowing the State to read a statement made by an accomplice to the police about a week after the robbery, where the statement was consistent with the accomplice's testimony.

People v. Hudson, 86 Ill.App.3d 335, 408 N.E.2d 325 (5th Dist. 1980) The improper admission of five witnesses' prior consistent statements was plain error and prejudicial - the statements were used to improperly bolster the witnesses' testimony and as substantive evidence of guilt, and "clouded the evidence to such a degree as to make it impossible to determine whether the jury relied upon [them]."

People v. Wheeler, 186 Ill.App.3d 422, 542 N.E.2d 524 (4th Dist. 1989) It was error for a State witness to testify that shortly after the incident he gave a statement to the police describing the perpetrator, and for the prosecutor to comment in closing argument concerning that description, where there was no allegation of recent fabrication or that the witness had any greater motive to lie after the statement than before.

People v. Kennedy, 150 Ill.App.3d 319, 501 N.E.2d 1004 (5th Dist. 1986) The prior consistent statements of two accomplices, made at the time of their arrests, were properly admitted to rebut the defense theory that the accomplices were motivated to testify falsely by their hope to be charged with a lesser offense and receive shorter sentences. The prior statements were made before any potential deal or plea bargaining was discussed with the accomplices, and therefore before any motive to testify falsely arose.

People v. Lambert, 288 Ill.App.3d 450, 681 N.E.2d 675 (2d Dist. 1997) 1. A witness's prior consistent statement was admissible as rehabilitation where on cross-examination, defense counsel suggested that the witness's testimony "was the product of a motivation" to obtain a favorable plea agreement. In addition, defense counsel sought to convince the jury that the witness's testimony had been fabricated in response to the suggestion of a third party. Although the witness denied telling the third party that he would testify falsely, the import of the defense cross-examination and evidence clearly suggested to the jury that the testimony was fabricated.

2. However, the prior consistent statement of a second witness was not admissible on the theory that the defense charged that his testimony was a recent fabrication. The "only portion of . . . cross-examination . . . which may be said to remotely raise a charge of recent fabrication" was counsel's elicitation of the fact that the witness had rehearsed his testimony with prosecutors. Rejecting People v. Askew, 273 Ill.App.3d 798, 652 N.E.2d 1041 (1st Dist. 1995) and People v. Ollins, 235 Ill.App.3d 158, 601 N.E.2d 922 (1st Dist. 1992), the Court held that the fact that a witness rehearsed his testimony with counsel does not imply that any fabrication occurred.

3. In addition, the trial judge erred by admitting the prior consistent statements of both witnesses as substantive evidence. In general, Illinois follows a common law rule that a prior consistent statement is admissible only for rehabilitation. The rationale for this rule is that although "mere repetition does not imply veracity," the trier of fact is likely to place belief "in that which is most often repeated."

Furthermore, the substantive use of the statements was not harmless error. The witnesses in question were crucial to the State's case, because they were the only eyewitnesses to testify for the State and their testimony was the only evidence directly linking defendant to the crimes. In addition, the prosecutor repeatedly emphasized the prior statements during closing arguments, and the evidence was close. In rejecting the State's harmless error argument, the Court concluded that "[i]f prejudice cannot be found on the facts of this case, we doubt it will ever be found."

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People v. Johnson, 2012 IL App (1st) 091730 (No. 1-09-1730, 3/23/12)

1. Other-crimes evidence is generally inadmissible where its sole relevance is to establish defendant's propensity to commit crimes.

In a first-degree-murder prosecution, eliciting evidence on cross-examination of defense witnesses that they were aware that defendant was incarcerated on drug charges had no admissible bearing on his guilt or innocence other than to promote jury bias.

2. The general rule is that prior consistent statements are inadmissible to corroborate the trial testimony of a witness because the statements serve to unfairly enhance the credibility of the witness. The jury is likely to attach disproportionate significance to them as people tend to believe that which is most often repeated, regardless of its intrinsic merit.

Prior consistent statements are not admissible merely because the testimony of a witness has been discredited, or opposing counsel has sought to challenge his testimony. They may be introduced to rebut an allegation that the witness was motivated to testify falsely, or otherwise to rebut an allegation of recent fabrication. To qualify for this exception, the prior consistent statements must have been made prior to the existence of the alleged motive to testify falsely or the alleged fabrication.

Prior consistent statements of a prosecution witness were not properly admitted to rebut an allegation that the witness was motivated to testify falsely. Although the State elicited evidence that defendant and the witness were in rival factions of the same gang, defense counsel did not argue that the witness had a motive to falsely implicate the defendant in the crime. The defense position was that the witness's identification of defendant was honest, but mistaken. A charge of mistake or inaccuracy is not sufficient to render admissible the prior consistent statements of a witness.

Even if the defense had chosen to argue that the witness had a motive to falsify due to their gang rivalry, the State could only have introduced the prior consistent statement upon a showing that the statement predated the existence of the rivalry. There is no question here that the gang rivalry, as well as any motive to fabricate that might have arisen from that gang rivalry, preexisted the offense.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Maldonado, 398 Ill.App.3d 401, 922 N.E.2d 1211 (1st Dist. 2010)

1. To preserve an issue for appeal, the defendant must: (1) object at trial or raise the issue in a motion *in limine*, and (2) present the issue in a post-trial motion. Here, defendant preserved an issue concerning the admissibility of gang-related evidence when he replied to the State's motion *in limine* to admit the evidence and raised the issue in the post-trial motion.

Even had the defendant not preserved the issue, it would have been reviewable as plain error because the evidence was closely balanced and the improperly admitted evidence could have affected the outcome of the trial. (See **WAIVER – PLAIN ERROR – HARMLESS ERROR**, §§56-1(b)(2), 56-2(a)(3)).

2. Evidence of gang-related activity is admissible only where there is sufficient proof that such activity is related to the crime charged. Here, the trial court admitted the evidence for the limited purpose of impeaching two of the State's witnesses who had recanted their pretrial statements. Although the State acknowledged that it lacked evidence to show that the crime was gang-related, it presented additional gang evidence that had nothing to do with the impeachment of the witnesses. In addition, it used that evidence in closing argument to suggest a possible gang motive for the offense.

Because the improperly-admitted evidence may have affected the verdict, a new trial was required.

3. The trial court erred by allowing the State to introduce evidence that a shotgun was recovered from defendant's residence, because the offense had been committed with a handgun and no connection was shown between the weapon and the defendant. In the court's view, the State introduced the evidence solely to suggest that the shotgun must have belonged to the defendant, and that "someone who possesses a shotgun is more likely to commit a murder than someone who does not."

4. Evidence that a witness made a prior consistent statement is generally inadmissible for the purpose of corroborating trial testimony, unless the opposing party contends that the witness recently fabricated his or her testimony and the prior statement was made before the alleged motive to fabricate arose. Here, the trial judge improperly admitted prior consistent statements which were made after the alleged motive to fabricate came into existence.

Defense counsel argued that when the witness was first interviewed by police, she truthfully said that she had no knowledge of the offense. Counsel alleged that after being detained at the police station for several hours, the witness falsely inculpated the defendant. Counsel also argued that the witness repeated the false accusation in her testimony before the grand jury and at trial.

Because the statements which were admitted to corroborate the witness's trial testimony - her statement at the police station and her grand jury testimony - were both made after the motive to falsify arose, they did not rebut counsel's allegations and should not have been admitted.

Defendant's conviction for first degree murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Matthews, 2012 IL App (1st) 102540 (No. 1-10-2540, 10/10/12)

1. As a general rule, polygraph evidence is inadmissible because polygraph test results are not sufficiently reliable to use as proof of guilt or innocence, and because jurors may give polygraph test results undue weight due to their quasi-scientific nature, despite their inherent unreliability.

An exception to this rule exists where a defendant or a witness claims that the statement he made to the police was coerced or induced by promises made by the authorities. Evidence that the defendant or witness took a polygraph exam is admissible to rebut those claims by providing an alternative explanation for the making of the statement.

This exception does not apply where the claim of coercion or inducement is not made by the declarant of the statement, but by another witness. In that case, there is no need for a surrogate rebuttal witness in the form of polygraph evidence, because an actual rebuttal witness, the declarant, is available to testify. The jury can then perform its function of deciding which witness to believe. Introducing polygraph evidence in that circumstance does not rebut the claim of coercion or inducement, and infringes on the function of the jury by giving more credibility to the testimony of the witness who denies coercion or inducement.

The trial court abused its discretion when it admitted evidence that a prosecution witness took a polygraph exam before making a statement inculpating defendant in a murder, to rebut the testimony of a defense witness that the prosecution witness told her that her statement was coerced by police threats that she would be charged with the murder. The polygraph evidence supported the credibility of the prosecution witness and invaded the province of the jury to resolve conflicts in the evidence and to determine the weight to be given testimony.

2. As a general rule, a witness cannot be rehabilitated by the admission of statements consistent with his testimony. An exception exists where there is a claim that the witness recently fabricated the testimony or the witness has a motive to give false testimony, but only if the prior consistent statements were made before the time of the alleged fabrication or before the motive to fabricate arose.

The State introduced the written statement and grand jury testimony of its witness that were consistent with the witness's trial testimony. Although a charge was made that the witness had a motive to fabricate, the prior statements were not made before the motive to fabricate arose, and therefore should not have been admitted.

The admission of this evidence was plain error because the evidence was closely balanced. Much of the State's case relied on the testimony of this witness that the defendant admitted to killing the murder victim. While defendant's DNA was found under the victim's fingernails and her fingerprints were found on a metal tin next to a night table, this evidence was consistent with defendant's relationship with the victim. No other physical evidence connected defendant to the offense.

The Appellate Court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

People v. McWhite, 399 Ill.App.3d 637, 927 N.E.2d 152 (1st Dist. 2010)

1. Prior consistent statements are inadmissible for the purposes of corroborating trial testimony or rehabilitating a witness. Such statements may be admitted to rebut a charge of recent fabrication or motive to testify falsely, provided that the prior consistent statement was made before the alleged fabrication or motive arose.

Even where admissible on a charge of recent fabrication or motive to lie, prior consistent statements go only to rehabilitate the witness and may not be used as substantive evidence. Prior statements are not admissible merely because a witness's testimony has been discredited or to rebut a charge of mistake, poor recollection, or inaccuracy.

2. Statements which a surveillance officer made during his preliminary hearing testimony and in his arrest reports were improperly admitted at a trial for possession of heroin with intent to deliver. Although defense counsel impeached the officer with the fact that certain facts had been omitted from the vice case report, the impeachment by omission fell short of charging recent fabrication or a motive to lie. Furthermore, had there been a suggestion of recent fabrication or motive to lie, the officer's statements at the preliminary hearing and in the arrest reports would have been inadmissible because they arose after the charge or motive would have come into existence.

3. Because the officer was the only witness for the State and the trial court specifically relied on the improperly-admitted statements in finding that the officer's testimony was credible, it was not clear that the verdict would have been the same had the statements not been admitted. Thus, the error was not harmless.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Randolph, 2014 IL App (1st) 113624 (No. 1-11-3624, 3/26/14)

1. A prior statement that is consistent with the declarant's testimony at trial constitutes hearsay, and is generally inadmissible to bolster credibility or rehabilitate a witness who has been impeached by a prior inconsistent statement. The basis for this prohibition is a concern that a witness's credibility might be unfairly enhanced merely because allegations have been repeated.

A prior consistent statement is admissible, however, to rebut an express or implied suggestion by the opposing party that a witness is motivated to testify falsely or has given recently fabricated testimony. A prior consistent statement cannot be admitted merely because a party seeks to discredit testimony as mistaken or inaccurate. Instead, prior consistent statements are admissible only if they disprove, explain, or qualify either the failure to speak or the inconsistent statement. A prior consistent statement which is admitted to rebut an allegation of motive or recent fabrication may be used solely to rehabilitate the witness and not as substantive evidence.

Admission of a prior consistent statement is reviewed for abuse of discretion. In addition, erroneous admission of such evidence may be harmless if the verdict would have been the same had the evidence not been admitted.

2. Where the defense cross-examined one of the arresting officers about the fact that some aspects of his testimony had been omitted from his police report, the trial court erred by allowing the prosecution to elicit testimony concerning portions of the police reports that were consistent with the officer's testimony. The Appellate Court questioned whether defense counsel raised a charge of recent fabrication by focusing the cross-examination on the report's omissions concerning defendant's conduct. The court concluded that such questions, standing alone, would not have permitted the State to introduce prior consistent statements because "if impeachment by omission justified the introduction of such hearsay, the exception would swallow the rule."

On the other hand, at one point defense counsel asked the officer whether a fact he was "remembering today" had been left out of his police report. The court acknowledged that this question implied recent fabrication and thus might invite the introduction of a prior consistent statement.

However, the statements elicited by the prosecution did not disprove, explain or qualify the inconsistencies between the report and the officer's trial testimony. Instead, the prosecutor merely asked the police officer to recite that his report contained some facts that were consistent with his testimony at trial. Such evidence merely reinforced the trial testimony without shedding light on why certain facts had been omitted from the police report in the first place. Thus, it should not have been admitted.

Furthermore, even where prior consistent statements are properly admitted, the jury should be instructed that the statements are admissible only to rebut a charge of recent fabrication. In addition, it is improper for the State to refer the prior consistent statements as substantive evidence in closing argument. In this case, there was no limiting instruction, and the State invited the jury to consider the prior statement substantively. Those errors, together with the fact that the State's case hinged entirely on the credibility of the police officers, "convince us that the result of the trial may well have been different" had the prior consistent statements not been admitted.

Defendant's conviction for possession of a controlled substance was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011)

1. Generally, statements made prior to trial are inadmissible for the purpose of corroborating trial testimony or rehabilitating a witness. Prior consistent statements may be admitted, however, in two circumstances: (1) where there is a charge that the witness has recently fabricated the testimony; or (2) where the witness has a motive to testify falsely. In either circumstance, the statement must have been made before

the alleged fabrication or motive to lie arose.

A note that the complaining witness wrote to her friend containing details consistent with her trial testimony was not admissible as a prior consistent statement. The defense did suggest that the complainant had a motive to lie, but that motive arose before the note was written.

2. Certain statements by the complainant are admissible in the prosecution of certain offenses perpetrated against a child under the age of 13, but the out-of-court statements must have been made before the complainant attained 13 years of age or within three months after the commission of the offense, whichever is later. 725 ILCS 5/115-10(b)(3). The note containing the statements at issue was written after the complainant turned 14, and did not qualify as a statement made within three months of the date of the commission of the offense, as the State never clearly established the date of the last sexual act between defendant and complainant.

People v. Ruback, 2013 IL App (3d) 110256 (No. 3-11-0256, 4/22/13)

Defendant's wife testified as a prosecution witness and denied that she participated with defendant in a sexual assault. The State introduced as substantive evidence her prior inconsistent statement to the police in which she implicated herself and defendant in the assault. The trial court excluded evidence that she denied the assault at the beginning of the same police interview.

1. Generally, the testimony of a witness may not be corroborated by the admission of a prior statement consistent with her trial testimony. There are two exceptions to this rule. A prior consistent statement may be introduced to rebut an express or implied charge that (1) the witness is motivated to testify falsely, or (2) her testimony is a recent fabrication. In those instances, evidence may be admitted that the witness made the same statement before the motive came into existence or before the time of the alleged fabrication. Even if the prior statement is inadmissible to rebut a charge that the witness was motivated to testify falsely because the prior statement was made during the time the improper motive is alleged to have existed, it can be admitted to rebut a charge of recent fabrication

The State implied that defendant's wife had a motive to falsify her exculpatory trial testimony because she was married to the defendant and had communicated with him a month prior to trial. Her prior consistent statement denying the sexual assault was not admissible to rebut that charge of motive to falsify, because the defense could not show that she did not have a motive to falsify when she initially denied the allegations. At the time of the police interview, she was married to the defendant and was herself a suspect.

Her initial statement to the police was also not admissible to rebut a charge of recent fabrication. The State made no charge of recent fabrication. The mere fact that a witness's testimony has been discredited or contradicted is insufficient to allow use of a prior consistent statement because such an expansion of the exception would swallow the rule. If the only requirement necessary to trigger the exception was the existence of an inconsistent statement prior to trial, the exception would negate the rule *in toto*.

2. Under the completeness doctrine, if one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the trier of fact. The remaining part is admissible only when in fairness it is required to prevent the trier of fact from receiving a misleading impression as to the nature of the introduced statement. The remaining part must concern what was said on the same subject at the same time.

Defendant's wife's statements from the beginning of the police interview denying the sexual assault were not admissible under the completeness doctrine because they "do not explain why she later denied the allegations, or qualify her later statements; they merely contradict the prior inconsistent statement admitted into evidence by the State."

Schmidt, J., specially concurred. There is only one exception to the rule against admission of prior consistent statements. A prior consistent statement is admissible to rebut a charge that a witness lied only if a motive to falsify did not exist at the time of the prior statement.

A reasonable juror would have concluded that the State did charge that defendant's wife's testimony

was a lie, but her prior statement was not admissible to rebut that charge because she had a motive to falsify at the time of the prior statement. The completeness doctrine challenge was forfeited because defendant did not argue it below. Even if error had occurred, it was harmless beyond a reasonable doubt.

Holdridge, J., specially concurred. The prior statement was admissible under the completeness doctrine. It was part of the same police interview, part of which the State introduced. The statement would have established the context of the statement that the jury did hear and would have qualified that statement in the context of the wife's overall credibility. But its exclusion was harmless beyond a reasonable doubt because the evidence of guilt was overwhelming and there was nothing in the entire statement that would have been of help to the defendant.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

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§19-17
Prior Statements of Identification

Note: 725 ILCS 5/115-12 allows certain out-of-court statements of identification to be used as substantive evidence where the declarant testifies and is subject to cross-examination concerning a statement identifying a person after perceiving him.

People v. Holveck, 141 Ill.2d 84, 565 N.E.2d 919 (1990) Testimony of an out-of-court identification of the defendant by a declarant is admissible under §115-12 even if the declarant does not make an in-court identification. The statute merely requires that the declarant testify at trial and be subject to cross-examination regarding the out-of-court statement of identification. See also, People v. Bowen, 298 Ill.App.3d 829, 699 N.E.2d 1117 (1st Dist. 1998) (**Holveck** overruled People v. Davis, 137 Ill.App.3d 769, 44 N.E.2d 1098 (1st Dist. 1985), which interpreted 725 ILCS 5/115-12 as permitting the admission of prior statements of identification only if those statements were consistent with the declarant's identification of the defendant at trial).

People v. Shum, 117 Ill.2d 317, 512 N.E.2d 1183 (1987) The State elicited testimony, from the victim and a police officer, that the victim said she had been shot by "Keith." The victim was previously acquainted with Keith and made an in-court identification of the defendant, who first name was Keith.

The Supreme Court held that the victim's statement was one of identification; thus, her testimony, and that of the police officer, was admissible.

People v. Tisdel, 201 Ill.2d 210, 775 N.E.2d 921 (2002) 1. Prior out-of-court statements may not be admitted to corroborate trial testimony on the same subject, unless: (1) the prior consistent statement is used to rebut a charge or inference that the witness is motivated to testify falsely or that his in-court testimony is a recent fabrication, or (2) the out-of-court statement is one of identification.

2. The court overruled People v. Hayes, 139 Ill.2d 89, 564 N.E.2d 803 (1990), which held that the trial court erred by admitting testimony that before identifying the defendant, a witness viewed pictures of other persons and failed to make an identification. Hayes held that such statements concern "non-identification" rather than "identification," and that the second exception to the general rule therefore did not apply.

Here, the court concluded that Hayes' limitation of the "statements of identification" exception was "flawed," and that the exception should be construed to include the "entire identification process," including "non-identification" procedures.

People v. Arman, 131 Ill.2d 115, 545 N.E.2d 658 (1989) It was improper for a police officer to testify that a witness identified the defendant's photo from the Chicago Police Department's identification files. When identification is a material issue, testimony relating the use of mug shots in an investigation may be introduced to show how a defendant was initially linked to the commission of an offense. However, mug shot evidence which informs the jury of the defendant's commission of unrelated criminal acts should not be admitted. By referring to the photograph as having come from the Police Department's identification files, the officer informed the jury that the person depicted had been previously arrested. See also, People v. Nelson, 193 Ill.2d 216, 737 N.E.2d 632 (2000) (State committed reversible error by eliciting officer's testimony that the complainant was shown several sets of mug shots portraying the defendant; the jury was informed, "in a not-so-subtle manner," that mug shots had been taken on three different occasions that were far enough apart for defendant's appearance to change, and that the most recent photograph was taken near the time of the offenses that were being prosecuted).

People v. Yates, 98 Ill.2d 502, 456 N.E.2d 1369 (1983) To establish a sufficient foundation to use a police artist sketch to impeach identification testimony, the person who prepared the sketch must testify that the identification witness previously adopted and confirmed the sketch as an accurate drawing. "We deem it advisable to require unequivocal testimony from the police artist that the drawing not only was a representation prepared at the direction of the witness," but that the witness, "after having had the opportunity to view the completed sketch, adopted it as an accurate portrayal of the suspect." The Court also noted that the foundation is satisfied even if the identification witness denies that he agreed to the sketch's accuracy.

People v. Colon, 162 Ill.2d 23, 642 N.E.2d 118 (1994) Although the trial court may have erred by admitting evidence that two persons who did not testify had identified defendant in a lineup, the error was harmless where defendant was positively identified by two other witnesses and there was a substantial amount of corroboration. Hearsay testimony of an out-of-court identification is reversible error only if it serves as a substitute for a courtroom identification or is used to strengthen or corroborate a weak identification.

People v. Beals, 162 Ill.2d 789, 643 N.E.2d 789 (1994) Although a general rule of evidence is that a witness may not testify regarding out-of-court statements that corroborate statements made by a witness or third party, that general rule does not apply to statements of identification. Thus, where a witness who previously identified the offender is available for cross-examination, a third person's corroborative testimony that he heard or saw the identification is reliable and admissible.

People v. Lewis, 223 Ill.2d 393, 860 N.E.2d 299 (2006) 1. 725 ILCS 5/115-12 creates a hearsay exception for statements of identification where the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement. Resolving a conflict between appellate districts, the court concluded that the plain language of §115-12 does not require that the declarant testify about the statement of identification before a third party testifies about it.

2. The declarant was "available" for cross-examination although she was not questioned about the statement on direct examination. Generally, a witness is subject to cross-examination when he or she takes the witness stand, is placed under oath, and responds willingly to questions. Although the scope of cross-examination is generally limited to the subject matter of direct examination and matters affecting credibility, this limitation is construed liberally to permit inquiry on subjects which tend to explain, discredit or destroy the witness's direct testimony. Where the principal issue is identification, the defendant is given wide latitude to question the identifying witness on matters explaining or discrediting the identification.

Because defendant did not attempt to cross-examine the declarant on her out-of-court statement, he could not claim that he was prohibited from doing so by the rule limiting the scope of cross-examination. "[H]ad [the trial court] been given the opportunity to apply our case law, defendant should have been allowed

to question [the declarant] on her out-of-court identification because that subject is directly relevant to challenging the identification made from the witness stand."

In addition, the defendant could have recalled the declarant after the third party testified about the identification. Although recalling a witness is left to the discretion of the trial court, it would be an abuse of discretion to deny a request to recall a witness if the defendant would be deprived of an opportunity to present evidence crucial to his defense.

3. Although the post-trial motion stated only that hearsay had been improperly admitted, without identifying the hearsay testimony or the name of the witness involved, the court concluded that the issue was sufficiently preserved for review. The trial court clearly understood that defendant was challenging the admissibility of the evidence under 730 ILCS 5/115-12. In addition, only two hearsay objections, both of which concerned the same testimony, were raised at trial. See also, People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005) (declarant is "available" for cross-examination, both for purposes of §115-12 and under Crawford v. Washington, if he or she is "available at trial, under oath, and willing to testify"; the declarant is not "unavailable" for cross-examination merely because he denies making the out-of-court statement).

People v. Arteman, 150 Ill.App.3d 750, 502 N.E.2d 85 (4th Dist. 1986) A State's witness who identified the defendant in court was properly allowed to testify that he recognized the defendant in the hallway earlier that day, and that he told this to the prosecutor.

People v. Gonzalez, 292 Ill.App.3d 280, 685 N.E.2d 661 (2d Dist. 1997) Noting a conflict in authority, the Appellate Court concluded that §115-12 was intended to admit out-of-court statements of identification even where the declarant could not identify the defendant at trial. Although precedent on the question is conflicting, "sound public policy" supports the practice of admitting reliable identifications made at the time of an offense, even where the identification cannot be repeated at trial.

People v. Armstead, 322 Ill.App.3d 1, 748 N.E.2d 691 (1st Dist. 2001) The State erroneously introduced hearsay statements by a non-testifying witness who allegedly told police that defendant was the shooter. Admission of hearsay identification testimony constitutes plain error where it serves as a substitute for a courtroom identification or is used to strengthen or corroborate a weak identification. Because the substance of the hearsay clearly implicated defendant as the shooter, and the evidence was close, the outcome of the trial could have been affected.

People v. Crump, 319 Ill.App.3d 538, 745 N.E.2d 692 (3d Dist. 2001) The trial judge erred by admitting the investigating officer's opinion concerning probable cause to believe defendant committed the offense. The court rejected the argument that the officer's testimony was admissible under 725 ILCS 5/115-12, which authorizes a hearsay exception for statements of identification where the declarant testifies at trial and is subject to cross-examination.

Section 115-12 creates an exception to the hearsay rule - the State conceded that the officer's statement was not hearsay. Furthermore, had the statement been hearsay, §115-12 would have been inapplicable because the statement did not concern identification of a person.

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People v. Whitfield, 2014 IL App (1st) 123135 (No. 1-12-3135, 12/12/14)

Under 725 ILCS 5/115-12, an out-of-court statement of identification is an exception to the hearsay rule if the witness testifies at trial and is subject to cross-examination about the statement. Here, the witness testified that he witnessed the shooting but was unable to identify defendant as the perpetrator. The State introduced the witness's out-of-court statement that defendant was the shooter.

Defendant argued that the out-of-court statement was inadmissible because the witness did not make an in-court identification of defendant and testified that he had never made such an identification. Defendant relied on **People v. Stackhouse**, 354 Ill. App. 3d 265 (1st Dist., 2004) for the proposition that an out-of-court statement of identification under 115-12 is not admissible when the witness unequivocally denies at trial that he made an out-of-court identification.

The court declined to follow **Stackhouse**, and instead held that there is no requirement in 115-12 that the witness confirm in his testimony that he made an identification. Thus even though the witness in this case denied identifying defendant as the shooter, his out-of-court statement of identification was substantively admissible under 115-12.

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§19-18
Testimony From Prior Proceedings

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 1. Where "testimonial" hearsay is to be offered into evidence at a criminal trial, the Sixth Amendment requires a showing that: (1)the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant concerning the testimony. Ohio v. Roberts, 438 U.S. 56 (1980), erred by suggesting that the Confrontation Clause can be satisfied by the trial court's finding that testimonial hearsay is reliable; although the Confrontation Clause is intended to insure that evidence is reliable, such reliability is assessed in only one way - "by testing in the crucible of cross-examination."

2. "Testimonial" statements include, at a minium, testimony at a preliminary hearing, before a grand jury or at a previous trial, and statements made in response to police questioning. Equivalent statements (such as affidavits and depositions), as well as statements which a reasonable declarant would believe might be used by the prosecution at trial, may also be "testimonial."

California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) Where defendant was represented by counsel and had an opportunity to cross-examine the witness at preliminary hearing, the preliminary hearing testimony was admissible at trial when the witness became unavailable.

People v. Patterson, 217 Ill.2d 407, 841 N.E.2d 889 (2005) 1. Crawford v. Washington, 541 U.S. 36 (2004), was violated when the grand jury testimony of a witness who refused to testify at defendant's trial was read to the jury. The testimony was admitted under 725 ILCS 5/115-10.2, which authorizes the admission of hearsay statements by a declarant who refuses to testify despite a court order. Such testimony can be admitted only if: (1) the hearsay is offered on a material point, (2) the hearsay is more probative on that point than any other evidence which is reasonably available, (3) the hearsay has equivalent circumstantial guarantees of trustworthiness as traditional hearsay exceptions, and (4) the interests of justice will be served by admitting the statement.

2. However, Crawford error is subject to harmless error analysis. The court rejected the argument that violations of the Confrontation Clause constitute structural error that is not subject to the harmless error rule.

Here, the error was harmless beyond a reasonable doubt. The error could not have contributed to the conviction where the grand jury testimony was consistent with the defendant's testimony on several points, there was evidence to corroborate the grand jury testimony concerning points on which it contradicted defendant's testimony, and the evidence of guilt was overwhelming. The court also rejected defendant's argument that he would not have testified had the grand jury testimony been excluded, finding that such an assertion was mere speculation.

People v. Sutherland, 223 Ill.2d 187, 860 N.E.2d 178 (2006) 1. Testimony from a prior hearing is admissible at trial if the witness is unavailable and the defendant had ample opportunity to cross-examine at the prior hearing. Whether there was ample opportunity to cross-examine is decided on a case-by-case basis. The trial court's ruling on the admissibility of prior testimony is reviewed for abuse of discretion.

2. An opportunity to cross-examine is meaningful and adequate where the motive and focus of the cross-examination at the initial proceeding is the same or similar to that which would guide cross-examination at the subsequent proceeding. The court concluded that where a crime scene technician who was deceased at the time of defendant's second trial had testified at the first trial, the motive and focus of cross-examination would have been the same at both trials. Thus, the trial court did not err by admitting the testimony from the first trial.

The court rejected the argument that the testimony should have been excluded because defense counsel failed to conduct adequate cross-examination at the first trial; defendant "cites no case law holding that prior testimony of a deceased witness will only be admitted where ample opportunity to cross-examine existed and such opportunity was fully and effectively utilized."

The court also rejected the argument that defendant lacked an ample opportunity to cross-examine at the first trial because that conviction was reversed due to ineffective assistance of counsel. "Two specific instances of ineffective assistance [relating to investigation and presentation of evidence] do not render prior counsel's conduct throughout the trial deficient."

People v. Horton, 65 Ill.2d 413, 358 N.E.2d 1121 (1976) The testimony of a witness at a preliminary hearing is admissible at trial when the witness is unavailable, without fault on the part of the State, and ample opportunity to cross-examine existed at the preliminary hearing. Whether there was "ample opportunity to cross-examine" at the preliminary hearing must be decided upon the circumstances of each case. "Ample opportunity to cross-examine" means an opportunity to "effectively" cross-examine; merely providing an opportunity to cross-examine at the preliminary hearing is not per se "adequate" in light of the absence of discovery and the limited nature of the evidence which may be introduced at a preliminary hearing. See also, People v. Rice, 166 Ill.2d 35, 651 N.E.2d 1083 (1995) (State did not have an adequate opportunity to cross-examine declarant at suppression hearing in the declarant's case where the issues involved at that hearing were substantially different from those involved when the declarant refused to testify at defendant's trial).

People v. Wilkerson, 123 Ill.App.3d 527, 463 N.E.2d 139 (4th Dist. 1984) A witness's previous testimony may be admitted into evidence at a trial, as an exception to the hearsay rule, if the witness has become unavailable and the current opponent of the evidence had the opportunity to cross-examine the witness at the earlier hearing.

In addition, a defendant's testimony at trial may properly be introduced against him at a later trial.

People v. Tokich, 314 Ill.App.3d 1070, 734 N.E.2d 117 (4th Dist. 2000) Supreme Court Rule 414(a) provides that if it appears "that the deposition of any person other than the defendant is necessary for the preservation of relevant testimony because of the substantial possibility it would be unavailable at the time of hearing or trial," the court may order the taking of a deposition "for use as evidence at a hearing or trial." The trial judge did not err by allowing the State to present the videotaped deposition of a detective who, at the time of defendant's trial, was in China to adopt a child.

1. Rule 414 was intended to strike a balance between the need to preserve evidence and a criminal defendant's right to have witnesses testify before the jury. Live testimony should be the rule, and exceptions are allowed only under special circumstances.

2. The trial court did not abuse its discretion by admitting the videotaped deposition - the detective's absence was not merely for his own convenience, and he would have lost the opportunity to adopt the child had he changed his travel plans in order to attend defendant's trial.

People v. Brown, 374 Ill.App.3d 726, 870 N.E.2d 1033 (1st Dist. 2007) 1. 725 ILCS 5/115-10.4 provides that certain hearsay statements may be admitted if there are sufficient circumstantial indicia of trustworthiness, the statements were made under oath at a trial or other proceeding, and the declarant is deceased at the time of trial. Under §115-10.4, trustworthiness is determined by several factors, including the adequacy of the defense's opportunity for cross-examination. Under Illinois case law, adequate cross-examination occurs where the motive and focus of the cross-examination at the previous proceeding is the same or similar to that which exists when the statement is admitted at trial.

2. Where the prosecutor called a witness at a bond revocation hearing and elicited broad testimony concerning the circumstances of the offense, defense counsel's motive to cross-examine was not the same as it would have been when the State sought to introduce the testimony at a trial for aggravated kidnapping and battery. "[T]he issues at the bond hearing differed significantly from the issues at trial."

3. The court rejected the argument that the trial judge "changed the motive for cross-examination at the bond hearing" where, in response to the prosecutor's question whether counsel was "waiving his right to conduct a meaningful cross," the judge directed defense counsel to recall the witness and conduct a full cross-examination. By compelling defense counsel to recall and cross-examine the witness, the trial court transformed the bond hearing into an evidentiary disposition without compliance with Supreme Court Rules, which mandate 21 days notice and a showing of "certain specified grounds for the exceptional procedure." The "attempt to convert the bond hearing to an evidentiary deposition did not change defense counsel's basic motivation at the hearing," because the issues at the bond hearing were substantially different than those which would arise at trial. Because counsel did not have an adequate opportunity for cross-examination, the testimony did not have sufficient guarantees of trustworthiness to make it admissible under §115-10.4.

People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2d Dist. 2006) Testimony which a deceased witness gave before a grand jury should have been excluded under Crawford. At the time of trial, 725 ILCS 5/115-10.4 provided that prior testimony by a deceased witness is admissible if the interests of justice will be served and the statement: (1) has guarantees of trustworthiness equivalent to those accompanying statements which qualify for hearsay exceptions, (2) is offered as evidence of a material fact, and (3) is more probative on the point for which it is offered than any other evidence which can reasonably be obtained. (P.A. 94-53 (eff. 6/17/05) amended §115-10.4 to require that the prior statement must have been subject to cross-examination.) Because grand jury testimony is clearly "testimonial," the statements should have been excluded because defendant did not have an opportunity for cross-examination.

However, that in view of the overwhelming evidence of guilt and the cumulative nature of the hearsay, the Crawford error was harmless beyond a reasonable doubt.

People v. Melchor, 376 Ill.App.3d 444, 875 N.E.2d 1261 (1st Dist. 2007) 1. At the time of defendant's trial, 725 ILCS 5/115-10.4 provided a statutory exception to the hearsay rule for the prior testimony of a deceased

witness where the testimony had circumstantial guarantees of trustworthiness, was offered as evidence of a material fact, and was more probative on the point for which it is offered than any other evidence which the proponent could procure through reasonable efforts, if the general purposes of the statute and the interests of justice would be served by admitting the evidence.

After defendant's trial, the legislature amended the statute to add the requirement that the testimony had been "subject to cross-examination by the adverse party." Although the amendment did not apply retroactively to defendant's trial, the court found that even before the amendment, the presence or absence of cross-examination was a factor in determining whether previous testimony was reliable.

2. The court concluded that the trial judge did not err by finding that the first two requirements - materiality and probative value - were satisfied where the State sought to introduce the prior testimony of a deceased witness. (The witness testified at a co-defendant's trial, but died of a drug overdose while defendant was a fugitive). The deceased witness was the only eyewitness to identify defendant as the shooter, and the only other testimony that defendant had been involved in the offense was the co-defendant's testimony, which was found to be insufficiently untrustworthy to be admitted at defendant's trial under §115-10.4.

The court concluded, however, that the testimony did not show sufficient circumstantial guarantees of trustworthiness to justify its admission. Trustworthiness is based on the totality of the circumstances; the testimony in question could not be deemed reliable in light of the absence of any cross-examination by the defendant or a party aligned with his interests, the failure of the co-defendant's attorney to ask any questions concerning several matters relevant to the identification, the witness's extensive criminal record, the possibility that he may have hoped for leniency from the State on a pending charge, and the witness's admission that he consumed alcohol before he witnessed the shooting.

People v. Torres, 2012 IL 111302 (No. 111302, 2/2/12)

1. Evidentiary and constitutional requirements for the admission of former testimony are the unavailability of the witness at trial and an adequate opportunity to effectively cross-examine the witness at the prior hearing. The proponent of the evidence bears the burden of proving the necessary elements for admissibility.

Unavailability is a narrow concept, subject to a rigorous standard. A witness is not unavailable unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The law does not require the doing of a futile act. But if there is a possibility, albeit remote, that affirmative measures might produce the witness, the obligation of good faith may demand their effectuation. The lengths to which the prosecution must go to produce a witness is a question of reasonableness.

In considering whether there was a prior adequate opportunity to cross-examine the witness, a court should look to whether the motive and focus of the examination conducted at the prior hearing was the same or similar to that which would have been conducted at trial. The motive-and-focus test is not the sole guide to resolution of the question of the adequacy of the prior opportunity to cross-examine, however.

Two other factors are also relevant. Defendant must be afforded the freedom to fully question the witness regarding critical areas of observation and recall, to test him for any bias and prejudice, and to otherwise probe for matters affecting his credibility. What counsel knows while conducting the cross-examination may also impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing. Counsel's opportunity to cross-examine may not have been adequate if the hearing was conducted without the benefit of discovery.

2. The State sought to admit at defendant's trial the preliminary hearing testimony of an occurrence witness. The State alleged that the witness was unavailable because he had been deported to Mexico more than 20 years prior. Simply establishing the fact of deportation may not be enough to establish the witness's

unavailability. But since the parties agreed that the witness had been deported, and the defense conceded that the requirement of unavailability had been met, the court concluded that the defense forfeited any challenge to the unavailability of the declarant.

Defendant had not been afforded an adequate opportunity to cross-examine the witness at the preliminary hearing, however, and therefore the former testimony was inadmissible. At that hearing, counsel was not privy to inconsistent statements that the witness had given to the police that might have been used to confront the witness and induce further changes in the witness's version of the events. Counsel also was unaware of the status of the witness as an alien, or the circumstances of his departure from the United States, all of which might have been relevant to a motive of the witness to curry favor with the State.

The preliminary hearing court also placed restrictions—overt and covert—on defense counsel's cross-examination. Remarks that the court made at the start of the hearing evinced that the court was not enthusiastic about proceeding immediately with the hearing. Two objections that the court sustained when defense counsel attempted to probe for possible bias and prejudice of the witness also appeared to send "the message to counsel to wrap it up, and counsel did just that. We think it clear from the record that counsel would have done more with the witness at the preliminary hearing if he had felt free to do so."

The error in the admission of the preliminary hearing testimony of the witness was not harmless as his testimony was the only trial evidence placing defendant inside the bar where the shooting occurred at or near the time of the shooting.

People v. Hood, 2014 IL App (1st) 113534 (No. 1-11-3534, 10/6/14)

1. The right to confront witnesses includes the right to view and hear the witness and to help defense counsel with cross-examination. Although the right to confrontation, like all constitutional rights, may be waived, there is a presumption against waiver, and any waiver must be a knowing, voluntary act with awareness of the consequences. For any waiver to be effective, it must be clearly established that there was an intentional relinquishment of a known right.

2. Here the State conducted an evidence deposition pursuant to Illinois Supreme Court Rule 414, which allows a party to take a deposition if there is a substantial possibility that the witness will not be available to testify at trial. During the deposition, the witness identified defendant as the offender. The prosecutor and defense counsel, but not defendant, were present for the video deposition, and defense counsel cross-examined the witness.

There was no waiver of defendant's confrontation right on the day of the deposition, nor during the next six status hearings. Finally, at a status hearing held over six months after the deposition, the State stated on the record that it had initially requested that defendant be present for the deposition but that defense counsel had waived his presence. Defense counsel confirmed that she had waived defendant's appearance. The video deposition was introduced as evidence during defendant's trial. Defendant made no objection at trial to his absence from the deposition.

3. On appeal, defendant argued that he had been denied his right to confrontation by not being present at the deposition. Although defense counsel stated that she had waived defendant's presence, the record did not show that defendant personally and knowingly waived his right to confrontation.

The Appellate Court agreed. The record contained no waiver of defendant's rights prior to or during the deposition. Additionally, there was no discussion of a waiver during the six status hearings held over a six-month period following the deposition. It was not until over six months later that the parties referred to an alleged off-the-record waiver by defense counsel of defendant's presence at the deposition. The record thus failed to show that defendant knowingly and voluntarily waived his right to confrontation.

4. The court further held that defendant did not properly waive his confrontation rights under Rule 414. Rule 414(e) provides that defendant and defense counsel may waive defendant's confrontation rights at a deposition in a written waiver. The court held that it was error to admit the deposition without a written waiver.

5. Although defendant failed to raise either issue below, the court reached the issues under the

second prong of the plain error doctrine. Under this prong, a reviewing court may review procedurally defaulted claims where the error is so serious that defendant was denied a substantial right and thus a fair trial. Prejudice is presumed under the second prong due to the importance of the right involved.

The right to confront witnesses is a substantial constitutional right. Both errors involved the right to confront witnesses and thus they both concerned a substantial right reviewable under the second prong of plain error.

Defendant's conviction was reversed and the case remanded for a new trial.

6. The dissent would not have found a violation of the right to confrontation where defense counsel was present and cross-examined the witness. The dissent also would not have found that any error which might have occurred fell within the second prong of plain error. The second prong only applies to structural errors, a very limited class of cases which does not include defendant's right to be present at a deposition.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)

People v. Lard, 2013 IL App (1st) 110836 (No. 1-11-0836, 6/28/13)

1. The confrontation clause authorizes the admission of testimony from a prior proceeding where the witness is unavailable at trial and the defense had an adequate opportunity to effectively cross-examine at the prior hearing. An adequate opportunity for effective cross-examination exists where the motive and focus of the cross-examination at the time of the initial proceeding are the same as or similar to the motive and focus during the subsequent proceeding.

In addition, 725 ILCS 5/115-10.4 authorizes the admission of prior statements where the witness is deceased at the time of trial. Factors to be considered in determining whether to admit prior testimony under §115-10.4 include the materiality, probative value, and trustworthiness of the prior testimony, the interests of justice, and the prior opportunity for cross-examination. Here, defendant claimed that the opportunity for cross-examination at a preliminary hearing was inadequate to justify admission of a deceased police officer's testimony under either §115-10.4 or the confrontation clause.

2. The confrontation clause does not require that counsel have an opportunity at the preliminary hearing to ask about every fact that might be relevant at trial. Thus, the opportunity to cross-examine may have been adequate at the earlier hearing even where discovery materials disclose new information which is relevant to cross-examination. What matters is that at the preliminary hearing defense counsel had a "fair opportunity" to inquire into the witness's observation, interest, bias, prejudice, and motive. Furthermore, to the extent that a witness at the preliminary hearing testifies to facts showing probable cause to believe that the defendant committed an offense, the defense has a motive to test the witness's credibility, powers of observation, and ability to recall.

Because defense counsel cross-examined the officer at the preliminary hearing and asked about his powers of observation and recall, just as would have been done at trial, the court concluded that the preliminary hearing testimony was properly admitted. Although at trial the defense had access to discovery that had not been available at the prior hearing, defendant did not show how he would have benefitted from additional cross-examination based on information gleaned from the discovery.

The court also rejected the argument that cross-examination was limited at the preliminary hearing because defense counsel represented both defendant and a co-defendant. Defendant presented no evidence that the co-defendants had antagonistic defenses or that counsel was concerned that questioning which would have benefitted one defendant would have hurt the other.

Defendant's conviction for residential burglary was affirmed.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Starks, 2012 IL App (2d) 110273 (No. 2-11-0273, 2/14/12)

The trial court did not abuse its discretion by excluding the prior testimony of a deceased complainant. The Appellate Court held that the prior testimony did not meet the requirements of 725 ILCS 5/115-10.4, which creates an exception to the hearsay rule for the admission of the certain prior statements

of a deceased witness if the statements were made under oath and were "subject to cross-examination by the adverse party," or Illinois Rule of Evidence 804(b)(1), which provides that prior testimony may be admitted if the opposing party "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Illinois precedent provides that in determining whether to admit the prior testimony of a deceased witness under §115-10.4, the court must consider materiality, probative value, trustworthiness, the interests of justice, and the prior opportunity for cross-examination. Furthermore, under Rule of Evidence 804(b)(1), a prior opportunity to cross-examine permits the admission of prior testimony if the motive and focus of the cross-examination at the initial proceeding were the same or similar to that which guides cross-examination during the subsequent proceedings.

At the original trial for aggravated criminal sexual assault, aggravated battery, and unlawful restraint, the complainant testified that she had been raped by the defendant. Serology testing on the complainant's underwear and vaginal swab disclosed the presence of semen, and the State's expert testified that defendant could not be excluded as the source. However, two witnesses stated that the complainant had told them that defendant did not rape her; one of the witnesses quoted the complainant as stating that she claimed to have been sexually assaulted because defendant was "going to pay for beating her up."

Defendant was convicted and sentenced to terms totaling 60 years. During post-conviction proceedings, new DNA testing excluded defendant as the source of the semen. In addition, the new testing showed that despite the State expert's testimony at the original trial, the earlier testing excluded defendant as the source of the semen. A new trial was ordered as a result of the post-conviction proceedings.

At the new trial, the State moved to admit the prior testimony of the complainant, who had died since the first trial. The trial court denied the motion.

1. The Appellate Court held that defendant did not have an adequate opportunity and motive to cross-examine the complainant at the original trial. Not only was defendant falsely informed that he could not be excluded as the source of the semen, but due to the erroneous application of the rape shield statute he was not permitted to ask the complainant whether she had sexual intercourse with anyone else around the time of the alleged offense. The court concluded that the inability to question the complainant about her prior sexual contacts and the exculpatory scientific evidence "precluded defendant from exposing facts from which the fact finder could have drawn inferences about complainant's reliability and credibility."

2. The court rejected the State's argument that if the jury found that defendant did not have sexual intercourse with the complainant, the prior testimony would be relevant to whether the defendant committed attempted aggravated criminal sexual assault. The court found that the inability to cross-examine the complainant about evidence concerning her credibility affected all of the charges, not merely those relating to sexual intercourse.

The court found that the absence of an adequate opportunity and motive to cross-examine the complainant precludes the admission of the prior testimony under either §115-10.4 or Illinois Rule of Evidence 804(b)(1). The trial court's order barring the admission of the prior testimony was affirmed.

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§19-19
Statements Against Penal Interest

Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) 1. Whether based on due process or the compulsory process and confrontation clauses of the Sixth Amendment, the federal constitution guarantees a meaningful opportunity to present a complete defense. This right is violated by a rule which infringes on the ability to present a defense and which is arbitrary or disproportionate to its intended purpose. However, the Federal Constitution does permit rules of evidence which exclude evidence on the ground that the probative value is outweighed by other factors such as unfair prejudice, confusion of

the issues, or potential to mislead a jury.

2. Under a rule adopted by the South Carolina Supreme Court, defense evidence showing that someone other than the defendant committed the crime is admissible if it raises a reasonable inference of the defendant's innocence. Such evidence is inadmissible, however, if it merely casts suspicion on another or raises a "conjectural inference" of a third party's guilt. In this case, the South Carolina Supreme Court interpreted the rule as precluding defense evidence of third party guilt if the State has strong forensic evidence of the defendant's guilt.

The Supreme Court concluded that the South Carolina rule violates the constitutional right to present a defense, because it excludes evidence of third party guilt based solely on the strength of the prosecution's case, even if the defense evidence has great probative value and does not cause harassment, prejudice or confusion of the issues. In addition, the court criticized the South Carolina rule because it took the prosecution's evidence at face value, without examining credibility or reliability.

The court stressed that the South Carolina rule was not rationally related to its intended purpose - to focus the trial on central issues by excluding evidence which has only a weak logical connection to those issues. "The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty."

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) A State hearsay rule that did not recognize a penal interest exception could not be applied mechanistically to exclude evidence that a third party had confessed to the crime. The third party confession was made under circumstances that "provided considerable assurance" of its reliability, was made spontaneously to a close acquaintance shortly after the crime and was corroborated by other evidence. In addition, the statements were unquestionably against the declarant's interests, and the declarant was under oath in court and could have been cross-examined.

Williamson v. U.S., 512 U.S. 594, 129 L.Ed.2d 476, 114 S.Ct. 2431 (1994) The declaration against interest exception (Federal Rule of Evidence 804(b)(3)) allows admission of only that portion of a statement that is actually against the declarant's interest. The exception is based on the assumption that inculpatory statements are reliable; non-inculpatory statements are not reliable merely because they are made "within a broader narrative that is generally self-inculpatory."

Because the trial court erroneously admitted portions of an accomplice's statement that implicated only the defendant (and not the accomplice), the Supreme Court remanded the cause for a new trial.

People v. Tenney, 205 Ill.2d 411, 793 N.E.2d 571 (2002) 1. Due to concerns about reliability, unsworn, out-of-court declarations that the declarant committed the crime for which the defendant is on trial are generally inadmissible, even though such statements are against the declarant's penal interest. Where such hearsay bears persuasive assurances of trustworthiness and is critical to the defense, however, due process may require that it be admitted.

Under Chambers v. Mississippi, 410 U.S. 284 (1973), four factors are considered to determine whether a declaration against penal interest is sufficiently reliable to be admitted on due process grounds: (1) whether the statement was made spontaneously to a close acquaintance shortly after the crime; (2) whether the statement was corroborated by other evidence; (3) whether the statement is self-incriminating and against the declarant's interest; and (4) whether there is adequate opportunity to cross-examine the declarant. The Chambers factors are merely guidelines to admissibility; all four factors need not be present to justify a finding that a statement is reliable.

2. A statement exculpating the defendant and admitting the declarant's participation in the offense was sufficiently reliable to be admitted. First, the declarant's statement was self-incriminating and against his penal interest; because the declarant said he participated in the home invasion with which defendant was

charged, "[n]o credible argument could be made that making that declaration was not against his penal interest."

The second **Chambers** factor - whether the statement was corroborated - was also satisfied. The court stated that where the sufficiency of the corroborating evidence is a close question, the judge should admit the statement and rely on the jury to correct any prejudicial impact.

Two **Chambers** factors - that the statement was made spontaneously to a close acquaintance shortly after the offense and that the declarant was available for cross-examination - were not present. The State must have regarded the statement as reliable, however, because it introduced it at a trial of the declarant. "[I]f a confession is sturdy enough for the State to use in its own case - if it is the sort of evidence that prosecutors regularly use against defendants - then defendants are entitled to use it for their own purposes." Compare People v. Williams, 193 Ill.2d 1, 737 N.E.2d 230 (2000) (statement identifying shooter was not sufficiently reliable to be admitted where it exculpated the declarant of primary involvement in the offense and was uncorroborated; in addition, the declarant had previously identified two persons who were exonerated by police).

People v. Bowel, 111 Ill.2d 58, 488 N.E.2d 995 (1986) At defendant's trial for robbery, he called his father and a friend, who both testified that a man named Cooley told them that he (and not the defendant) had committed the offense. The defendant also sought to call a man named Howard as a witness. Howard would have testified that he overheard a conversation between Cooley and the defendant, during which Cooley admitted committing the offense. The trial judge refused to allow Howard's testimony.

After reviewing the law concerning the introduction of statements against penal interest, the court held that the trial court did not abuse its discretion.

1. In Chambers v. Mississippi, 410 U.S. 284 (1973), the statement against penal interest exception to the hearsay rule enabled the defendant to introduce evidence of a third party's confession to the crime with which the defendant was charged. In Chambers, the third party confession had "sufficient indicia of trustworthiness" because: (1) it was made spontaneously to a close acquaintance shortly after the crime, (2) it was corroborated by other evidence, (3) it was self-incriminating and against the declarant's interest, and (4) there was adequate opportunity for cross-examination.

The Supreme Court rejected the State's argument that all of the factors set out in Chambers are required for a statement against penal interest to be admitted. The **Chambers** factors are to be regarded simply as indicia of trustworthiness, not as requirements for admission. The question to be considered "is whether the declaration was made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of trustworthiness."

The determination of reliability is to be made by the trial judge, whose ruling should be reversed only upon a clear showing of abuse of discretion.

2. Here, the trial court did not abuse its discretion by excluding Howard's testimony. The Court pointed to several factors: (1) Howard was not a party to the conversation, but only overheard it, (2) Howard was walking back and forth during the conversation, and it was not clear how far away he was or whether he heard all or only part of the conversation, and (3) the declarant could not be found, and thus was not available for cross-examination by the State. The Court also noted that Howard's testimony would have been substantially the same as that of the two defense witnesses who were allowed to testify about statements Cooley made to them.

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) At defendant's trial for kidnapping, rape and murder, the defense introduced several statements by Brian Dugan, who had confessed to committing the crimes with which defendant was charged. However, the trial court refused to admit details of several other crimes to which Dugan also confessed. Defendant claimed that the details of the statements would have shown that the offense here fit Dugan's modus operandi and that Dugan's confession to this offense was reliable.

On appeal, defendant claimed that the details of the other crimes should have been admitted not only

to show modus operandi, but also to corroborate Dugan's claim that he had acted alone in committing this offense. In response, the State claimed that Dugan's statements were erroneously admitted because they were not against his penal interest, and that the admissibility of corroborating evidence was therefore irrelevant.

The Supreme Court held that Dugan's statements to these offenses were against Dugan's penal interest, and therefore were not inadmissible hearsay. Although the statements were made during plea negotiations and on the condition they could not be used against Dugan, the information conveyed could have led the police to admissible evidence. Thus, the statements, even if not admissible themselves, were against Dugan's penal interests because they subjected him to the possibility of prosecution and a death sentence.

In addition, the fact that Dugan made the statements during plea negotiations did not mean that they ceased to be against his penal interest, but only that they could not be introduced in a prosecution against him.

People v. Rice, 166 Ill.2d 35, 651 N.E.2d 1083 (1995) The co-defendant's testimony at his suppression hearing, in which he admitted that he alone possessed the substance that defendant was charged with possessing, was not admissible as a statement against penal interest. The Court declined to decide whether the admissibility of declarations against penal interest should be decided under Federal Rule of Evidence 804 or under Chambers v. Mississippi, 410 U.S. 284 (1973). Both Rule 804 and **Chambers** require that the circumstances surrounding the statement establish reliability; the Court concluded even if all the other requirements for admission were satisfied, there were insufficient indicia of reliability to justify admission of the statements.

The Court stressed that the co-defendant's testimony was not a spontaneous statement and was not subjected to contemporaneous cross-examination on the points relating to the defendant. In addition, the witness had a motive to testify falsely to obtain a favorable ruling on his motion to suppress, and there was absolutely no evidence to corroborate his claims exculpating the defendant. Under these circumstances, there was insufficient evidence of reliability to justify admission under either the Federal Rules of Evidence or **Chambers**.

People v. Tate, 87 Ill.2d 134, 429 N.E.2d 470 (1981) Declarations against penal interest are admissible only if there are objective indicia of the trustworthiness of the declarations. Such indicia of reliability were not present where, although the alleged statement was self-incriminating and there was an opportunity for cross-examination, the alleged statement was two months after the crime rather than shortly thereafter. In addition, there was no independent corroboration; although the declarant confirmed that a conversation took place with the defense witness, he did not corroborate the contents of the conversation.

People v. Thomas, 171 Ill.2d 207, 664 N.E.2d 76 (1996) The trial court did not err by excluding defendant's court-reported, post-arrest statement, in which he admitted firing the weapon that killed the decedent but claimed there were extenuating circumstances. The Court noted that the only **Chambers** factor present was that the statement was against the declarant's interest. On the other hand, the statement was made to authorities rather than to a close acquaintance, there was no corroboration of defendant's claims of self-defense or involuntary manslaughter, and the State had no opportunity for cross-examination (since the statement was not made under oath and was not part of an adversarial trial process). But see, People v. Kokoraleis, 149 Ill.App.3d 1000, 501 N.E.2d 207 (2d Dist. 1986) (statements made to police officers while declarants were in custody had assurance of reliability; statements were made to law enforcement personnel, were corroborated by other evidence, and were incriminatory; in addition, neither declarant stood to benefit by disclosing his role in the offenses, and both "must have been aware of the possibility that disclosure would lead to criminal prosecution"; although neither declarant was available to testify, finding of reliability does not require all four Chambers factors).

People v. Gray, 378 Ill.App.3d 701, 883 N.E.2d 546 (4th Dist. 2008) A codefendant's confession was

sufficiently reliable to be admitted at defendant's trial.

1. Although the State had no opportunity for cross-examination in light of the co-defendant's refusal to testify when called at defendant's trial, the police were able to thoroughly question the co-defendant when he gave the statement exculpating the defendant. In addition, the State chose to try defendant first, although the co-defendant's statement would have been admissible against him whether he was tried first or second, and the co-defendant testified at his own trial, meaning that his testimony would have been admissible at defendant's trial had the order of the trials been reversed. Thus, "the State may have gained some advantage" by electing to try the defendant first.

2. Although the confession was not made spontaneously to a close acquaintance, the co-defendant had nothing to gain by admitting that he had been the dominant actor in the crime. In addition, because the co-defendant's statement was made on the day of the offense and resulted in the possibility of a more severe sentence, it was not likely a statement "calculated" to curry favor.

3. The court rejected the State's argument that the co-defendant's statement was not against his penal interest. "[A] declarant's statement that he committed the crime is the classic example of the statement against penal interest."

4. There was sufficient corroborating evidence to indicate that the statement was trustworthy. A finding of corroboration does not require the trial judge to be completely convinced that the exculpatory statement is true. Instead, the court must find only that there is sufficient corroboration to permit the jury to make the ultimate determination concerning the truth of the statements.

Here, the co-defendant was eventually convicted, and on appeal the State argued that any disparity between the sentences of the defendant and the co-defendant was warranted by the co-defendant's greater participation in the crime. "If evidence is sufficiently reliable for prosecutorial use, the State cannot claim it is too unreliable when offered by the defendant."

The statement was also corroborated by the first statement of a surviving victim. Although the witness changed her account at trial, the jury should have been allowed to decide which version to believe.

People v. Swaggirt, 282 Ill.App.3d 692, 668 N.E.2d 634 (2d Dist. 1996) 1. The factors specified by **Chambers** are merely indicia of trustworthiness, and need not all be present for a statement to be admissible. In addition, other indicia of trustworthiness may be considered. Admissibility is determined by whether, under the totality of the circumstances, the statement is shown to be trustworthy.

2. The Court considered the **Chambers** factors and concluded that the statements in this case were sufficiently trustworthy to be admitted.

a. The first factor - whether the statements were made spontaneously to a close acquaintance shortly after the crime occurred - was not satisfied in this case. Although the statements were made spontaneously and shortly after the crime, the witnesses were not "close acquaintances" of the declarant where they had known him for several years, but did not stay in close contact and were unaware of the basic facts of his life.

b. The second factor - whether the statements were corroborated by other evidence - was satisfied by testimony placing the declarant at the scene of the crime and in possession of a weapon similar to that used in the offense. In addition, one witness testified that a man who resembled the declarant hit another man with an unidentified object, and several witnesses indicated that the declarant might have struck the victim as revenge for the latter striking the declarant's daughter.

The Court rejected the State's argument that the above evidence could not be considered corroborating because "virtually all of it is from the testimony of defense witnesses" who were later found by the trial court to lack credibility. The State failed to cite any authority for "the novel proposition" that State's witnesses must be the source of corroborating evidence. In addition, the **Chambers** factors involve not credibility determinations, but objective indicia of trustworthiness.

c. The third factor - whether the statements were self-incriminating and against the declarant's penal interest - was clearly satisfied.

d. The final factor - whether the State had adequate opportunity to cross-examine the declarant - was not satisfied, because the declarant invoked his Fifth Amendment rights when called to testify. The Court rejected defendant's argument that the declarant should be considered available for cross-examination because the State could have granted him immunity.

The Court also rejected the defendant's argument the declarant was available for cross-examination because the State was able to ask to him limited questions, finding that the State did not have a fair opportunity to fully test the "trustworthiness" of the statements in question.

3. However, considering the circumstances as a whole, the statements were sufficiently reliable to warrant admission. "[I] light of the constitutional guarantee that criminal defendants should have a 'meaningful opportunity to present a complete defense," the trial court abused its discretion by excluding the testimony.

People v. Taylor, 287 Ill.App.3d 800, 679 N.E.2d 82 (5th Dist. 1997) A newly-discovered witness's testimony at the post-trial hearing in a previous trial should have been admitted as a declaration against penal interest. The Court held the statements were made under circumstances that insured their trustworthiness; the witness testified under oath that he had committed the robbery, he was subjected to unlimited cross-examination concerning the truthfulness of his claim, the statement was clearly against his penal interest, and there was corroborating evidence in the form of the earlier confession to a trusted relative. In addition, the State's initial investigation of the crime had yielded objective evidence corroborating the claim of guilt. "Taken as a whole, these circumstances provide considerable assurance of the reliability of [the] testimony."

People v. Anderson, 291 Ill.App.3d 843, 684 N.E.2d 845 (1st Dist. 1997) 1. The trial court abused its discretion by finding that declarations against penal interest were untrustworthy. The statements were made shortly after the crimes occurred, were clearly against the declarants' penal interests, and were corroborated by other evidence. In addition, the statements were given to police and prosecutors - "a telling mark of trustworthiness" because of their obviously inculpatory nature and the fact that the declarants could expect to be prosecuted. The Court also noted that the witnesses inculpated two other members of their gang, making it less likely that defendant's name was omitted in an effort to protect gang members who had not yet been arrested, and that at the time of his statement one of the witnesses knew defendant was in custody.

The existence of minor discrepancies between the statements was insufficient to make the statements untrustworthy; each co-defendant implicated himself, named the same four perpetrators, described the same events and "detailed the crime virtually identically."

Although the State could not cross-examine the declarants at defendant's trial (because they invoked their Fifth Amendment rights), the absence of an opportunity to cross-examine does not necessarily render declarations against penal interest untrustworthy.

2. In addition, the trial court erred by finding the statements unreliable because there would be eyewitness testimony placing defendant at the scene and because defendant could have been guilty even if the statements in question exonerated him.

3. The Court also noted that it was "ironic" that the State would argue that statements taken under its exclusive control were unreliable, especially since it sought to introduce the statements at the declarants' trial.

People v. Boyd, 307 Ill.App.3d 991, 719 N.E.2d 306 (3d Dist. 1999) The trial court did not abuse its discretion by finding that affidavits were not sufficiently trustworthy to be admitted where there was no opportunity to cross-examine the declarants and three months elapsed between the events in question and the statements.

People v. Turner, 373 Ill.App.3d 121, 866 N.E.2d 1215 (2d Dist. 2007) The court rejected the State's

argument that **Chambers** permits admission of a statement against penal interest only if the declarant admits committing the crime for which the defendant is on trial. Because the purpose for the general prohibition of statements against penal interest is to prevent false exculpatory testimony from being presented, "it makes no difference whether the declarant confesses to the crime of which the defendant is accused or some other crime, so long as the declarant's statement is probative to the defense." Under **Chambers**, the key issue is not "precisely what crime the declarant confesses to, but whether the confession is against his penal interest, and, if so, whether it is sufficiently trustworthy to be admitted."

Cumulative Digest Case Summaries **§19-19**

People v. Garcia, 2012 IL App (2d) 100656 (No. 2-10-0656, 6/20/12)

1. It is within the trial court's discretion to determine whether evidence is relevant and admissible and the trial court's decision on the issue will not be reversed absent an abuse of discretion.

The police found cocaine and cannabis in defendant's car after a traffic stop. The trial court did not abuse its discretion in excluding evidence that defendant's passenger pleaded guilty to a lesser charge of cocaine possession. The State's theory was that defendant and his passenger jointly possessed the drugs and the passenger's admission did not establish his exclusive possession of the drugs or rule out joint possession with defendant.

2. Citing Ill. R. Evid. 804(b)(3), the Appellate Court also concluded that evidence of the plea could not be admitted as a statement against penal interest, because that hearsay exception applies only when the declarant is unavailable as defined by Ill. R. Evid. 804(a). Defendant failed to demonstrate any of the bases for deeming a witness unavailable under §804(a).

The court affirmed defendant's conviction.

McLauren, J., dissented.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

While not conclusive or dispositive on the issue of possession, the guilty plea was relevant. It would have bolstered defendant's credibility when he said that the drugs were his passenger's "in that it would have taken much of the sting out of the idea that defendant was just looking for the most convenient person to blame. Furthermore, it weighs heavily against the simplest theory of events: defendant's truck, defendant's drugs, [the passenger's] bad luck." The case was credibility driven. Evidence of the passenger's guilty plea would have required the jury to actually consider the issue of joint possession and could have materially affected the verdict. It would not have been unduly prejudicial to the State because it claimed that the possession was joint.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. McCullough, 2015 IL App (2d) 121364 (No. 2-12-1364, 2/11/15)

1. Under Illinois Rule of Evidence 803(16) (the ancient document rule) statements in an authenticated document that has been in existence 20 years or more may be admitted as an exception to the hearsay rule. If the author of the ancient document had personal knowledge of the substance underlying the assertions in the document, the document is admissible. Although there are no Illinois cases on point, federal courts interpreting an identical federal rule of evidence are split on whether the ancient document rule allows admission of all assertions in the document, even those that involve double hearsay. Some courts require a separate hearsay exception for each layer of hearsay contained in a document, while others allow the admission of all statements in a document.

Defendant was tried in 2012 for a kidnapping and homicide that occurred in the town of Sycamore in 1957. Defendant sought admission of FBI reports that were prepared during the 1957 investigation of the case and contained evidence of an alibi that had otherwise disappeared due to the death of the witnesses. The

reports contained multiple layers of hearsay (FBI agents who had no personal knowledge of the events reporting what various witnesses had told them), and they relied to a large extent on statements of defendant or his family members. The reports established that defendant had not been in Sycamore at the time of the offense.

The Appellate Court held that the reports were not admissible. The court adopted the view that each layer of hearsay requires its own hearsay exception before it is admissible. Since all the statements in the reports contained multiple layers of hearsay, the ancient document rule did not allow their admission. The court also noted that one of the bases for the ancient document rule is that statements in an ancient document are usually written before a motive to fabricate arises. But here much of the alibi was based on the statements of defendant or his family, who had a motive to fabricate at the time the FBI reports were created.

The trial court's exclusion of the reports was affirmed.

2. Under Illinois Rule of Evidence 804(b)(3), an out-of-court statement that would subject a person to civil or criminal liability is admissible. Three conditions must be met before the statement can be admitted: (1) the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) the trustworthiness of the statement must be corroborated.

The trial court admitted the 1994 deathbed statement of defendant's mother that defendant "did it." The trial court agreed with the State's theory that the statement was against her penal interest since it showed that she had lied in 1957 when she told the FBI that defendant was at home at the time of the offense, and hence was subject to possible prosecution for obstruction of justice.

The Appellate Court held that the trial court erred in admitting the statement since it was not against the mother's penal interest. The court held that the statement itself must on its face be self-incriminating. The mother's statement, however, did not on its face incriminate her. Instead, to be incriminating, the State would have needed to introduce the inadmissible hearsay statement of what the mother told the FBI in 1957 and then speculate that (1) the State could have prosecuted her for obstruction of justice 37 years later as she lay dying of cancer, and (2) that she would have waived any statute of limitations bar.

Although the Appellate Court held that the statement should not have been admitted, it affirmed defendant's conviction on harmless error grounds.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

People v. Wilcox, 407 Ill.App.3d 151, 941 N.E.2d 461 (1st Dist. 2010)

1. Whether an inference of guilt may be drawn from evidence of flight depends upon whether the defendant knew that a crime had been committed and that he or she was a suspect. The evidence did not support an inference that defendant's flight showed guilt of murder - defendant had been told that police were looking for him, but not that he was a suspect for murder, and he believed that police wanted to talk to him about the violation of an I-bond in an unrelated arrest. The court acknowledged that defendant obtained false identification several years after he fled, but held that "[i]f defendant had been fleeing from the murder, he most likely would not have waited so long to obtain fake identification."

Because the evidence did not support an inference that defendant fled Illinois to avoid arrest for the murder in question, the trial court erred by admitting the evidence of flight. Furthermore, because the evidence was prejudicial, the evidence was closely balanced, and during closing argument the State relied heavily on defendant's flight, the plain error rule applied.

2. An out-of-court statement offered to establish the truth of the matter asserted is hearsay and is generally inadmissible. However, in the interests of justice, an out-of-court statement which is against the declarant's penal interest is admissible if there are sufficient *indicia* of trustworthiness. Factors considered in determining whether an out-of-court statement is sufficiently trustworthy to be admitted include whether: (1) the statement was made spontaneously to a close acquaintance shortly after the crime; (2) the statement is corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's penal interest; and (4) there is an adequate opportunity to cross-examine the declarant. These four factors are merely guidelines; all four need not be present for a statement to be admitted. The primary consideration is

whether the statement was made under circumstances which provide objective *indicia* of trustworthiness.

Where a witness provided the defense with a signed statement in which he said a third person admitted shooting the decedent, the trial court erred by finding that the statement was insufficiently reliable to be admitted. The parties agreed that the statement was self-incriminating and against the declarant's penal interest, and that the declarant was available for cross-examination. Thus, the third and fourth factors were satisfied.

Furthermore, the first factor was satisfied because the statement was made spontaneously to a close acquaintance shortly after the shooting in question. Although the record did not show the relationship between the declarant and the witness who gave the signed statement, defense counsel informed the court that if the witness was permitted to testify he would state that he and the declarant were active members of the same gang and knew each other well enough that the declarant knew where to find the witness at a particular time.

The second factor requires that the statement be sufficiently corroborated to show that it was reliable. Under Illinois law, only "some" corroborating evidence need be present. The trial court should admit the statement if the question of corroborating evidence is close.

The court found that sufficient corroboration was present. First, the declarant's description of the shooting was corroborated by expert testimony concerning the decedent's wounds. Second, the statement was consistent with the trial testimony except the testimony which identified defendant as the shooter, which the defense claimed was fabricated and which the third party statement directly rebutted.

Because the third party's statement was sufficiently reliable to be admitted, the trial court abused its discretion by granting the State's motion *in limine* and barring the statement.

Defendant's convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Jonathan Steffy, Chicago.)

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§19-20
Statements Concerning State of Mind

People v. Newbury, 53 Ill.2d 228, 290 N.E.2d 592 (1972) The trial court erred by excluding testimony concerning a conversation between a friend and the deceased about the planned wedding of the deceased and the defendant. Since the deceased's state of mind had been put in issue, the testimony fell within the hearsay exception governing declarations as to mental or emotional attitudes.

People v. Cloutier, 178 Ill.2d 141, 687 N.E.2d 930 (1997) The "state of mind" exception admits out-of-court statements which tend to show the declarant's state of mind at the time of the utterance. The statements of two women could not be admitted on the theory that they disclosed the defendant's state of mind.

People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 (1983) The defendant was convicted, at a jury trial, of murder and armed violence. The evidence showed that defendant fired shots into a parking lot from a passing automobile, killing a person named Quinn. Over objection, the State was allowed to introduce evidence of a subsequent shooting incident in which defendant shot from an automobile into another vehicle.

Defendant contended that the trial court erred in excluding testimony by a person who was with defendant during the second shooting, and who would have testified that defendant said he was going to shoot out the tires on an automobile. Such testimony was admissible under the "statement of intent" exception to the hearsay rule (i.e., the statement was admissible to prove defendant's intent in the second shooting and to prove that he acted in accordance with that intent).

People v. Floyd, 103 Ill.2d 541, 470 N.E.2d 293 (1984) Testimony concerning a declarant's state of mind is admissible if there is a reasonable probability that the statements are truthful and the declarant's state of mind is relevant. Here, the state of mind of the deceased was not relevant; since the deceased "voluntarily accompanied defendant on the evening of her death and that they had spent the evening drinking and dancing," and since defendant admitted that the decedent had filed for divorce and had struggled to resist his sexual advances, her statements expressing her fear that she would be harmed by the defendant served no purpose except to create the inference that defendant was guilty of her murder. See also, People v. Chevalier, 131 Ill.2d 66, 544 N.E.2d 942 (1989) ("state of mind" statements are only admissible if relevant; because deceased spouse's state of mind was not relevant at defendant's trial for murder, an attorney who had been consulted by the wife about a divorce should not have been allowed to testify to the decedent's statement that defendant had threatened her); People v. Huber, 131 Ill.App.3d 163, 475 N.E.2d 599 (1st Dist. 1985) (testimony about the deceased's statement (that defendant had threatened her with violence and was willing to go to extreme lengths to get her to return) was improper; although statements of state of mind may be admissible when "relevant to a material issue in the case," the states of mind of both the witness and the deceased were irrelevant).

People v. Whiters, 146 Ill.2d 437, 588 N.E.2d 1172 (1992) At defendant's trial for voluntary manslaughter involving her stabbing of a man named "Barker," defendant should have been allowed to introduce evidence that on the day before the stabbing, Barker said he had beaten a certain women the previous night. Such testimony showed the reasonableness of defendant's belief in the need for self-defense. "Perception of danger is always material and relevant to defendant's belief that the use of deadly force is justified."

People v. Britz, 112 Ill.2d 314, 493 N.E.2d 575 (1986) At his trial for murder, defendant should have been allowed to introduce tape recordings of conversations he had with a Youth Service Bureau counselor who urged defendant to confess to the police. Such conversations were relevant to the truth of the defendant's confession and the weight it should be given:

> "It is clear that the defendant was attracted to [the counselor], and considering their conversations, he, in a twisted way, might have thought [she] would be impressed by the confessions. The jury should have been allowed to hear how [the counselor] appealed to a naive and distorted sense of masculinity in attempting to have the defendant implicate himself in the crime. These appeals of [the counselor] were relevant to the truth or falsity of the confessions, especially in light of the defendant's credulousness. Even if the jury did hear some testimony that [the counselor] had attempted to exert influence over the defendant, the testimony could not substitute for the effect of hearing the tapes."

The Court also noted that the recorded conversations were not hearsay, because "the stimulating language of [the counselor] is admissible not for its truth, but for its effect on the [defendant]."

People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991) Evidence about a phone conversation the complainant had with her father was not admissible under the "state-of-mind" exception - the State used the conversation to show that defendant had a gun and that complainant could not get away, and not solely as evidence of complainant's state of mind regarding whether she consented to intercourse. In addition, no limited purpose was mentioned at trial, and the conversation was clearly used as substantive evidence in closing argument.

People v. Miller, 327 Ill.App.3d 594, 763 N.E.2d 865 (1st Dist. 2002) 1. A criminal defendant has the right to testify concerning his intent or motive where such evidence is material to the issue of guilt. Improper exclusion of such testimony is reversible error where the testimony is essential to the defense, unless other,

sufficient evidence of intent or motive is admitted.

2. The trial court abused its discretion and committed plain error at defendant's murder trial by excluding testimony that defendant had contemplated divorcing the decedent. Where the State claimed that defendant killed the decedent because she was leaving him, defendant's testimony that he wanted a divorce "was clearly relevant to show the absence of the motive" argued by the State.

3. The trial court also erred by refusing to allow defendant to give state of mind testimony to rebut the State's theory that certain of defendant's actions showed consciousness of guilt. Although the admission of evidence is left to the trial court's discretion, the judge twice "precluded defendant from testifying regarding a material issue in the case and then allowed the State to exploit the lack of defendant's testimony in closing arguments."

People v. Munoz, 348 Ill.App.3d 423, 810 N.E.2d 65 (1st Dist. 2004) 1. Under Siebert v. People, 143 Ill. 571, 32 N.E. 431 (1892), the decedent's statement about his intention to commit suicide is inadmissible in a homicide prosecution, unless that statement was combined with a contemporaneous act which the statement might explain. The court concluded that although Siebert has never been expressly overruled, it has been abandoned by the Illinois Supreme Court. Under present Illinois law, "state-of-mind" declarations, including statements of intent to commit suicide, are admissible as a hearsay exception where: (1) the declarant is unavailable; (2) there is a reasonable probability that the hearsay statement is truthful; and (3) the declarant's state of mind is relevant to a material issue in the case.

2. Where defendant was charged with the first degree murder of his wife, and contended that she had committed suicide, testimony that she made suicidal statements one month and one week before her death should have been admitted. In the course of its holding, the court noted that most jurisdictions and legal commentators have held that a decedent's declarations or threats of suicide are generally admissible both to show the decedent's state of mind and to support a theory of suicide, at least where the circumstances of the death are equally consistent with suicide and homicide and the declarations were made within a reasonable time before death.

People v. Garlick, 46 Ill.App.3d 216, 360 N.E.2d 1121 (5th Dist. 1977) Trial court erred by prohibiting defendant's mother and sister from testifying about various statements made by defendant during the month prior to an alleged murder. Such testimony was not hearsay - it was not offered to show the truth of the matter asserted therein, but concerning defendant's mental state and an insanity defense.

People v. McMullen, 138 Ill.App.3d 872, 486 N.E.2d 412 (2d Dist. 1985) Where a police officer testified that when he served the burglary complaint, defendant said he "should be getting a complaint for possession of stolen property instead of burglary," defendant should have been allowed to answer the question, "[W]hat were you thinking" when making the statement. Defendant's state of mind when he made the statement was relevant because his explanation could have affected the weight which the jury gave to the statement.

People v. Fletcher, 59 Ill.App.3d 310, 375 N.E.2d 1333 (1st Dist. 1978) Evidence of deceased police officer's final radio transmission ("406 Hillside, traffic stop, Mannheim and I-90, double 'L' Lincoln") was admissible to show the intent or state of mind of the officer. The transmission demonstrated the officer's intent to stop the vehicle.

People v. Reddock, 13 Ill.App.3d 296, 300 N.E.2d 31 (2d Dist. 1973) The deceased's sister was properly allowed to testify about deceased's statement that he was meeting defendant. A statement of intent that refers to a destination and is made at the time of departure on a journey is admissible as an exception to the hearsay rule.

People v. Ortiz, 65 Ill.App.3d 525, 382 N.E.2d 303 (1st Dist. 1978) At his murder trial, defendant attempted

to establish that he reasonably believed the use of force to be necessary to prevent death or great bodily harm to himself. The trial court erred by not allowing the defendant to testify that immediately before the incident, a certain person warned him that the alleged victim was a "killer." This testimony was not offered for the truth of the matter asserted, but was evidence of a material issue - the defendant's state of mind at the time of the occurrence.

People v. Christen, 82 Ill.App.3d 192, 402 N.E.2d 373 (2d Dist. 1980) The trial judge committed reversible error by sustaining the State's objections to defense counsel's questions, on direct examination of the defendant, concerning defendant's state of mind before the shooting. Because defendant was charged with murder and raised self-defense, he was entitled to testify directly about his state of mind at the time of the incident.

Defendant did not waive the issue by failing to make an offer of proof when the objection was sustained; under the circumstances, the relevance and content of the testimony were adequately demonstrated.

People v. Keefe, 209 Ill.App.3d 744, 567 N.E.2d 1052 (1st Dist. 1991) When a defendant raises self-defense, he is permitted to testify directly about his state of mind and whether he subjectively believed that it was necessary to use force. Where defendant testified that he took out his knife because he was being strangled by the complainant, he should have been allowed to also testify whether he was afraid and what he was feeling. See also, People v. Suerth, 97 Ill.App.3d 1005, 423 N.E.2d 1185 (1st Dist. 1981) (at trial for involuntary manslaughter involving the shooting of a person in the vestibule of an apartment building at 5:00 a.m., defendant should have been allowed to testify about a two-year-pattern of break-ins, burglaries and arsons in the building; evidence was relevant to defendant's state of mind in arming himself when he heard noises).

People v. Upton, 230 Ill.App.3d 365, 595 N.E.2d 56 (1st Dist. 1992) Where defendant was charged with attempt murder and aggravated battery based on shooting a tow truck operator who was repossessing defendant's vehicle, and contended that he fired his weapon only to stop what he believed to be a theft of his vehicle, he should have been allowed to testify whether he intended to kill or cause great bodily harm. A defendant who is charged with specific intent offenses is permitted to testify directly to his state of mind.

People v. Booker, 274 Ill.App.3d 168, 653 N.E.2d 952 (1st Dist. 1995) Where defendant was tried for first degree murder and claimed that he acted in self-defense, the trial court erred by refusing to allow the defense to present evidence that defendant feared the deceased. Among the excluded evidence was defendant's testimony that a friend had overheard the decedent say that defendant would be "dealt with" if he testified in an upcoming court case and that at the time of the offense, defendant knew that the decedent had previously been charged with murder.

People v. Evans, 104 Ill.App.3d 598, 432 N.E.2d 1285 (1st Dist. 1982) At his trial for aggravated battery, the defendant raised self-defense and sought to testify about his knowledge of the complainant's prior conviction for murder. The State objected on the ground that the conviction was more than 10 years old and was therefore inadmissible under People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695 (1971). The Appellate Court held that the 10-year rule of Montgomery was inapplicable because the prior conviction was offered to show defendant's state of mind, not to impeach the complainant's credibility. The defendant's knowledge of the complainant's prior murder conviction was admissible to show the reasonableness of defendant's apprehension of imminent harm.

People v. Eshaya, 144 Ill.App.3d 757, 494 N.E.2d 772 (1st Dist. 1986) The trial judge properly prohibited a defense witness, an occurrence witness, from testifying about his own state of mind at the time of a

shooting. Although a defendant's state of mind immediately before a killing is relevant when self-defense is raised, an occurrence witness's state of mind is not in question.

People v. Goodman, 77 Ill.App.3d 569, 396 N.E.2d 274 (4th Dist. 1979) Testimony concerning statements of the deceased (that because he was afraid for his life he hid his ammunition when he returned home from work) was admissible under the state of mind exception to the hearsay rule. The state of mind exception is limited to instances where: (1) the declarant is unavailable, and (2) there is a reasonable probability that the proffered hearsay statements are truthful. Both requirements were satisfied in this case.

People v. Adams, 102 Ill.App.3d 1129, 430 N.E.2d 267 (2d Dist. 1981) Witness's testimony about a telephone conversation with the deceased shortly before his death was properly admitted. Because the deceased stated he was leaving defendant, with whom he was living, the conversation was used to show the intent or state of mind of the deceased.

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People v. Hill, 2014 IL App (2d) 120506 (No. 2-12-0506, 3/31/14)

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Statements which are offered for a reason other than to prove the truth of the matter asserted are not hearsay and are generally admissible.

Under Illinois Rule of Evidence 803(3), statements concerning the declarant's then existing state of mind, emotion, sensation, or physical condition are admissible under the "state of mind" exception to the hearsay rule. However, a hearsay statement is not admissible to prove the state of mind, emotion, sensation, or physical condition of a person other than the declarant.

By contrast, a statement is not hearsay if it is offered to show the effect of the statement on the listener's state of mind or to explain why the listener acted as he did. Thus, a statement may be admissible to show that it gave rise to a motive on the part of a person who heard the statement.

2. The trial court properly admitted notes which the decedent wrote before she died in a fire which defendant was charged with setting. The notes indicated that the decedent intended to end her relationship with defendant.

The evidence showed that defendant and the decedent were arguing in the apartment before the fire broke out, neighbors saw defendant's car speed away moments before the fire was first observed, and the decedent's handwritten notes were likely seen by the defendant because they were found in areas of the home where he had necessarily been during and after the argument. The court concluded that the notes were admissible on two theories - to show the decedent's state of mind, and to show the effect of the notes on defendant, including creating a motive to murder the decedent.

Defendant's convictions for first degree murder and aggravated arson were affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Miller, 2013 IL App (1st) 110879 (No. 1-11-0879, 6/28/13)

1. The trial court committed plain error at defendant's trial for aggravated possession of a stolen motor vehicle where it sustained a hearsay objection when the defense asked the owner of the car whether she learned, after reporting that the car was missing, that her husband had in fact sold it. The Appellate Court concluded that the question did not necessarily call for a response based on an out-of-court statement, because the record did not indicate how the witness would have come to know that her husband had sold the vehicle. Furthermore, even had the witness learned of the sale from an out-of-court statement, the question would have been proper because it was intended to show the witness's state of mind rather than to prove the truth of the matter asserted – that the car had in fact been sold. The court stressed that the evidence would

have been central to the case because the owner's belief that the vehicle had been sold would have rebutted inferences that the car was stolen or that defendant had knowledge of the theft.

2. The court concluded that reversal was required by the cumulative effect of the exclusion of the evidence and the trial judge's reliance on an incorrect recollection of a witness's testimony. Defendant was prejudiced by the errors because the evidence was closely balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner's husband, and defendant's explanation was reasonable and could have convinced a reasonable trier of fact.

3. The court rejected the State's argument that defendant's flight at the time of his arrest was evidence of consciousness of guilt. Defendant was initially pursued because of a traffic violation, and it could not be said on the record that the attempt to elude the police was motivated by knowledge that the vehicle was stolen rather than by a desire to avoid a traffic citation. The court also noted that defendant's alleged statement admitting that he knew the car was stolen was inadmissible because it was elicited during custodial interrogation conducted in the absence of **Miranda** warnings.

Defendant's conviction for aggravated possession of a motor vehicle was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Munoz, 398 Ill.App.3d 455, 923 N.E.2d 898 (1st Dist. 2010)

1. Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless it falls within an exception to the hearsay rule. The trial court's evidentiary rulings on the admissibility of hearsay are reviewed for abuse of discretion.

Under the "state of mind" exception to the hearsay rule, a hearsay statement may be admissible if it expresses the declarant's state of mind at the time of the utterance, the declarant is unavailable to testify, there is a reasonable probability that the hearsay statements are truthful, and the statements are relevant to a material issue in the case.

2. The trial court erred by allowing the State's key witness to testify that at various times before her death, the decedent had stated that: (1) she was tired of her relationship with the defendant, and (2) defendant was jealous and always wanted to know where she was and what she was doing. Because the "state of mind" exception authorizes the admission of hearsay only if the declarant's state of mind is relevant to a material issue, the decedent's hearsay statements would be admissible only if her state of mind was relevant, and even then only to prove that state of mind.

The court acknowledged it had previously ordered a new trial because the trial court excluded the declarant's statements indicating that she was in a suicidal state of mind. Such statements were highly relevant to a material issue in the case – whether a murder occurred. By contrast, hearsay concerning the declarant's belief that the defendant was jealous had no relevance and should not have been admitted.

The court concluded that the State attempted to use the hearsay evidence as a "back door" method of proving the truth of the hearsay – that defendant was jealous – and that he therefore had a motive to kill the decedent.

The court rejected the argument that the error was harmless, noting that the evidence was closely balanced and the hearsay went to an alleged motive.

3. The conviction should also be reversed on an independent ground - because a detective who interrogated defendant on the night of his arrest testified that he informed defendant that he did not believe defendant was telling the truth, that defendant changed his story three times, and that in the detective's opinion defendant did not "ever" tell the truth on the night of the arrest.

Under Illinois law, a witness is not permitted to comment on the veracity or credibility of another witness. The court rejected the argument that the detective was merely explaining the investigative procedure, noting that on redirect the detective said that he "simply did not believe that the defendant ever told him the truth that night." The court also noted that the statement was specifically elicited by the

prosecutor and had no legitimate purpose.

Due to the closeness of the evidence, the court found that plain error occurred. The court stressed that the error was particularly prejudicial because: (1) the ultimate issue was the relative credibility of the witnesses, and (2) the detective was an "authority figure" whose opinion of defendant's credibility was likely to be taken seriously by the jury.

4. The court also noted that an expert witness phrased her opinion of the cause of death in language which "echoed" the reasonable doubt standard. The court stated that on retrial, the witness should refrain from testifying that she believed "beyond a reasonable degree of medical certainty" that the death was the result of a homicide.

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§19-21
Statements to Treating Physicians

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) Most traditional hearsay exceptions involve "non-testimonial" hearsay, for which the Sixth Amendment permits States to exercise flexibility in developing the law of hearsay. A showing of unavailability and a prior opportunity for cross-examination are not required for admission of "non-testimonial" hearsay. See also, People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2d Dist. 2006) (decedent's statements to treating physician concerning the cause of her injuries were "non-testimonial" to the extent that they described the nature of the alleged attack and her injuries, but were "testimonial" when she identified the defendant as the person who caused the injuries); People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (1st Dist. 2007) (725 ILCS 5/115-13 provides that in prosecutions for specified sex offenses, statements made by the victim to medical personal for purposes of medical diagnosis or treatment shall be admitted as an exception to the hearsay rule; however, admission of "testimonial" hearsay violates **Crawford**; hearsay was "testimonial" because objective circumstances showed no ongoing emergency and that the primary purpose of the statement was to establish or prove past events which would be potentially relevant to a later prosecution; physician was an "agent" of the police who "interrogated" the complainant).

People v. Gant, 58 Ill.2d 178, 317 N.E.2d 564 (1974) A treating doctor may testify about the statements of a patient to the extent that such statements concern "presently existing bodily condition" and the "cause or the external source of the condition to be treated." The doctor's testimony may include some details of the incident.

People v. Falaster, 173 Ill.2d 220, 670 N.E.2d 624 (1996) Defendant argued that the trial court erred by allowing a registered nurse who had taken a medical history from the complainant to testify that the latter identified defendant as the perpetrator of the offenses. The nurse took the medical history as part of an examination by a doctor who saw the complainant after she claimed to have been sexually abused. The testimony was admitted under 725 ILCS 5/115-13, which provides that in prosecutions for certain sex offenses, "statements made by the victim to medical personnel for purposes of medical diagnosis or treatment . . . insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule."

1. An examination conducted to investigate a claim of sexual abuse may qualify for admission under §115-13. The statute does not distinguish between examining and treating physicians; in addition, "we do not agree with defendant that the diagnostic purpose of the examination would be incompatible with its investigatory function."

2. The Court rejected the argument that the complainant's identification of the offender was

inadmissible because it was irrelevant to her "diagnosis and treatment." In cases involving allegations of sexual abuse, "a victim's identification of a family member as the offender is closely related to the victim's diagnosis and treatment." Thus, the identification of the perpetrator is made for purposes of medical "diagnosis or treatment," and §115-13 applies. Compare, People v. Sexton, 162 Ill.App.3d 607, 515 N.E.2d 1359 (4th Dist. 1987) (physician's testimony as to statements by the patient may not include name or description of the assailant).

People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 (1986) An examining psychiatrist may testify about the statements made to him by the defendant when such statements were relied upon in forming his diagnosis. Such statements are not offered for their truth, but merely to explain the basis of the witness's opinion. The holding in People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466 (1968) (that a nontreating expert may not testify about the statements of a defendant) was rejected. See also, Melecosky v. McCarthy, 115 Ill.2d 209, 503 N.E.2d 355 (1986) (examining physician).

People v. Britz, 123 Ill.2d 446, 528 N.E.2d 703 (1988) The trial court properly prohibited defense psychiatrists from testifying about statements made to them by the defendant during their examinations. The Court distinguished this case from Anderson, in which the expert relied on reports by other psychiatrists, information relating to the defendant's prior offense, and statements made to the expert by the defendant. Here, the experts did not rely on any other reports, did not refer to any statements of witnesses or police officers, and did not talk to friends or members of defendant's family. Thus, their opinions relied substantially on defendant's statements.

The Court concluded:

> "To allow an expert to rely solely on self-serving statements made by the defendant to determine his sanity defense . . . [would] circumvent and abrogate the intent and meaning of the Federal Rules of Evidence [Rules 703 and 705] and the rules announced in Wilson [v. Clark, 84 Ill.2d 186, 417 N.E.2d 1322 (1981)] and Anderson. If this court were to allow such testimony, it would open the door for a defendant to tell his side of the story without the possibility of being cross-examined."

People v. Winfield, 160 Ill.App.3d 983, 513 N.E.2d 1032 (1st Dist. 1987) The "statements to a treating physician" exception applies to statements made to a nurse.

People v. Fuelner, 104 Ill.App.3d 340, 432 N.E.2d 986 (1st Dist. 1982) A statement by the complainant's mother (that complainant was raped), made to the physician treating the complainant, was not admissible under the "statement to a treating physician" exception. This exception permits testimony about statements made by the patient to the physician concerning the cause of the condition to be treated, but does not allow testimony about statements made to the physician by a third party.

People v. Falkner, 131 Ill.App.3d 706, 475 N.E.2d 964 (2d Dist. 1985) Evidence obtained through an autopsy does not qualify for the "treating physician" exception to the hearsay rule.

People v. Mitchell, 200 Ill.App.3d 969, 558 N.E.2d 559 (5th Dist. 1990) Statements that are not reasonably pertinent to diagnosis or treatment are not admissible under 725 ILCS 5/115-13 (authorizing the admission of statements relevant to medical diagnosis or treatment in prosecutions for certain sex offenses). Statement that assailant said he would take what he wanted if the complainant would not go out with him, and claim that the assailant demanded money after the sexual attack, were inadmissible.

People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2d Dist. 2006) The complainant's statements to a

treating physician concerning the cause of her injuries were "non-testimonial" to the extent that they described the nature of the alleged attack and her injuries, but were "testimonial" when she identified the defendant as the person who caused the injuries. Under Crawford v. Washington, the "testimonial" statements could not be admitted.

People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (1st Dist. 2007) 1. Admission of "testimonial" hearsay to physician violated **Crawford**; hearsay was "testimonial" because the objective circumstances showed that there was no ongoing emergency and that the primary purpose of the statement was to establish or prove past events which would be potentially relevant to a later prosecution.

2. The doctor was an "agent" of the police, so that his questioning of the complainant constituted "interrogation." A physician has a dual function in a rape case - both to investigate the crime and to provide medical treatment. The statement in question would clearly have been "testimonial" had it been made to a police officer - the holding should not be different merely because the officer took the victim to a doctor who then took a statement. The Confrontation Clause cannot be "evaded by having the note-taking policeman simply bring the victim to a note-taking doctor."

People v. Oehrke, 369 Ill.App.3d 63, 860 N.E.2d 416 (1st Dist. 2007) 1. Illinois recognizes the common law exception to the hearsay rule for statements made to medical personnel for purposes of diagnosis and treatment. The hearsay exception includes statements concerning the cause or external source of the condition to be treated; however, statements identifying the offender are generally deemed to be beyond its scope. The trial court has discretion to determine whether statements are reasonably pertinent to diagnosis or treatment.

2. The court rejected the argument that the 91-year-old complainant's statements - that her son had abused her - were made for medical diagnosis or treatment. In cases involving sex offenses against minors, the identity of the offender has sometimes been held to be relevant to diagnosis and treatment because the physician needs to ensure that the complainant is not released to a dangerous situation. However, no Illinois court "has extended the medical diagnosis and treatment hearsay exception to include an adult physical abuse victim's statements identifying an attacker." To do so, "we would have to shift the rationale behind the hearsay exception from medical treatment and diagnosis to prevention of future physical harm. We decline to broaden the terms of the . . . exception by judicial fiat."

Cumulative Digest Case Summaries **§19-21**

People v. Boling, 2014 IL App (4th) 120634 (No. 4-12-0634, 3/12/14)

1. 725 ILCS 5/115-10 authorizes the admission of certain hearsay statements of a child in prosecutions for specified sex offenses, so long as adequate indicia of reliability are present and the child either testifies or is unavailable and the statements are corroborated. The court concluded that under the plain language of the statute, §115-10 is not limited to hearsay statements that directly describe the elements of the charged offenses. Instead, §115-10 authorizes admission of a "matter or detail pertaining to any act which is an element of an offense," including statements relating to the relationship between the child and defendant if such statements are relevant to explain the context in which the alleged acts occurred. Similarly, statements which relate steps defendant allegedly took to conceal his relationship with the child from others may be admitted under §115-10.

The court also concluded that hearsay statements by the complainant concerning defendant's apparent sexual abuse of another child may be admissible under §115-10. When determining whether such statements are admissible, courts should consider: (1) the relationship of the declarant to the other child, (2) the proximity of the acts in time and place to the act allegedly performed upon the declarant, (3) the similarity of the acts performed on each child, and (4) whether there was a common perpetrator. Where the complainant believed that the second child, a cousin who was about the same age as the complainant, was

being abused by defendant in the same room where the complainant had been abused, her statements and conclusions were admissible to corroborate her claims and to provide the jury with an understanding of the psychological aspects of the defendant's abusive relationship with the declarant. "In this sense, [the complainant's] statements described a matter or detail pertaining to the charged offenses."

2. 725 ILCS 5/115-13 authorizes the admission of statements of the complainant in a sex offense prosecution when such statements are made to medical personnel for purposes of medical diagnosis or treatment, insofar as those statements are reasonably pertinent to diagnosis or treatment. Section 115-13 permits details of sex acts to be admitted, including how, when, and where the act occurred and the identity of the perpetrator.

Thus, statements which the complainant made to a nurse/sexual assault examiner and which identified defendant as the attacker were admissible under §115-13. Furthermore, §115-13 authorized admission of statements concerning the defendant's threats to harm the complainant's pets if she told anyone about the abuse, because those statements were relevant to the declarant's state of mind and emotional condition.

However, §115-13 did not authorize admission of the declarant's statements that: (1) defendant apparently abused another person, and (2) the declarant told her mother about the abuse because she "heard that maybe it had happened to some other kids." These statements were not reasonably pertinent to the declarant's diagnosis or treatment.

3. A police officer may testify concerning steps taken in investigating a crime where such testimony is required to fully explain the State's case. However, out-of-court statements admitted to explain the course of an investigation are admissible only to the extent necessary to provide that explanation, and should not be admitted if they reveal unnecessary and prejudicial information. Furthermore, testimony about the steps of an investigation may not include the substance of conversations with non-testifying witnesses. In addition, evidence which would suggest that the defendant engaged in prior criminal activity is admissible only if it is relevant and specifically connects the defendant with the crime for which he is being tried.

Here, the court applied the principles of the "police investigation" hearsay exception although the witnesses in question - the mother and aunt of the complainant - were civilians rather than law enforcement agents. In applying the principles underlying the exception, the court noted that the two witnesses "conducted something akin to an investigation into defendant's suspected abuse" of the complainant.

However, the court concluded that the evidence went well beyond what was necessary to explain the decision to investigate information about the possible abuse, because both witnesses testified either directly or indirectly about the substance of conversations and suggested that defendant had been previously accused of sexual improprieties with children. The court rejected the State's argument that it elicited the testimony because it had a legitimate need to explain its case, noting that the prosecutor could have limited the evidence to showing that based upon information obtained from a third party, the women decided to have a discussion with the complainant about "good" and "bad" touches. Had the evidence been presented in such a manner, the exact information and its source would not have been revealed.

4. The court also noted that in prior cases, it suggested that a trial judge faced with the possibility of admitting evidence explaining the steps of a police investigation should conduct an *in camera* hearing to determine what statements will be permitted. **People v. Cameron,** 189 Ill.App.3d 998, 546 N.E.2d 259 (4th Dist. 1989). Such a hearing would have been appropriate here although the evidence concerned lay rather than police testimony. In addition, although defendant failed to raise a formal objection to the testimony, the trial court had ample warning through the §115-10 hearing that hearsay concerning the defendant's prior crimes would be elicited at trial. Under these circumstances, the trial court should have *sua sponte* exercised its discretion to hold an *in camera* hearing.

The court concluded:

> [Twenty-five] years after **Cameron**, the State continues to commit error by introducing unduly prejudicial out-of-court statements for the purported purpose of explaining the steps of an investigation. . . . The State's repeated

> abuse of this limited exception to the hearsay rule — in the face of repeated condemnation from the Appellate Court — shows a disrespect for the fundamental purpose of the hearsay rule. . . . [T]rial courts and courts of review should begin more closely scrutinizing (1) the State's purported need to offer hearsay statements to explain the steps of an investigation, as well as (2) the potential prejudice resulting from such evidence. In other words, the time is long overdue for trial courts to *routinely* be conducting "**Cameron** hearings."

5. Because the State's case in a prosecution for sex offenses against a child was based on the credibility of minor witnesses, the court found that the evidence was closely balanced. Thus, the plain error rule applied. Because defendant was denied a fair trial by the cumulative effect of several errors including the erroneous admission of hearsay evidence, allowing a prosecution witness to testify concerning the credibility of the complainant, and commenting in closing argument on the credibility of witnesses, the convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Freeman, 404 Ill.App.3d 978, 936 N.E.2d 1110 (1st Dist. 2010)

A common law exception to the rule against hearsay exists with respect to statements made to medical personnel for purposes of diagnosis and treatment. That exception is codified with respect to statements of sexual assault victims by 725 ILCS 5/115-13. Such statements are considered relevant and reliable.

No error occurred in the admission pursuant to this statute of the statement of an alleged victim of a sexual assault to an ER physician that she had not had sex before, where the physician testified that statement informed his treatment and diagnosis of sexual assault.

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. The testimony of a nurse regarding the statements of the complainant contained in the triage notes of another nurse was not hearsay. The testimony was not offered for the truth of the matter asserted, but to explain the actions of the nurse in treating the complainant.

2. Even if the testimony of the nurse regarding the triage notes was hearsay, it was properly admitted as an exception to the hearsay rule pursuant to 725 ILCS 5/115-13, which authorizes admission of statements of sexual assault victims made to medical personnel for purposes of medical diagnosis and treatment.

3. Admission of the testimony of the nurse regarding the triage notes did not violate the Sixth Amendment Confrontation Clause because the notes were not testimonial hearsay. To determine whether hearsay is testimonial, the focus is on whether, at the time the statement was made, the declarant was acting in a manner analogous to a witness at trial, describing or giving information regarding events that had previously occurred. When the statement is the product of questioning by persons other than law enforcement personnel, the proper focus is the intent of the declarant. The inquiry is whether the objective circumstances would lead a reasonable person to conclude that the statement would be used against the defendant.

The court considered the declarant to be the nurse who prepared the triage notes and concluded that because her intent was to gather information for treatment and not prosecution, the notes were not testimonial.

4. A fingerprint examiner should not be permitted to testify that a print found at the scene matches the fingerprint of the defendant where the examiner did not testify to and made no notes of the points of comparison the examiner found. Absent this foundation, the testimony deprives defendant of the means to challenge the conclusion drawn by the examiner. The court found no plain error because the evidence was

not closely balanced and the error did not impact the fairness of the trial.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 (1st Dist. 2011)

Defense counsel waived claims that a doctor was erroneously allowed to give hearsay testimony concerning medications prescribed by other doctors. On the merits, the court held that under exceptions to the hearsay rule, a treating physician may testify to the contents of a patient's medical records and to medications the patient is taking.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

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§19-22
Judicial Notice

§19-22(a)
Generally

Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961) Due process requires that a defendant be informed of the facts of which the court is taking judicial notice, and that such facts be put in the record for appellate review.

Judicial notice is the recognition by a judge or jury that a certain fact is true, without the need for any formal proof. Judicial notice may be taken of matters which come within either of the following two categories:

1. Matters of common knowledge or which everyone knows to be true. (Owens v. Green, 400 Ill. 380, 81 N.E.2d 149 (1948); People v. Jones, 31 Ill.2d 42, 198 N.E.2d 821 (1964); People v. Tassone, 41 Ill.2d 7, 241 N.E.2d 419 (1968).

2. Matters that are readily verifiable from sources of indisputable accuracy. People v. Davis, 65 Ill.2d 157, 357 N.E.2d 792 (1976); In Re Abdullah, 85 Ill.2d 300, 423 N.E.2d 915 (1981).

People v. Fisher et al., 184 Ill.2d 441, 705 N.E.2d 67 (1998) The court refused to take judicial notice of the assertion that non-first-time DUI offenders under the age of 21 present a greater risk to highway safety than non-first-time DUI offenders over that age:

> "Courts may take judicial notice of matters which are commonly known, or, if not commonly known, are readily verifiable from sources of indisputable accuracy. . . . A cursory examination of relevant, if not indisputable, authority reveals that it is impossible to readily confirm that non-first offenders under the age of 21 pose the greater risk to highway safety."

People v. Varnado, 66 Ill.App.3d 413, 384 N.E.2d 37 (1st Dist. 1978) A court is not required to take judicial notice of any matter unless requested to do so. A party which wants a matter to be judicially noticed must usually bring the matter to the attention of the court on the record.

In re McDonald, 144 Ill.App.3d 1082, 495 N.E.2d 78 (4th Dist. 1986) Trial judge should advise the parties that judicial notice is being taken so they may be heard on the question.

People v. Jakupcak, 275 Ill.App.3d 830, 656 N.E.2d 442 (3d Dist. 1995) The Northwestern University traffic accident reconstruction manual could be considered on appeal though it had not been introduced at

trial. Scholarly works to which the parties and witnesses referred at trial are properly considered on appeal, even if they were not actually introduced. Here, a defense expert testified that he had written one of the chapters in the manual, and the State's expert conceded that the manual was an authoritative treatise.

Cumulative Digest Case Summaries **§19-22(a)**

People v. Armstrong, 395 Ill.App.3d 606, 919 N.E.2d 57 (1st Dist. 2009)

The court declined to consider whether it was error to take judicial notice of a diagnosis of Shaken Baby Syndrome without first holding a **Frye** hearing. The court noted that even if a **Frye** hearing should have been held, the error was harmless because there was ample evidence that blunt force trauma caused the child's death. "To the extent question remains as to acceptance . . . of the scientific validity of Shaken Baby Syndrome as a diagnosis, we conclude this is not the case to provide an answer. . . . [T]he guilty verdict did not turn on the admission of evidence relating to the syndrome."

People v. Boykin, 2013 IL App (1st) 112696 (No. 1-11-2696, 11/12/13)

A reviewing court may take judicial notice of matters not previously presented to the trial court when the matters are capable of instant and unquestionable demonstration. A reviewing court will not take judicial notice of critical evidentiary material not presented to and not considered by the fact finder during its deliberations.

In a prosecution for delivery of a controlled substance within 1,000 feet of a school, evidence of the school's closure is critical material that was not presented to the trier of fact. Therefore the Appellate Court declined to take judicial notice of the school's closure based on newspaper articles and a news release.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. Love, 2013 IL App (3d) 120113 (No. 3-12-0113, 9/24/13)

Illinois Rule of Evidence 201 governs judicial notice of adjudicative facts and provides that judicial notice may be taken at any stage of a proceeding. When a court allows a party's request to prove an adjudicative fact by judicial notice in a criminal proceeding, "the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g). This directive is rooted in the criminal defendant's constitutional right to a jury trial.

Outside the presence of the jury in a DUI prosecution, the court took judicial notice that the applicable conversion factor for blood serum alcohol content to whole blood alcohol content is 1.18, as provided by the Illinois Administrative Code. Over objection, the court gave the jury this non-IPI instruction regarding the conversion factor:

> In the course of this case, you have heard testimony about the results of a blood draw. There are two ways to measure blood alcohol concentration: by serum levels or by what is called whole blood. Whole blood is [the] standard used by law enforcement and legal proceedings, and it can be calculated by converting the serum level to the whole blood equivalent. In this case, the testimony was that the serum level was .190. The blood serum or blood plasma alcohol concentration results will be divided by 1.18 to obtain a whole blood equivalent. After conversion, the whole blood equivalent is .161.

This instruction violates Ill. R. Evid. 201. It contains no cautionary language advising the jury that it was not mandated to accept the identified conversion factor or adopt the calculations based on a formula using this factor. It also referenced a contested fact, defendant's purported blood serum level, that was not subject to judicial notice, and in this respect became testimonial.

The error was not harmless. A separate instruction informed the jury that *if* it found defendant's

alcohol level was greater than 0.08, it *may* presume that defendant was under the influence of alcohol. The judicial notice instruction did not contain similar limiting language that the jury was not required to conclude that defendant's blood alcohol level was .161. The jury could have easily viewed the defective instruction to require it to find that defendant's blood alcohol level was twice the level that supported a strong but permissive presumption of intoxication.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Messenger, 2015 IL App (3d) 130581 (No. 3-13-0581, 9/1/15)

1. The trial court must take judicial notice of an "adjudicative" fact when requested to do so by a party who supplies the court with any necessary supporting information. Illinois Rule of Evidence 201(d). The judicial notice doctrine extends to facts which, while not generally known, are readily verifiable from sources of indisputable accuracy. A court may take judicial notice of a fact which constitutes an element of the offense. Judicial notice is reviewed for abuse of discretion.

Here, the trial court properly took judicial notice of the fact that the jail complex where a battery occurred was "public property." Outside the jury's presence, a witness testified that Whiteside County owned the complex and that the area where the battery occurred was not open to the public.

2. Under **Apprendi**, any fact other than a prior conviction which increases the maximum penalty for a crime must be charged, submitted to a jury, and proven beyond a reasonable doubt. The court found that taking judicial notice of an element of a crime does not violate **Apprendi** so long as the jury has the option to accept or reject the fact concerning which judicial notice was taken. In addition, an IPI instruction (Criminal 4th No. 1.01) informs the jury that it need not accept as conclusive any fact that has been judicially noticed.

The trial court failed to give IPI Criminal 4th No. 1.01, and instead gave a non-IPI instruction stating that the "entire county jail is public property." The court found that the failure to give the IPI instruction constituted error, but that error was harmless in light of the overwhelming evidence of guilt, the trial court's oral admonishment to the jury during trial that the court had taken judicial notice that the jail was public property but that judicially noticed facts are not conclusive, and the inability of the defense to produce any evidence to rebut the fact that the jail was public property.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Gavin Dow, Chicago.)

People v. Rubalcava, 2013 IL App (2d) 120396 (No. 2-12-0396, 9/30/13)

Defendant was charged with having unlawful contact with a street gang member for having direct contact with Antonio Delgadillo. (725 ILCS 5/25-5(a)(3)). To establish guilt, the State was required to prove beyond a reasonable doubt that defendant had contact with a street gang member after being ordered in a non-criminal proceeding to refrain from such contact. A "streetgang member" is defined as a person who "actually and in fact belongs to a gang." (740 ILCS 147/10).

The Appellate Court reversed the conviction on reasonable doubt grounds. In the course of its holding, the court held that it would have been improper for the trial judge to take judicial notice of the evidence presented in a civil case in which a different trial judge found that Delgadillo was "more likely than not" a gang member. The parties did not dispute that the trial court properly took judicial notice of the finding that Delgadillo was "more likely than not" a gang member.

1. Under Illinois Rule of Evidence 201(b), a judicially noticed fact must not be subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The court concluded that the evidence in the civil case - police testimony and descriptions of photographs of purported gang members - did not

satisfy this standard, particularly since Delgadillo disputed it in both the civil and civil trials.

2. In addition, although a court may take judicial notice of matters of record, taking judicial notice does not permit the admission of hearsay evidence which would otherwise be prohibited. Testimony in a previous action is admissible in a subsequent proceeding if the witness is dead, insane, or so ill that he cannot travel, or if he is "kept out of the way by the adverse party." Testimony from a prior proceeding is not admissible through judicial notice.

3. The court rejected the argument that defendant waived the issue and in effect stipulated to use of the evidence in the civil case where he agreed that the trial court could take judicial notice of matters of record. In the absence of a stipulation or a clear forfeiture, the trial court could take notice only of matters that were properly subject to judicial notice. Defendant's recognition of the fact that the trial court could take judicial notice of its own records did not constitute an agreement that all of the evidence presented in the civil case could be considered against him substantively in the criminal case.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Spencer, 408 Ill.App.3d 1, 948 N.E.2d 196 (1st Dist. 2011)

A reviewing court may take judicial notice of factual evidence when the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.

The Appellate Court refused to take judicial notice that a high school parking lot was not open to the public and was reserved for registered parking by students and faculty. The website that the State referenced for this information contained forms for the 2010-11 school year and did not show that the parking policies were in effect in 2006 when defendant was arrested.

(Defendant was represented by Assistant Defender John Koltse, Chicago.)

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§19-22(b)
Proper Judicial Notice

Judicial notice may be taken of the following:

1. **Geographical Facts**

Geographical facts that are well known. **People v. Greene**, 27 Ill.App.3d 1080, 328 N.E.2d 176 (1st Dist. 1975).

The distance between certain cities. **People ex rel. Lejcar v. Meyering**, 345 Ill. 449, 178 N.E. 80 (1931).

That Cicero is in Cook County. **People v. Bucciferro**, 37 Ill.App.3d 211, 345 N.E.2d 738 (1st Dist. 1976).

That a certain city is within a certain county. **People v. Meid**, 130 Ill.App.2d 482, 264 N.E.2d 209 (2d Dist. 1970).

That two named cities are within the same county. **People v. Harvey**, 48 Ill.App.2d 261, 199 N.E.2d 236 (1st Dist. 1964).

That a certain highway junction is in a particular county. **People v. Stoafer**, 112 Ill.App.2d 198, 251 N.E.2d 108 (5th Dist. 1969).

2. **Dates and Weather Conditions**

The days and dates shown on a calendar. **People v. Duyuejonck**, 337 Ill. 636, 169 N.E. 737 (1930).

That daylight savings time was in effect on July 30 and that it was light at 4:30 p.m. **People v. Cain**, 14 Ill.App.3d 1003, 303 N.E.2d 756 (1st Dist. 1973).

That it is dark at 7:00 p.m. in October. **People v. Schwabauer**, 369 Ill. 261, 16 N.E.2d 723 (1938).

3. **Court Records**

Prior conviction of the defendant in the same court. **People v. Davis, supra**; **People v. Tucker**, 44 Ill.App.3d 583, 358 N.E.2d 729 (3d Dist. 1976).

Other proceedings in the same case before the court; a judge at a delinquency proceeding may take judicial notice that at a suppression hearing in the same case, the respondent testified that he was 15 years old. **In re Brown**, 71 Ill.2d 151, 374 N.E.2d 209 (1978); **People v. Rupert**, 148 Ill.App.3d 27, 499 N.E.2d 93 (3d Dist. 1986).

Court may take judicial notice of its own records. **People v. Hoffman**, 25 Ill.App.3d 261, 322 N.E.2d 865 (1st Dist. 1974); People v. Chisum, 30 Ill.App.3d 546, 333 N.E.2d 546 (2d Dist. 1975).

Appellate court may take judicial notice of its own records. **People v. Alexander**, 40 Ill.App.3d 457, 352 N.E.2d 245 (1st Dist. 1976).

Testimony in another proceeding based on a transcript of such testimony. **In Re McDonald**, 144 Ill.App.3d 1082, 495 N.E.2d 78 (4th Dist. 1986).

4. **Laws and Public Records**

The common law. **People v. Horwitz**, 362 Ill. 289, 199 N.E. 788 (1936).

The laws of other states and the U.S. **People v. Behnke**, 41 Ill.App.3d 276, 353 N.E.2d 684 (5th Dist. 1976).

City ordinances. **City of Palos Heights v. Pakel**, 121 Ill.App.2d 63, 258 N.E.2d 121 (1st Dist. 1970).

Regulations of the Illinois Department of Corrections. **Baker v. Department of Law Enforcement**, 124 Ill.App.3d 964, 464 N.E.2d 1260 (2d Dist. 1984).

Records of the Illinois Department of Corrections and Parole and Pardon Board. **People v. Dupree**, 16 Ill.App.3d 769, 306 N.E.2d 693 (1st Dist. 1974); **People v. Sykes**, 45 Ill.App.3d 674, 359 N.E.2d 897 (5th Dist. 1977).

That the defendant has been paroled. **People v. Bryan**, 5 Ill.App.3d 1006, 284 N.E.2d 706 (4th Dist. 1972) **People v. Gossage**, 80 Ill.App.3d 36, 399 N.E.2d 334 (3d Dist. 1980).

Rules and regulations of a fire protection district. **Sye v. Wood Dale Fire Prot. Dist. No. 1**, 43 Ill.App.3d 48, 356 N.E.2d 938 (2d Dist. 1976).

A directive of the Illinois Department of Public Aid. **People ex rel. Newdelman v. Weaver**, 50 Ill.2d 237, 278 N.E.2d 81 (1972).

The contents of the pathological report and protocol of the coroner's office. **People v. Garrett**, 62 Ill.2d 151, 339 N.E.2d 753 (1975).

5. **Scientific Principles and Drug Use**

The reliability of learned treatises, periodicals and other scientific works by recognized authorities. **Darling v. Charleston Community Memorial Hospital**, 33 Ill.2d 326, 211 N.E.2d 253 (1965).

The accuracy of radar as a means of determining speed. **People v. Beil**, 76 Ill.App.3d 924, 395 N.E.2d 400 (4th Dist. 1979); **People v. Abdallah**, 82 Ill.App.2d 312, 226 N.E.2d 408 (1st Dist. 1967).

Scientific reliability of the ABO system of blood grouping. **People v. Gillespie**, 24 Ill.App.3d 567, 321 N.E.2d 398 (2d Dist. 1974).

The scientific dispute on the harmfulness of cannabis. **Illinois NORML, Inc. v. Scott**, 66 Ill.App.3d 633, 383 N.E.2d 1330 (1st Dist. 1978).

That heroin is a derivative of opium. **People v. Robinson**, 14 Ill.2d 325, 153 N.E.2d 65 (1958).

That heroin is a narcotic. **People v. Adams**, 46 Ill.App.3d 735, 361 N.E.2d 827 (5th Dist. 1977).

That narcotic addicts turn to theft as a way of paying for their habit. **People v. Jones**, 31 Ill.2d 42, 198 N.E.2d 821 (1964).

That the terms "reds," "red devils," and "Christmas trees" refer to the drug secobarbital. **People v. Davis**, 6 Ill.App.3d 622, 286 N.E.2d 8 (4th Dist. 1972).

That cannabis is called marijuana, but not heroin. **People v. Washington**, 81 Ill.App.2d 90, 225 N.E.2d 472 (1st Dist. 1966).

That there are varied effects from the use of alcoholic liquors. **Grant v. Paluch**, 61 Ill.App.2d 247,

210 N.E.2d 35 (1st Dist. 1965).

6. **Miscellaneous Matters**

That property has some value; in this case, that a tractor and trailer were worth more than $150. **People v. Tassone**, 41 Ill.2d 7, 241 N.E.2d 419 (1968).

That an 11-year-old automobile has some value, less than $150. **People v. Sparks**, 9 Ill.App.3d 470, 292 N.E.2d 447 (1st Dist. 1972).

That a supermarket chain was a corporation capable of owning property. **People v. Sims**, 29 Ill.App.3d 815, 331 N.E.2d 178 (1st Dist. 1975).

The corporate status of the Checker Cab Company. **People v. Middleton**, 43 Ill.App.3d 1030, 357 N.E.2d 1238 (1st Dist. 1976).

That in many cases an informer might be in danger if he testifies. **People v. Hall**, 117 Ill.App.2d 116, 253 N.E.2d 890 (1st Dist. 1969).

That plastic bags make rustling noises. **People v. Bolender**, 24 Ill.App.3d 804, 322 N.E.2d 624 (2d Dist. 1974).

Frequently used, variety, conventionality and utility in mode of dress. **People v. Moore**, 6 Ill.App.3d 932, 287 N.E.2d 130 (1st Dist. 1972).

Cumulative Digest Case Summaries **§19-22(b)**

People v. Messenger, 2015 IL App (3d) 130581 (No. 3-13-0581, 9/1/15)

1. The trial court must take judicial notice of an "adjudicative" fact when requested to do so by a party who supplies the court with any necessary supporting information. Illinois Rule of Evidence 201(d). The judicial notice doctrine extends to facts which, while not generally known, are readily verifiable from sources of indisputable accuracy. A court may take judicial notice of a fact which constitutes an element of the offense. Judicial notice is reviewed for abuse of discretion.

Here, the trial court properly took judicial notice of the fact that the jail complex where a battery occurred was "public property." Outside the jury's presence, a witness testified that Whiteside County owned the complex and that the area where the battery occurred was not open to the public.

2. Under **Apprendi**, any fact other than a prior conviction which increases the maximum penalty for a crime must be charged, submitted to a jury, and proven beyond a reasonable doubt. The court found that taking judicial notice of an element of a crime does not violate **Apprendi** so long as the jury has the option to accept or reject the fact concerning which judicial notice was taken. In addition, an IPI instruction (Criminal 4th No. 1.01) informs the jury that it need not accept as conclusive any fact that has been judicially noticed.

The trial court failed to give IPI Criminal 4th No. 1.01, and instead gave a non-IPI instruction stating that the "entire county jail is public property." The court found that the failure to give the IPI instruction constituted error, but that error was harmless in light of the overwhelming evidence of guilt, the trial court's oral admonishment to the jury during trial that the court had taken judicial notice that the jail was public property but that judicially noticed facts are not conclusive, and the inability of the defense to produce any evidence to rebut the fact that the jail was public property.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Gavin Dow, Chicago.)

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§19-22(c)
Improper Judicial Notice

It is improper to take judicial notice of the following:

That improper methods are used to obtain confessions. **People v. Lewis**, 32 Ill.2d 391, 207 N.E.2d 65 (1965).

That a "true-tone" color T.V., which projected only a black and white picture, was worth more than $150. **People v. Scott**, 59 Ill.App.3d 864, 376 N.E.2d 375 (2d Dist. 1978).

Of abbreviations peculiar to particular trades or professions and not known by the general public, or of any other abbreviation not in general use. **People v. Allen**, 8 Ill.App.3d 176, 289 N.E.2d 467 (3d Dist. 1972).

That in some areas of Chicago it is necessary for a person to be armed. **People v. Wade**, 71 Ill.App.2d 202, 217 N.E.2d 329 (1st Dist. 1966).

That on September 18 at 5:00 a.m., it is "quite bright out" (**People v. McDonald**, 46 Ill.2d 92, 263 N.E.2d 75 (1970)).

The contents of a weather report for a day two months previously. **Cook County Department of Environmental Control v. Tomar**, 29 Ill.App.3d 751, 331 N.E.2d 196 (1st Dist. 1975).

That cannabis is polytypic. **People v. Krall**, 29 Ill.App.3d 86, 329 N.E.2d 441 (4th Dist. 1975).

Of the proceedings in the lower court in a different case. **People v. Washington**, 81 Ill.App.2d 901, 225 N.E.2d 472 (1st Dist. 1967) (aff'd 41 Ill.2d 16, 241 N.E.2d 425 (1968)).

Cumulative Digest Case Summaries **§19-22(c)**

In re S.M., 2014 IL App (3d) 140687 (No. 3-14-0687, 2/4/15)

1. Defendant was charged in juvenile court with unlawful possession of a concealable handgun by a person under 18 years of age. 720 ILCS 5/24-3.1(a)(1). The State did not present any evidence establishing defendant's age, which was an element of the offense. During closing argument, defendant pointed out this failure, and in rebuttal the State asked the trial court to take judicial notice of the court record showing that the court's juvenile jurisdiction attached for minors under 18 years of age. The trial court agreed with the State, finding that as a matter of jurisdiction defendant was under 18, otherwise he would have been tried in adult court.

2. The Appellate Court reversed defendant's adjudication, holding that the State failed to prove defendant was under 18, an element of the offense, and that the trial court could not properly fill in that missing proof by taking judicial notice of defendant's age.

Illinois Rule of Evidence 201 allows a trial court to take judicial notice of certain facts which are not subject to reasonable dispute, meaning they are generally known in the local population or are capable of accurate and ready determination by consulting sources of unquestioned accuracy. A court may take judicial notice of its own records, including the status of pleadings in a juvenile proceeding.

3. The State charged defendant in juvenile court, which has exclusive jurisdiction to adjudicate criminal offenses committed by minors under the age of 18, and defendant did not file a motion to dismiss the charges. But procedural silence regarding allegations in a charging document cannot be construed as a judicial admission to an element of the offense. The failure of defendant to contest specific allegations in the charge did not absolve the State of its obligation to prove the elements of an offense.

Additionally, defendant's age was not technically a jurisdictional requirement since juvenile court is simply a division of the circuit court. Defendant's silence with respect to jurisdiction thus did not constitute an admission that he was under 18 at the time of the offense.

4. The Appellate Court rejected the State's argument, made for the first time on appeal, that the trial court could fill in the State's missing proof by taking judicial notice of defendant's unsworn statement during arraignment that he was 16 years old. Not only was the statement unsworn, it was also self-incriminating, since defendant gave the answer in response to a direct question from the court about his age, an element of the offense. If this statement could be considered on appeal to provide the necessary proof of age, it would

prevent defendant from any meaningful opportunity to challenge this element at trial, or to challenge the admission of his statement as violating his right against self-incrimination.

5. The Appellate Court also held that the trial court could not take judicial notice of an adjudicative fact without first reopening the evidentiary portion of the trial. Here, defendant pointed out the missing proof during its closing argument. The State was not entitled to have a "do-over" by asking the court in its rebuttal argument to supplement the completed evidence pursuant to judicial notice.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Lucas Walker, Ottawa.)

People v. Boykin, 2013 IL App (1st) 112696 (No. 1-11-2696, 11/12/13)

A reviewing court may take judicial notice of matters not previously presented to the trial court when the matters are capable of instant and unquestionable demonstration. A reviewing court will not take judicial notice of critical evidentiary material not presented to and not considered by the fact finder during its deliberations.

In a prosecution for delivery of a controlled substance within 1,000 feet of a school, evidence of the school's closure is critical material that was not presented to the trier of fact. Therefore the Appellate Court declined to take judicial notice of the school's closure based on newspaper articles and a news release.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. Love, 2013 IL App (3d) 120113 (No. 3-12-0113, 9/24/13)

Illinois Rule of Evidence 201 governs judicial notice of adjudicative facts and provides that judicial notice may be taken at any stage of a proceeding. When a court allows a party's request to prove an adjudicative fact by judicial notice in a criminal proceeding, "the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g). This directive is rooted in the criminal defendant's constitutional right to a jury trial.

Outside the presence of the jury in a DUI prosecution, the court took judicial notice that the applicable conversion factor for blood serum alcohol content to whole blood alcohol content is 1.18, as provided by the Illinois Administrative Code. Over objection, the court gave the jury this non-IPI instruction regarding the conversion factor:

> In the course of this case, you have heard testimony about the results of a blood draw. There are two ways to measure blood alcohol concentration: by serum levels or by what is called whole blood. Whole blood is [the] standard used by law enforcement and legal proceedings, and it can be calculated by converting the serum level to the whole blood equivalent. In this case, the testimony was that the serum level was .190. The blood serum or blood plasma alcohol concentration results will be divided by 1.18 to obtain a whole blood equivalent. After conversion, the whole blood equivalent is .161.

This instruction violates Ill. R. Evid. 201. It contains no cautionary language advising the jury that it was not mandated to accept the identified conversion factor or adopt the calculations based on a formula using this factor. It also referenced a contested fact, defendant's purported blood serum level, that was not subject to judicial notice, and in this respect became testimonial.

The error was not harmless. A separate instruction informed the jury that *if* it found defendant's alcohol level was greater than 0.08, it *may* presume that defendant was under the influence of alcohol. The judicial notice instruction did not contain similar limiting language that the jury was not required to conclude that defendant's blood alcohol level was .161. The jury could have easily viewed the defective instruction to require it to find that defendant's blood alcohol level was twice the level that supported a strong but permissive presumption of intoxication.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Rubalcava, 2013 IL App (2d) 120396 (No. 2-12-0396, 9/30/13)

Defendant was charged with having unlawful contact with a street gang member for having direct contact with Antonio Delgadillo. (725 ILCS 5/25-5(a)(3)). To establish guilt, the State was required to prove beyond a reasonable doubt that defendant had contact with a street gang member after being ordered in a non-criminal proceeding to refrain from such contact. A "streetgang member" is defined as a person who "actually and in fact belongs to a gang." (740 ILCS 147/10).

The Appellate Court reversed the conviction on reasonable doubt grounds. In the course of its holding, the court held that it would have been improper for the trial judge to take judicial notice of the evidence presented in a civil case in which a different trial judge found that Delgadillo was "more likely than not" a gang member. The parties did not dispute that the trial court properly took judicial notice of the finding that Delgadillo was "more likely than not" a gang member.

1. Under Illinois Rule of Evidence 201(b), a judicially noticed fact must not be subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The court concluded that the evidence in the civil case - police testimony and descriptions of photographs of purported gang members - did not satisfy this standard, particularly since Delgadillo disputed it in both the civil and civil trials.

2. In addition, although a court may take judicial notice of matters of record, taking judicial notice does not permit the admission of hearsay evidence which would otherwise be prohibited. Testimony in a previous action is admissible in a subsequent proceeding if the witness is dead, insane, or so ill that he cannot travel, or if he is "kept out of the way by the adverse party." Testimony from a prior proceeding is not admissible through judicial notice.

3. The court rejected the argument that defendant waived the issue and in effect stipulated to use of the evidence in the civil case where he agreed that the trial court could take judicial notice of matters of record. In the absence of a stipulation or a clear forfeiture, the trial court could take notice only of matters that were properly subject to judicial notice. Defendant's recognition of the fact that the trial court could take judicial notice of its own records did not constitute an agreement that all of the evidence presented in the civil case could be considered against him substantively in the criminal case.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Shamhart, 2016 IL App (5th) 130589 (No. 5-13-0589, 6/13/16)

Defendant raised several claims of ineffective assistance of his trial counsel in documents filed after he was convicted. The court appointed new counsel to represent defendant but would not allow defendant to testify at an evidentiary hearing in support of his claims. Instead, the court said it would take judicial notice of defendant's filings.

In finding that the trial court improperly denied defendant the opportunity to present evidence in support of his claims, the Appellate Court rejected the State's argument that there was no need for an evidentiary hearing because the trial court took judicial notice of the defendant's filings.

Under the Illinois Rules of Evidence, judicial notice only applies to facts that are not subject to reasonable dispute. Ill. R. Evid. 201. Here, the documents filed by defendant raised a multitude of issues, and the court did not believe "the State would stand idly by and have no response" to defendant's claims, thereby conceding those claims. The factual allegations were thus not proper subjects for judicial notice.

The cause was remanded for an evidentiary hearing on defendant's post-trial claims.

(Defendant was represented by Assistant Defender Richard Whitney, Mt. Vernon.)

People v. Spencer, 408 Ill.App.3d 1, 948 N.E.2d 196 (1st Dist. 2011)

A reviewing court may take judicial notice of factual evidence when the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.

The Appellate Court refused to take judicial notice that a high school parking lot was not open to

the public and was reserved for registered parking by students and faculty. The website that the State referenced for this information contained forms for the 2010-11 school year and did not show that the parking policies were in effect in 2006 when defendant was arrested.

(Defendant was represented by Assistant Defender John Koltse, Chicago.)

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§19-23
Opinion Testimony

§19-23(a)
Opinions of Lay Witnesses

People v. Enis, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) Generally, a witness may only testify to facts within his own personal knowledge and recollection, and may not draw inferences, speculate about matters beyond his personal knowledge, or judge the veracity of other witnesses or evidence.

People v. Terrell, 185 Ill.2d 467, 708 N.E.2d 309 (1998) A witness, whether expert or lay, may provide an opinion on the ultimate issue in a case. The trier of fact is not required to accept the witness's conclusion, which therefore cannot be said to usurp the province of the jury.

People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994) In a prosecution for aggravated criminal sexual assault, lay witnesses who were familiar with "the field of strength training and exercising" were properly allowed to testify that the exercises defendant required of his baseball players were not appropriate.

1. Such testimony could not be admitted as the opinions of lay witnesses; the opinion of a non-expert is admissible only to the extent it is: (a) rationally based on the witness's firsthand perception, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Lay witness opinion is admissible where "the facts could not otherwise be adequately presented or described in such a way as to allow the fact finder to form an opinion or reach an intelligent conclusion."

Because neither witness saw the defendant administer any of the exercises, they lacked firsthand knowledge on which to base their opinions. Instead, their conclusions were based on literature presented at trial and responses to hypothetical questions, two types of evidence reserved for opinion testimony by experts.

2. However, the Court also concluded that the testimony of both witnesses should have been admitted as expert testimony. (See discussion at §19-23 below).

People v. Linkogle, 54 Ill.App.3d 830, 368 N.E.2d 1075 (3d Dist. 1977) A witness may not voice an opinion or conclusion concerning a third party's statement, but may only recite the statement itself.

People v. Brown, 200 Ill.App.3d 566, 558 N.E.2d 309 (1st Dist. 1990) It was error for the prosecutor to elicit a witness's opinion as to what defendant meant by a remark. A lay witness may only testify as to facts of which he has personal knowledge. A new trial was required because the testimony went to the ultimate question of fact to be decided by the jury. See also, People v. McClellan, 216 Ill.App.3d 1007, 576 N.E.2d 481 (4th Dist. 1991) (error to allow police officer to give opinion whether sexual conduct was forced; a lay witness is permitted to testify only as to facts of which he has personal knowledge; opinion testimony from a lay witness is especially prejudicial when it goes to an ultimate question of fact); People v. Brouder, 168 Ill.App.3d 938, 523 N.E.2d 100 (1st Dist. 1988) (at trial for resisting arrest, error for police officer to testify that the defendant "resisted us"; testimony constituted a "legal conclusion that should not have been

admitted"). Compare, People v. Jones, 241 Ill.App.3d 228, 608 N.E.2d 953 (4th Dist. 1993) (at trial for sexual assault, it was not error for police officer to testify that in his experience it is normal for juvenile sexual abuse victims to initially deny having had sexual contact; personal knowledge of the reactions of juvenile sexual abuse victims was adequately shown where officer had 16 years experience as a police officer and 2½ years as a juvenile investigator; in addition, the opinion was one which could normally be derived by personal observation, was not based on "abstract ideas or theories," and assisted the jury in understanding the officer's testimony and that of the alleged victim).

People v. Williams, 62 Ill.App.3d 996, 379 N.E.2d 1268 (1st Dist. 1978) A lay or non-expert witness is allowed to state an opinion when it is difficult for him to reproduce for the jury the totality of the conditions perceived, and when the opinion is one that ordinary people are accustomed and capable of making.

In other words, when a lay witness cannot easily and clearly describe what he saw, heard or smelled so that it can be clearly understood by the jury, he is allowed to summarize his observations in a statement of conclusion or opinion. For example, it is difficult for a person to describe the odor of dynamite, whiskey or beer without simply stating that he is familiar with such odors and smelled them during the incident in question. Thus, an opinion about such odors is helpful to the jury and is proper testimony.

People v. Ehrler, 114 Ill.App.2d 171, 252 N.E.2d 227 (2d Dist. 1969) A lay witness is only allowed to voice an opinion based on his personal observation. Unlike an expert, a lay witness may not render an opinion based on facts in evidence or in response to a hypothetical question. See also, People v. Crump, 319 Ill.App.3d 538, 745 N.E.2d 692 (3d Dist. 2001) (improper opinion testimony by a lay witness is not prejudicial if the conclusion or testimony is obvious; furthermore, a lay witness may express an opinion based upon personal observation where: (1) it is difficult to reproduce for the jury the totality of the conditions perceived, and (2) the opinion is one that "persons in general are capable of making and understanding; no rule authorizes the admission of lay opinion testimony to show why a police officer took certain actions).

People v. Robinson, 368 Ill.App.3d 963, 859 N.E.2d 232 (1st Dist. 2006) The trial judge erred by refusing to allow a lay witness to give his opinion of defendant's sobriety. Lay witnesses may express their opinion on the issue of intoxication, if that opinion is based on personal observation and familiarity with the signs of intoxication. Because the witness had known defendant for several years and spent several hours with him on the night in question, and testified that defendant consumed no alcohol during that time, his opinion that defendant was not under the influence of alcohol was both relevant and admissible.

Lay witnesses may voice opinion on the following:

A person's sanity based upon personally observed facts, which must be stated in detail. **People v. Wright**, 111 Ill.2d 128, 490 N.E.2d 640 (1985); **People v. Bouchard**, 180 Ill.App.3d 26, 535 N.E.2d 1001 (2d Dist. 1989).

A person's intoxication. **People v. Sprinkle**, 74 Ill.App.3d 456, 393 N.E.2d 94 (4th Dist. 1979); **People v. Reeder**, 2 Ill.App.3d 471, 276 N.E.2d 768 (2d Dist. 1971).

A person's age. **People v. Davis**, 10 Ill.2d 430, 140 N.E.2d 675 (1957).

That a person appeared nervous. **Law v. Central Illinois Public Service Company**, 86 Ill.App.3d 701, 408 N.E.2d 74 (4th Dist. 1980).

That an odor following an explosion smelled like dynamite. **People v. Reed**, 333 Ill. 397, 164 N.E. 847 (1929).

That a smell was that of alcohol. **Logue v. Williams**, 111 Ill.App.2d 237, 250 N.E.2d 159 (5th Dist. 1969).

That a floor was "slippery" and a room "dark." **Haymes v. Catholic Bishop of Chicago**, 41 Ill.2d

336, 243 N.E.2d 203 (1968).

The speed of a motor vehicle. **Delany v. Badame**, 49 Ill.2d 168, 274 N.E.2d 353 (1971); **People v. Singletary**, 73 Ill.App.3d 239, 391 N.E.2d 440 (1st Dist. 1979).

That a substance was a blood stain. **People v. Preston**, 341 Ill. 407, 174 N.E. 383 (1930); **People v. Frink**, 59 Ill.App.3d 51, 374 N.E.2d 1311 (4th Dist. 1978).

The value of property where the witness has sufficient knowledge to give a reasonable estimate. **People v. Harden**, 42 Ill.2d 301, 247 N.E.2d 404 (1969); **Martin v. McIntosh**, 37 Ill.App.3d 526, 346 N.E.2d 450 (5th Dist. 1976); **Department of Public Works and Buildings v. Hufeld**, 68 Ill.App.2d 120, 215 N.E.2d 312 (3d Dist. 1966).

The size, weight, color, time, distance, speed and value of property. **People v. Singletary**, 73 Ill.App.3d 239, 391 N.E.2d 440 (1st Dist. 1979); **People v. Burton**, 6 Ill.App.3d 879, 286 N.E.2d 792 (1st Dist. 1972).

Lay witness may not voice opinion on the following:

That substance was marijuana. **People v. Park**, 72 Ill.2d 203, 380 N.E.2d 795 (1978).

The time needed to drive to a certain location, in the absence of a proper foundation. **People v. Wallenberg**, 24 Ill.2d 350, 181 N.E.2d 143 (1962).

That the defendant acted as if he had something more than usual on his mind. **People v. Hamilton**, 286 Ill. 390, 109 N.E. 329 (1915).

The speed of a vehicle when based upon physical evidence observed after the incident. **Deaver v. Hickox**, 81 Ill.App.2d 79, 224 N.E.2d 468 (4th Dist. 1967).

That eyeglasses caused headaches. **Hawkins v. Richardson**, 29 Ill.App.3d 597, 331 N.E.2d 201 (1st Dist. 1975).

Cumulative Digest Case Summaries **§19-23(a)**

People v. Thompson, 2016 IL 118667 (No. 118667, 1/22/16)

1. Under Illinois Rule of Evidence 701, lay opinion identification testimony is admissible if the testimony is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. When the identification is being made from a video recording or a photograph, both of which the jury is able to view for itself, the court held that such testimony is helpful where there is some basis for concluding that the witness is more likely to correctly identify the defendant than the jury.

It is not necessary to show that the witness has had sustained contact or intimate familiarity with, or special knowledge of the defendant. Instead, the witness must only have had contact with the defendant beyond what the jury has had to achieve a level of familiarity that would make the opinion helpful.

Courts should use a totality of circumstances approach in deciding whether such testimony is admissible, and should consider the following factors in making that decision: (1) the witness's general familiarity with the defendant; (2) the witness's familiarity with the defendant at the time the recording was made; (3) whether the witness observed the defendant dressed in a manner similar to the person depicted in the recording; (4) whether the defendant was disguised in the recording or changed his appearance between the time of recording and trial; and (5) the clarity of the recording and extent to which the person is depicted.

The absence of any of the above factors does not render the testimony inadmissible. And the extent of a witness's opportunity to observe the defendant goes to the weight, not admissibility, of the evidence.

2. Additional rules apply when lay opinion identification testimony is presented by law enforcement officers. Here, there is an added concern that evidence of the officer's relationship with defendant may end up revealing defendant's prior criminal history. The court therefore adopted certain precautionary procedures

when officers provide opinion identification testimony.

When the State seeks to introduce such evidence, the circuit court should permit the defendant to examine the officer outside the presence of the jury so he may explore the officer's level of familiarity as well as any bias or prejudice. When the officer testifies, he may identify himself as a member of law enforcement, but to establish familiarity he should only testify about how long he knew defendant and how frequently he saw him.

Additionally, the court should instruct the jury before the testimony and in the final charge that it need not give any weight to such testimony and that it should not draw any adverse inference from the witness's status as a law enforcement officer.

3. Here the State introduced lay opinion identification testimony from four witnesses, three of whom were law enforcement officers. The Supreme Court held that the testimony of the three officers was not properly admitted, but the testimony of the civilian witness was proper.

(a) Deputy Sheriff Sandusky interrogated defendant after he was arrested and viewed a video and still image of a man stealing anhydrous ammonia from storage tanks. Sandusky testified that defendant was the person in the images. The court held that Sandusky gained a familiarity with defendant during his interrogation, an interaction that was "in a more natural setting" than the jury would have had from its limited exposure to defendant in the courtroom. Sandusky was thus more likely to correctly identify defendant than the jury. But the trial court failed to employ the precautionary measures required for law enforcement witnesses and thus Sandusky's testimony was improper.

(b) Officer Jackson also identified defendant from the video and still image. But there was no evidence about how long he knew defendant or how often and under what circumstances he had seen him. There was thus no evidence demonstrating any basis for concluding that Jackson was more likely to correctly identify defendant than the jury. And the trial court failed to employ any precautionary measures prior to his testimony. Accordingly, Jackson's testimony was improper.

(c) Officer Huff was able to identify defendant from the video and still image based on his "previous dealings" with defendant. The court held that Huff had "a perspective of defendant that the jury did not have" and thus was more likely to correctly identify him. But his testimony was inadmissible because the court did not employ any precautionary procedures before admitting his testimony.

(d) Jessica Joslin identified defendant from the still image. She had never met or spoken to defendant, but she once saw him sleeping on the front porch of a mutual friend's house when she was "strung out on methamphetamine." The court held that
"although close" there was a sufficient basis to conclude that she was more likely to correctly identify defendant than the jury. And because Joslin was not a law enforcement officer, the trial court did not have to employ any precautionary procedures. Joslin's testimony was thus admissible.

4. Although the court found that the testimony of the three officers was inadmissible, it held that the error was harmless. Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Degorski, 2013 IL App (1st) 100580 (No. 1-10-0580, 10/17/13)

1. Occupation (reputable or disreputable) is an ordinary part of the background information elicited from any witness, and is properly considered in determining the weight to be given to the testimony of the witness.

It was not an abuse of discretion for the court to allow the former assistant State's Attorney who obtained a confession from the defendant to testify that he was now a judge, particularly where the State complied with the court's direction that it not give that fact undue emphasis, and the State did not argue that the jury should give the testimony of the witness greater weight because he was a judge. While a judge's occupation may lend an air of credibility to his testimony, the trier of fact is still free to disbelieve the witness.

2. The defense did not invite the former assistant State's Attorney's testimony that he found

defendant's confession reliable. Defense counsel asked the witness only a general question about whether he sought to obtain statements that were uncontaminated by outside information. The answer was not a direct response to the question and was volunteered. The defendant could not complain about the witness's subsequent testimony that he believed the defendant when he confessed because that testimony was elicited when defense counsel continued to question the witness about his opinion of defendant's confession.

3. Much like police officers, assistant State's Attorneys are authority figures whose testimony may be prejudicial if they inform jurors that they should believe the prosecution's case. But there is a distinction between an assistant State's Attorney testifying to a prior opinion of belief in a defendant's statement at the time it was made, and offering a present opinion of defendant's guilt at trial. Present opinion testimony is improper; previous opinion testimony is permissible.

The testimony of a former assistant State's Attorney that he believed defendant's confession at the time of its making was not a present opinion of defendant's guilt and was permissible.

(Defendant was represented by Assistant Defender Charles Hoffman, Chicago.)

People v. Jackson, 2013 IL App (3d) 120205 (No. 3-12-0205, 11/26/13)

A lay witness's testimony in the form of opinions or inferences is limited to those which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Ill. R. Evid. 701.

Generally, a lay witness may not offer an opinion as to the meaning of another's out-of-court statement. It is within the province of the jury to interpret such statements.

A detective testified that defendant's initial statement to him was a lie. This lay opinion testimony was erroneously admitted because it removed from the jury's consideration the veracity of defendant's statement to the police.

The Appellate Court concluded that the erroneous admission of this testimony was not plain error.

Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Littleton, 2014 IL App (1st) 121950 (No. 1-12-1950, 6/26/14)

The trial court did not abuse its discretion by allowing a detective who possessed no expertise in handwriting comparison to testify concerning his opinion about distinctiveness and similarities in handwriting. A witness who is not testifying as an expert may give opinion testimony where the opinion is rationally based on the perception of the witness, helpful to a clear understanding of the witness's testimony or determination of a fact in issue, and not based on scientific, technical or other specialized knowledge.

The detective examined two labels and stated that the "E's" on the labels were distinctive and similar. The Appellate Court found that the trial court did not abuse its discretion by allowing such testimony, noting that the detective's opinion was based on personal observation, was one that a non-expert is generally capable of making, and was helpful to a clear understanding of his remaining testimony. In addition, the detective stated only that some of the "E's" appeared to be similar, not that they were all the same or that he believed they had all been written by defendant.

The conviction for possession of child pornography was affirmed.

People v. Latimer, 403 Ill.App.3d 595, 935 N.E.2d 1037 (2d Dist. 2010)

Testimony of a lay witness in the form of an opinion may be introduced only if it is helpful to a clear understanding of his testimony or the determination of a fact in issue.

The police videotaped a drug transaction between an informant and a person in a red Pontiac van. After the transaction, the police followed the van but did not see any occupant. The police determined that the van was registered to defendant. Almost two weeks later the informant attempted unsuccessfully to complete another transaction with a white Buick. The police observed defendant exit the Buick after it drove from that meeting. A police officer compared the videotape and a still photograph of the driver of the red

van created from videotape with the state ID photo and a booking photo of the defendant and determined that defendant resembled the person in the still photo and the videotape. The trial court ruled that it would not allow the officer to testify at trial that defendant was the driver of the van.

The Appellate Court affirmed this ruling. Whether defendant was the driver of the van was a matter of opinion. The officer had no special expertise in comparing images. His lay opinion would not be helpful to understand the remainder of his testimony or to any fact in issue in the case.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

People v. Mandarino, 2013 IL App (1st) 111772 (No. 1-11-1772, 6/28/13)

Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary.

The Appellate Court concluded that defendant forfeited the issue where he did not argue at trial or in the post-trial motion that the testimony was inadmissible lay opinion. Furthermore, even if lay opinion was improperly admitted, the plain error rule did not apply where the evidence was not closely balanced.

In the alternative, the lay opinion was admissible on two theories - to rebut character evidence and under the doctrine of curative admissibility.

1. The court concluded that the defense introduced character testimony by eliciting evidence of defendant's exceptional performance and service records. Character evidence is generally inadmissible in a criminal trial unless introduced by the defendant, in which case the State is permitted to respond by offering its own character evidence. (Illinois Rule of Evidence 404). Here, the State rebutted the defense evidence of the accused's good character by showing that in light of the incident leading to the instant charges, the witness no longer viewed defendant as an excellent officer.

2. The evidence was also admissible under the curative admissibility doctrine, which allows the State to respond on redirect examination where the defendant has opened the door to a particular subject, even if the response elicits what would otherwise be inadmissible evidence. The purpose of the curative admissibility doctrine is to shield a party from unduly prejudicial inferences raised by the other side. Whether to allow curative evidence lies in the sound discretion of the trial court.

The court concluded that admitting the lay opinion of the witness, a deputy chief, "allowed the State to cure any impression . . . that [the witness] still regarded [defendant] to be an outstanding officer."

People v. McCarter, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2864, 6/24/11)

1. A requirement for admission of a prior inconsistent statement of a witness as substantive evidence is that the statement "narrates, describes, or explains an event or condition of which the witness had personal knowledge." 725 ILCS 5/115-10.1(c)(2). Statements of secondhand accounts of events are inadmissible hearsay.

Although some portions of a witness's prior statement admitted at defendant's trial recounted events of which she had personal knowledge, other parts contained statements made by a co-defendant describing the events at which the witness was not present and of which the witness had no personal knowledge, including that the co-defendant took $3000 from the deceased. Those portions of the statement were inadmissible hearsay.

2. While a witness may testify to statements made to her by the defendant, a witness may not offer her personal opinion of the meaning of those statements. Therefore, while the State could admit evidence that defendant told a witness, "It's going down," and that he was going to "take care of business," it could not admit the witness's opinion as to what she thought defendant meant by these statements.

Because these inadmissible statements provided the only evidence that a robbery took place, the court concluded that defense counsel was ineffective in failing to object to the evidence, thus also satisfying the second prong of the plain-error rule. "Based on plain error [the court] exercised [its] duty to set aside the armed robbery conviction where reasonable doubt remains of defendant's guilt."

(Defendant was represented by Assistant Defender Jessica Fortier, Chicago.)

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. The testimony of a nurse regarding the statements of the complainant contained in the triage notes of another nurse was not hearsay. The testimony was not offered for the truth of the matter asserted, but to explain the actions of the nurse in treating the complainant.

2. Even if the testimony of the nurse regarding the triage notes was hearsay, it was properly admitted as an exception to the hearsay rule pursuant to 725 ILCS 5/115-13, which authorizes admission of statements of sexual assault victims made to medical personnel for purposes of medical diagnosis and treatment.

3. Admission of the testimony of the nurse regarding the triage notes did not violate the Sixth Amendment Confrontation Clause because the notes were not testimonial hearsay. To determine whether hearsay is testimonial, the focus is on whether, at the time the statement was made, the declarant was acting in a manner analogous to a witness at trial, describing or giving information regarding events that had previously occurred. When the statement is the product of questioning by persons other than law enforcement personnel, the proper focus is the intent of the declarant. The inquiry is whether the objective circumstances would lead a reasonable person to conclude that the statement would be used against the defendant.

The court considered the declarant to be the nurse who prepared the triage notes and concluded that because her intent was to gather information for treatment and not prosecution, the notes were not testimonial.

4. A fingerprint examiner should not be permitted to testify that a print found at the scene matches the fingerprint of the defendant where the examiner did not testify to and made no notes of the points of comparison the examiner found. Absent this foundation, the testimony deprives defendant of the means to challenge the conclusion drawn by the examiner. The court found no plain error because the evidence was not closely balanced and the error did not impact the fairness of the trial.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Mister, 2015 IL App (4th) 130180-B (No. 4-13-0180, rev. op 8/4/16)

1. Under Illinois Rule of Evidence 701, a lay witness may give opinion testimony which is: (1) rationally based on the perceptions of the witness, and (2) helpful to a clear understanding of the testimony or to determination of a fact or issue. Although a witness may not offer opinion testimony regarding an ultimate question of fact to be decided by the jury, opinion testimony is not objectionable merely because it embraces an ultimate issue.

After noting a conflict in authority between jurisdictions and within the Appellate Court, the court concluded that a lay witness may give an opinion concerning the identity of a person depicted in a surveillance video where there is a basis to believe that the witness is more likely than the jury to correctly identify the individual in the videotape. The court rejected holdings that the witness must have prior familiarity with the subject in order to testify concerning his or her identity, finding that the witness's degree of familiarity with the subject goes to weight rather than admissibility. The court also rejected the argument that such testimony is admissible only if the subject's appearance has changed between the time the videotape was made and the trial.

2. The court concluded that a casino security guard's testimony concerning the actions of two persons on a surveillance video was admissible although the guard was not present when the video was made and did not observe the events that were depicted. The court concluded that the guard's testimony was rationally based on opinions he had developed by repeatedly viewing the video.

In addition, the testimony aided the trier of fact by providing a clear understanding whether the two persons were at the casino and left in the same vehicle. The court noted that the video contained nearly four hours of footage, lacked clarity, was difficult to assess, and involved "fluid scenes and numerous individuals

and vehicles." Thus, in the absence of the guard's opinion testimony, the jury would likely miss details concerning the events captured by the camera.

The court found that the testimony did not invade the province of the jury where the guard merely linked the individuals in the video to still photographs which had been taken the same night. Whether the defendant in the courtroom was the person who was depicted in the video was left to the jury's determination.

Finally, the court noted that the weight to be given to the opinion testimony was for the trier of fact to assess. Defense counsel extensively cross-examined the guard and had an opportunity to highlight any deficiencies in the testimony regarding the witness's familiarity with the defendant or the clarity of the videotape. Under these circumstances, the province of the jury was not compromised.

Defendants' conviction for armed robbery was affirmed.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

People v. O'Donnell, 2015 IL App (4th) 130358 (No. 4-13-0358, 3/11/15)

The trial court improperly allowed a police officer to testify that she believed defendant, who was convicted of driving under the influence of alcohol, was lying when he stated he had not been driving at the time of the accident. The officer testified that whenever she asked defendant if he had been driving, he would look away or look down, and in her experience that was a sign of deception.

The Appellate Court held that such "human lie detector" evidence was not admissible. This type of evidence violated the fundamental rule that one witness should not be allowed to express an opinion about another witness's credibility. Accordingly, it was error to admit such evidence.

The court nevertheless affirmed defendant's conviction since he had not objected to the evidence at trial, and since the evidence at trial was not closely balanced, it did not constitute plain error.

(Defendant was represented by Supervisor Larry Bapst, Springfield.)

People v. Richardson, 2013 IL App (2d) 120119 (No. 2-12-0119, 8/23/13)

1. Opinion testimony by a lay witness may be admitted so long as the opinion is based on the witness's personal observation, concerns an opinion that the witness is capable of making, and is helpful to the trier of fact in reaching an intelligent conclusion. Lay witnesses may testify about a substance which they observed and with which they are familiar, and such testimony may take the form of a conclusion as to the nature of the substance. Although a lay witness is generally not allowed to give an opinion concerning a legal conclusion that is at issue in the case, testimony in the form of an opinion or inference is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.

2. As a matter of first impression, the court found that at a jury trial for unlawful possession of a weapon by a felon while wearing body armor, the trial judge properly admitted a police officer's lay opinion that a vest worn by the defendant qualified as "body armor." The officer testified that the vest had the same fit and style as the armored vest the officer wore every day. In addition, the officer removed the vest's inserts and testified that they were intended to cover vital organs and protect such areas from bullets. Thus, the officer did not merely give an opinion that the vest was body armor, but demonstrated to the jury the basis for that conclusion.

3. The court rejected defendant's argument that because the vest was not submitted for scientific testing, it was impossible for the jury to conclude that it was not "fake body armor." The court found that the argument was based on pure speculation, as there was no evidence to support a conclusion that the body armor was fake. Furthermore, the officer removed plates from the vest and concluded that they were capable of stopping bullets. Finally, because the vest was admitted into evidence, the jury could draw its own conclusion about its nature.

Defendant's conviction for unlawful possession of a weapon by a felon wearing body armor was affirmed.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Steele, 2014 IL App (1st) 121452 (No. 1-12-1452, 9/30/14)

To prove a defendant guilty of aggravated battery based on great bodily harm under 720 ILCS 5/12-4(a), the State must prove the existence of a greater and more serious injury than the bodily harm required for simple battery. Bodily harm for simple battery requires some sort of physical pain or damage to the body, such as lacerations, bruises or abrasions. And while there is no precise legal definition of great bodily harm, it must be more serious or grave than the lacerations, bruises, or abrasions that constitute bodily harm.

The State failed to prove great bodily harm beyond a reasonable doubt. The evidence showed that defendant, while trying to evade a traffic stop, struck a police officer with his car. The medical reports from the hospital showed that the officer was treated for abrasions on his knees and discharged after a few hours. A photograph also showed that the officer had abrasions on his right elbow. These injuries did not constitute great bodily harm.

The officer testified about injuries more severe than abrasions, stating that he had torn ligaments in both knees and his right shoulder, and bone fragments in his right shoulder. These injuries would likely constitute great bodily harm, but since his testimony was not supported by the record, it could not form the basis for finding great bodily harm. The medical reports did not reflect any of these injuries, and the officer testified on cross that he was not diagnosed with these more serious injuries.

If the officer received a medical diagnosis showing more serious injuries than were initially identified, then the State needed to offer scans, X-rays, medical reports, or medical testimony to show that diagnosis. Where the question of causation is beyond the general understanding of the public, the State must present expert evidence to support its theory of causation.

Because the officer was treated and released from the hospital with only abrasions and bruising, the cause of the more serious injuries he testified about would not be readily apparent based on common knowledge and experience. Expert testimony was thus required to show that the more serious injuries were caused by the blow from defendant's car.

Additionally, while the officer was competent to testify about his physical condition since the incident, he was not competent to testify about a medical diagnosis of torn ligaments and bone fragments. Because the officer's testimony was the only evidence of the more severe injuries, and no medical evidence supported his testimony, the State failed to prove that the officer suffered great bodily harm.

The conviction was reduced to simple battery and remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Kadie Weck, Chicago.)

People v. Sykes, 2012 IL App (4th) 111110 (No. 4-11-1110, 7/31/12)

1. Under the silent-witness theory, a videotape may be introduced as substantive evidence so long as a proper foundation is laid. It is not necessary for a witness to testify to the accuracy of the images depicted in the video so long as the accuracy of the process used to produce the evidence is established. This is because the evidence is received as a so-called silent witness and thus speaks for itself.

2. When a lay witness provides opinion testimony, the witness's testimony in the form of opinions or inferences is limited to those which are: (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or otherwise specialized knowledge.

Lay opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the trial of fact, but it should be excluded when it consists of inferences and conclusions that can be drawn by the trier of fact.

3.Whether it is proper for a witness to narrate the contents of a video of which he has no personal knowledge is a legal issue involving no exercise of discretion, fact finding, or evaluation of credibility. Therefore, the issue is subject to *de novo* review.

4. A surveillance video that was of very poor quality and was difficult to watch was admitted as substantive evidence and thus spoke for itself. A witness who had no personal knowledge of the events at issue testified that the video depicted defendant removing money from a cash register. This testimony

invaded the province of the jury because the witness was in no better position than the jury to determine what the video depicted.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Thompson, 2014 IL App (5th) 120079 (No. 5-12-0079, 4/25/14)

1. A witness who did not personally observe the events in question may identify, as lay opinion testimony, a defendant depicted in a video or photograph so long as the witness was better able than the jury to make an identification. To determine whether such evidence is admissible courts must find that: (1) the witness was familiar with defendant prior to the offense; and (2) the testimony will aid the jury in resolving the issue of identification without invading the duties of the trier of fact. Testimony will properly aid the jury and not invade its duties where a defendant's appearance has changed between the time of recording and the date of trial, and/or the video or photograph is unclear and the testimony will help describe or interpret the unclear depiction.

Here, four witnesses identified defendant as the person depicted in the surveillance video and still photograph derived from the video. Each witness was familiar with defendant prior to the offense. But there was no evidence defendant had changed his appearance prior to trial, and none of the witnesses had a better perspective than the jury to interpret the evidence.

Although the still photograph was blurry, none of the witnesses who identified defendant described any particular features or aspects of defendant that would have aided the jury in interpreting the unclear depiction. The jury was able to compare both the video (which presented a clear depiction) and the distilled image against defendant, who was present in court, and there is no basis for concluding that the witnesses could make a more informed assessment of who was depicted in the surveillance evidence. The introduction of this identification testimony was thus improper.

2. The identification testimony was also improper as police procedure evidence. The consequential steps in a police investigation are generally relevant to explain the State's case to a jury. The State must be allowed to explain why a previously unidentified defendant became a suspect. But here none of the identification testimony explained how defendant became a suspect since he had already been identified before any of the police witnesses viewed the surveillance video. The identification testimony thus did not assist the jury in understanding the steps of the investigation or how defendant became a suspect.

3. Even if this identification testimony had been admissible, the cumulative impact of calling four witnesses to each offer their opinion of who was depicted in the surveillance video would have run the risk of improperly supplanting the function of the jury. Even when admissible, trial judges should limit the amount of such evidence. Here, the four identifications "painted multiple layers of prejudice on the images presented to the jury."

Given the singular role of surveillance evidence, a conviction obtained following the introduction of cumulative identification testimony cannot be trusted. The cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Lawrence O'Neill, Mount Vernon.)

People v. Thompson, 2014 IL App (5th) 120079 (No. 5-12-0079, modified upon denial of rehearing 11/18/14)

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Top

§19-23(b)
Opinions of Expert Witnesses

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2876, 125 L.Ed.2d 469 (1993)
1. **Frye v. U.S.**, 293 F. 1013 (1923), which bars expert opinion based on a scientific technique unless that technique is generally accepted as reliable in the relevant scientific community, has been superseded by the Federal Rules of Evidence, which authorize the admission of expert testimony that is reliable and relevant.

2. A trial judge may consider many factors in deciding whether evidence is reliable. While the acceptance of a scientific technique is not a prerequisite to the admission of expert testimony, it is a valid consideration in determining reliability.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) **Daubert v. Merrell Dow Pharmaceuticals**, 509 U.S. 579 (1993), which held that under Federal Rule of Evidence 702 scientific testimony may be admitted at federal trials only if it is both relevant and reliable, applies not only to "scientific" testimony but to all expert testimony. In addition, the specific factors of reliability mentioned in Daubert (i.e., whether a theory or technique can be and has been tested and subjected to peer review and publication; whether with respect to a particular technique there is a high "known or potential rate of error"; whether there are "standards controlling the technique's operation"; whether the theory or technique enjoys "general acceptance" within the relevant scientific community) are merely descriptive and not a definitive checklist to determine whether expert evidence is admissible. Instead, **Daubert** requires a "flexible" inquiry that depends on the particular circumstances of the case involved.

On review, the abuse of discretion standard applies to the trial court's determination to admit or exclude expert testimony under **Daubert**.

Donaldson v. CIPS, 199 Ill.2d 63, 767 N.E.2d 314 (2002) 1. In Illinois, the admissibility of expert scientific testimony is determined by the Frye test, which permits the admission of scientific evidence if the methodology or scientific principle on which it is based is sufficiently established to have gained general acceptance in the particular field in question. The "general acceptance" criteria does not concern the ultimate conclusion of an expert witness, but only the underlying methodology used to generate that conclusion. Thus, if the underlying method is reasonably relied upon by experts in the field, the factfinder may consider the opinion despite the novelty of the expert's conclusion.

Methodology need not be accepted unanimously or even by a majority of experts in order to satisfy **Frye**. However, a technique that is experimental or of dubious validity is not "generally accepted."

The **Frye** test does not make the trial judge a "gatekeeper" of all expert opinion testimony. Instead, the trial court is to apply **Frye** only if a principle, technique or test is "new" or "novel."

2. The court rejected the argument that Illinois law follows the "**Frye**-plus-reliability" test, which had been adopted by some appellate districts. Under that test, expert testimony is admissible only if the trial court determines both that the technique or methodology in question is generally accepted and that the specific opinion at issue is reliable. Under Illinois law, once a scientific technique is generally accepted, questions concerning the underlying data and the expert's opinion go to the weight of the evidence rather than to admissibility.

People v. McKown, 226 Ill.2d 245, 875 N.E.2d 1029 (2007) 1. In Illinois, novel scientific evidence can be admitted only if it satisfies the Frye test, which requires that the methodology or scientific principle underlying the evidence is sufficiently established to have gained general acceptance in the particular field to which to which it belongs. A court may determine the general acceptance of a scientific principle by holding a Frye hearing and considering evidence, or by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject.

2. Horizontal gaze nystagmus (HGN) evidence is "scientific evidence," and therefore subject to the Frye standard. HGN, which measures the degree of involuntary jerking of the eyes, is not within the common knowledge of laymen and requires expert interpretation.

In addition, HGN testing is "novel" because courts nationwide have split concerning whether it is a reliable indicator of the use of alcohol.

3. Most Illinois cases involving judicial notice of the scientific acceptance of HGN testing have relied on **State v. Superior Court (Blake)**, 149 Ariz. 269, 718 P.2d 171 (1986), in which the only expert testimony at the Frye hearing was presented by the prosecution. Furthermore, in showing that HGN testimony was based on an accepted scientific principle, the prosecution's expert witness in **Blake** relied on the adoption of HGN by the National Highway Transportation Safety Administration and several police departments. Because the actions of NHTSA and the police departments had been based on the expert's own studies, she "in essence referred back to her own conclusions, magnifying the opportunity for error."

The court also noted that courts of other jurisdictions have differed widely concerning the admissibility and reliability of HGN testimony, precluding reliance on such decisions as a basis for finding scientific acceptance. In addition, no Illinois court has held a **Frye** hearing concerning HGN.

4. The court rejected the argument that it could find HGN testimony to be reliable based on technical writings. Many of the writings offered by the State did no more than state the accepted theory that alcohol consumption may cause HGN, without finding that HGN is a reliable indicator of alcohol impairment when used as a roadside sobriety test. The court also noted the divergence of expert opinion in the field - many writings indicate that the HGN test is "too delicate" to be administered accurately outside a laboratory, and stress that nystagmus can be caused by many factors other than the use of alcohol.

The Supreme Court retained jurisdiction and remanded the cause for a **Frye** hearing. See also,

People v. Basler, 193 Ill.2d 545, 740 N.E.2d 1 (2000) (the purpose of a **Frye** hearing is to determine whether novel scientific evidence is generally accepted in the relevant scientific community).

In re Commitment of Simons, 213 Ill.2d 523, 821 N.E.2d 1184 (2004) Under Illinois law, the admission of expert testimony is governed by Frye, which permits the admission of scientific evidence only if the methodology or scientific principle on which the evidence is based has gained general acceptance in the particular field to which it belongs. "General acceptance" does not mean universal acceptance or that the methodology is accepted unanimously, but that the underlying method used to generate an expert opinion is reasonably relied upon by experts in the field.

In addition, **Frye** applies only to "new" or "novel" methodology. Methodology is considered "new" or "novel" if it is "original or striking" or does not resemble "something formerly known or used."

The trial court's decision concerning whether an expert witness is qualified to testify and will offer relevant testimony is reviewed for abuse of discretion. However, the trial court's determination whether the **Frye** standard has been satisfied is reviewed de novo. In reviewing a **Frye** ruling, a court of review may consider both the trial court record and "appropriate" sources from outside the record.

People v. Jordan, 103 Ill.2d 192, 469 N.E.2d 569 (1984) A witness will be permitted to testify as an expert "if his experience and qualifications afford him knowledge which is not common to lay persons and . . . such testimony will aid the trier of fact in reaching its conclusion. . . . Further, in rendering an opinion, the expert must rely upon scientific theories which have gained general acceptance in his field."

People v. Williams, 25 Ill.2d 562, 185 N.E.2d 686 (1962) A witness may only voice an opinion on subject matters for which he is qualified as an expert; he may not voice an opinion concerning matters for which he is not qualified or on matters that are within the knowledge and understanding of the trier of fact.

Hernandez v. Power Construction Co., 73 Ill.2d 90, 382 N.E.2d 1201 (1978) When a subject matter is complicated and outside the scope of knowledge and understanding of the ordinary layperson, a witness who has expert knowledge on that subject is allowed to voice an opinion, in order to aid the trier of fact in understanding the matter and resolving factual questions.

People v. Enis, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) The Supreme Court held that the trial judge did not err by precluding a defense expert witness from testifying about the reliability of eyewitness testimony. The Court discussed cases from other jurisdictions and set out the Illinois rule ("generally, an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion"). The Court found that the expert testimony in this case, as shown by the offer of proof, "would not have aided the trier of fact in reaching its conclusion."

People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994) Former professional athletes who were athletic trainers at the time of the trial should have been allowed to testify as experts. An expert may testify if his experience and qualifications afford him knowledge not commonly held by lay persons, and if his testimony will aid the factfinder. An expert's specialized knowledge may be gained through practical experience or by formal study or training; qualification as an expert depends not on the manner in which specialized knowledge was obtained, but on the extent to which such knowledge is beyond that normally possessed by a nonexpert.

People v. Covey, 34 Ill.2d 195, 215 N.E.2d 220 (1966) An expert witness may voice an opinion as to an ultimate fact in issue when the matter is beyond the knowledge and understanding of the average person.

People v. Park, 72 Ill.2d 203, 380 N.E.2d 795 (1978) The proponent of expert testimony has the burden of establishing the qualifications of an alleged expert. A police officer was not qualified to state an opinion that the substance seized was marijuana.

People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983) A State's witness who was a psychologist and psychopharmacologist was qualified to give an opinion on the question of defendant's ability to act intentionally while under the influence of alcohol and PCP. The Court noted that the witness did not voice an opinion on defendant's sanity.

The Court also discussed whether a clinical psychologist may express an opinion as to a person's mental condition. Citing People v. Noble, 42 Ill.2d 425, 248 N.E.2d 96 (1969), the Court stated that the trend of recent decisions is to permit a properly qualified psychologist to testify as to the nature and results of psychological tests "even to the extent of permitting the expression of opinions as to the mental condition of the individual." The Court also noted that Illinois statutory law permits a clinical psychologist "to testify as an expert witness in the form of his opinion about the issue of fitness or insanity or mental illness."

People v. Salazar, 126 Ill.2d 424, 535 N.E.2d 766 (1988) (rev'd other grounds, 162 Ill.2d 513, 643 N.E.2d 698 (1994)) The trial judge properly allowed a pathologist to testify regarding the sequence of gunshot wounds inflicted on the murder victim. The doctor's testimony was properly based on the amount of blood found in the chest cavity and was not impermissibly speculative. See also, **People v. Osborne**, 183 Ill.App.3d 5, 538 N.E.2d 822 (4th Dist. 1989) (pathologist was properly allowed to voice opinion that the victim died from suffocation).

People v. Albanese, 102 Ill.2d 54, 464 N.E.2d 206 (1984) At a murder trial, an accountant was properly allowed to testify as an expert and to state the opinion that defendant was in "critical financial condition." It would have been unreasonable to expect the jury to examine the complex financial documents to determine defendant's financial condition. In addition, the defense offered its own expert, who testified that defendant was not in critical financial condition, and the jury was free to balance the testimony of the two experts. Finally, the opinion did not invade the province of the jury.

Wilson v. Clark, 84 Ill.2d 186, 417 N.E.2d 1322 (1981) The Supreme Court adopted Federal Rules of Evidence 703 (Basis of Opinion Testimony by Experts) and 705 (Disclosure of Facts or Data Underlying Expert Opinion).

An expert may base an opinion on records (such as hospital records) which are the type reasonably replied by experts in the field, even if the records themselves are not in evidence. Thus, hypothetical questions need not be limited to facts in evidence, as was previously required under **People v. Yonder**, 44 Ill.2d 376, 256 N.E.2d 321 (1969). See also, **City of Chicago v. Anthony**, 136 Ill.2d 169, 554 N.E.2d 1381 (1990) (documents are not admitted for their truth, but solely to explain the basis of the expert's opinion; furthermore, the trial court must consider the reason for the substantive inadmissibility of the evidence and exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury).

People v. Nieves, 193 Ill.2d 513, 739 N.E.2d 1277 (2000) Under Illinois law, an expert may give an opinion based on facts that are not in evidence, if those facts are of a type reasonably relied upon by experts in the particular field. In addition, an expert may disclose the findings and conclusions of nontestifying experts for the limited purpose of explaining the basis of the testifying expert's opinion, even though such evidence would be hearsay if offered for its truth.

No error occurred where a pathologist who had not performed the autopsy was allowed to give an opinion on cause of death. The pathologist who performed the autopsy was retired and out of the country at the time of trial, and the chief medical examiner examined the original pathologist's records before testifying

that the death was the result of severe blows to the head and was consistent with being struck by a pipe. See also, **People v. Houser**, 305 Ill.App.3d 384, 712 N.E.2d 355 (4th Dist. 1999) (the trial court has discretion to determine whether evidence is the type reasonably relied upon by experts in the field; although the judge's determination shall not be disturbed absent an abuse of discretion, the court may not "abdicate its independent responsibilities" to determine whether "minimum standards of reliability" are satisfied; facts underlying an expert's opinion should be excluded where their probative value in explaining the expert opinion "pales beside" their prejudicial effect; information which is excluded by the law applicable to the case may not be entered under "guise" of being the basis of expert's opinion - purpose of the rule is to explore expert's opinion, not to admit evidence substantively).

People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 (1986) In order to explain the basis of his opinion, an expert witness may reveal, on direct examination, the contents of material upon which he relied. Thus, a psychiatrist may testify about the contents of statements made by the defendant when such statements were relied upon in forming the diagnosis. The holding in People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466 (1968) (that a nontreating physician could not base an opinion on statements made to him by the defendant) was rejected.

People v. Pasch, 152 Ill.2d 133, 604 N.E.2d 294 (1992) Defendant's right to confrontation was not violated when the State cross-examined a defense expert with the psychiatric reports of three experts who did not testify at trial, even though the cross-examination concerned the opinions of the nontestifying experts on defendant's sanity. Expert witnesses may consider psychological and medical records commonly relied upon by professionals in their field, and may testify to the contents of such records.

Although it would have been preferable for the trial judge to give specific instructions limiting the jury's consideration of the opinions of non-testifying experts, the failure to do so was not reversible error.

People v. Wright, 111 Ill.2d 128, 490 N.E.2d 640 (1985) The trial court did not err by allowing a psychiatrist to render an opinion that defendant had been hospitalized for 15 years in mental institutions for a treatable personality disorder rather than a mental disease. Although the psychiatrist had not considered reports prepared during that 15-year-period or discussed the hospitalization with the treating psychiatrists, the psychiatrist's examination of defendant, as well as his review of other materials, provided a sufficient factual basis to form an opinion. Furthermore, the credibility and weight to be given to the testimony was for the trier of fact to decide.

People v. Bryant, 113 Ill.2d 497, 499 N.E.2d 413 (1986) It was error to allow a forensic scientist to testify that glass pieces from the defendant's shoes and glass from a broken service station window had the same refractive index, and that there was "a good probability" that the glass came from the same source. "[T]he expert's testimony disclosed only that the pieces were consistent and therefore could have come from the same source'; "[t]here was no foundation presented for testimony regarding the frequency of the occurrence of this type of glass, much less a statement concerning the likelihood that the pieces had a common source."

Darling v. Charleston Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965) Standard or reputable texts may be used in cross-examining experts. See also, **People v. Behnke**, 41 Ill.App.3d 276, 353 N.E.2d 684 (5th Dist. 1976) (Federal Bureau of Narcotics manual "Basic Training Program for Forensic Drug Chemists" is not a "learned treatise" or of an "authoritative nature").

People v. Silagy, 101 Ill.2d 147, 461 N.E.2d 415 (1984) Where a psychiatrist testified that defendant was sexually dangerous, based in part on prior medical reports, it was proper to cross-examine him with another psychiatrist's prior diagnosis that defendant was not sexually dangerous.

People v. Godbout, 42 Ill.App.3d 1001, 356 N.E.2d 865 (1st Dist. 1976) The trial judge erred by taking judicial notice of an expert witness's expertise and thus preventing defendant from qualifying the expert before the jury. All matters bearing on an expert witness's qualifications may be brought out when presenting such a witness - a party offering an expert witness should be allowed to make plain the strength of the witness's grounds of knowledge and the reasons for trusting his belief.

People v. Collins, 71 Ill.App.3d 815, 390 N.E.2d 463 (1st Dist. 1979) A State expert witness (a pathologist) was properly allowed to give an opinion that a certain gun, or one absolutely like it, caused the injury in question. The opinion was based on the witness's personal and detailed examination of the wound and the gun.

People v. Beil, 76 Ill.App.3d 924, 395 N.E.2d 400 (4th Dist. 1979) Defendant was qualified to testify as an expert on radar where he had attended numerous courses on radar, had operated it while in the Navy, and had followed recent developments through literature in the field.

People v. Rice, 40 Ill.App.3d 667, 352 N.E.2d 452 (3d Dist. 1976) Expert testimony concerning the manner in which alcohol affects human memory and judgment should have been admitted in support of defendant's testimony that he had been drinking and remembered little of the incident in question. Such testimony was relevant to help the jury in its evaluation of the possibility that defendant suffered memory loss, and the jury may have had considerable doubt as to defendant's credibility without having some expert testimony on this issue.

People v. Einstein, 106 Ill.App.3d 526, 435 N.E.2d 1257 (1st Dist. 1982) A non-practicing pharmacist was properly found to be an expert in pharmacy, based on his education and experience.

People v. Johnson, 123 Ill.App.3d 1008, 463 N.E.2d 877 (4th Dist. 1984) An expert witness was properly allowed to testify that a piece of rubber found in defendant's car matched a rubber glove found near certain guns. The expert explained the comparison by reference to enlarged photos, a comparison the jury would not have been able to draw without the expert's testimony.

People v. Mathews, 299 Ill.App.3d 914, 702 N.E.2d 291 (1st Dist. 1998) Evidence of gang membership and activity is admissible where relevant to an issue in dispute, provided that the probative value is not substantially outweighed by the prejudicial effect. Where a police officer is called to testify concerning gang activity, the officer must qualify as an expert before the testimony can be admitted.

Where only limited testimony concerning the witness's "expertise" on gang crime was elicited (the officer was asked only if he was familiar with what gangs were located in the area of the shooting) "a more detailed foundation" was required. See also, **People v. Jackson**, 145 Ill.App.3d 626, 495 N.E.2d 1207 (1st Dist. 1986) (police officer with five years experience in street gang investigations was qualified to give an expert opinion of defendant's gang membership).

People v. Perry, 147 Ill.App.3d 272, 498 N.E.2d 1167 (1st Dist. 1986) In a murder case, it was error for a pathologist to voice his opinion that the death was not accidental. Where a jury is competent to determine the facts in issue, an expert opinion is of no special assistance and should not be admitted.

People v. Moody, 199 Ill.App.3d 455, 557 N.E.2d 335 (1st Dist. 1990) It was error to allow an evidence technician with the Chicago police department to testify concerning the maximum time after the discharge of a gun that a gunshot residue test could be expected to prove positive. There was no showing that the technician was qualified to give such an opinion, and his sole expertise was in administering the test by wiping defendant's hands with chemically treated cotton swabs, sealing the swabs, and delivering them to

the lab.

People v. Perry, 19 Ill.App.3d 254, 311 N.E.2d 341 (1st Dist. 1974) Policeman was not qualified to voice opinion concerning the amount of trigger pressure necessary to discharge gun.

People v. Groth, 105 Ill.App.3d 244, 434 N.E.2d 65 (4th Dist. 1982) A crime scene technician was improperly allowed to voice an opinion as to the number of people present in the room at the time of decedent's death; the foundation for his expertise was insufficient.

People v. Cunningham, 73 Ill.App.2d 357, 218 N.E.2d 827 (3d Dist. 1966) The trial judge may permit a psychiatrist to be present and observe the defendant while he testifies, and then use the observations as a basis for an opinion regarding the defendant's sanity. However, it is improper to permit a psychiatrist to observe other witnesses and thereafter refer to and characterize their testimony.

People v. Minnis, 118 Ill.App.3d 345, 455 N.E.2d 209 (4th Dist. 1983) The defendant, on trial for the murder of her husband, should have been allowed to present expert testimony on the "battered woman syndrome." See also, **People v. Jackson**, 180 Ill.App.3d 78, 535 N.E.2d 1086 (3d Dist. 1989) (courts which have permitted expert testimony on the battered woman syndrome "have generally done so only in cases involving self-defense and only for the purpose of explaining why the abuse a woman has suffered causes her to reasonably believe that her life is in danger and that she must use deadly force to escape her batterer"; expert's testimony about the battered woman syndrome was irrelevant where defendant did not claim self-defense, but that she was not involved).

People v. Howard, 305 Ill.App.3d 300, 712 N.E.2d 380 (2d Dist. 1999) It was improper to admit evidence of the Battered Woman Syndrome where the testimony concerned someone other than the defendant and covered actions occurring up to four years after the offense. In addition, by testifying that there was no evidence the girlfriend was attempting to deceive, the expert intruded on the province of the jury to determine credibility and assess the facts of the case. "[T]rial courts should reject the State's attempts to use expert testimony to bolster the credibility of witnesses, as these are matters best left to the trier of fact."

The court distinguished this case from precedent in which syndrome evidence was admitted only on rebuttal (after the victim's credibility had been attacked), to explain the behavior of a victim (rather than that of a mere witness), or to establish a defendant's state of mind when she murdered her spouse.

People v. DeJesus, 71 Ill.App.3d 235, 389 N.E.2d 260 (2d Dist. 1979) A physician was properly allowed to testify that he diagnosed a child's injuries as "the battered child syndrome."

People v. Harp, 193 Ill.App.3d 838, 550 N.E.2d 1163 (4th Dist. 1990) Pursuant to what is now 725 ILCS 5/115-7.2, a witness who is qualified as an expert may testify regarding rape-trauma syndrome and may offer an opinion on the ultimate issue that the sex offense complainant exhibited symptoms consistent with that syndrome. Allowing such testimony for the first time in rebuttal is within the discretion of the trial judge. (Section 115-7.2 provides that in prosecutions for certain offenses, "testimony by an expert, qualified by the court relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence.")

People v. Pollard, 225 Ill.App.3d 970, 589 N.E.2d 175 (3d Dist. 1992) An expert witness was properly allowed to testify that a 10-year-old sexual assault complainant suffered from Child Sexual Abuse Accommodation Syndrome. **People v. Nelson**, 203 Ill.App.3d 1038, 561 N.E.2d 439 (5th Dist. 1990) and **People v. Wasson**, 211 Ill.App.3d 264, 569 N.E.2d 132 (4th Dist. 1991) recognize C.S.A.A.S. as an accepted form of post-traumatic stress syndrome, the witness who testified was qualified as an expert, and a sufficient

foundation was established.

People v. Sifuentes, 248 Ill.App.3d 248, 618 N.E.2d 643 (1st Dist. 1993) Although an expert's opinion may be based on inadmissible information of the sort typically relied upon by experts in the field, the trial court must insure that what is presented as expert opinion is not merely a means of placing otherwise inadmissible matters into evidence. At an arson trial, an expert's testimony should have been excluded where it was based in large part on defendant's inadmissible confession.

People v. Wilson, 246 Ill.App.3d 311, 615 N.E.2d 1283 (4th Dist. 1993) At a jury trial for aggravated criminal sexual assault and aggravated criminal sexual abuse, expert testimony concerning the difficulty with which children remember and describe incidents of sexual abuse was properly excluded. "The limited cognitive abilities of children are well known, and any jury can be expected to take that factor into account when determining a child's credibility." Thus, the testimony would have provided no useful information to the jury.

The Court added that the expert testimony would have provided only "stereotyped generalizations" which were "of dubious authenticity." See also, **People v. Simpkins**, 297 Ill.App.3d 668, 697 N.E.2d 302 (4th Dist. 1998) (although 725 ILCS 5/115-7.2 authorizes expert testimony relating to any recognized form of post-traumatic stress syndrome, such testimony should be excluded when it would afford the jury no information beyond that already possessed by the average layperson and would severely impinge on the province of the jury to determine credibility and factual issues; expert testimony concerning the frequency with which children recant allegations of sexual abuse, and the reasons for such recantations, should have been excluded where it did not aid the jury but did impinge on its province to determine facts and credibility. Compare, **People v. Cardamone**, 381 Ill.App.3d 462, 885 N.E.2d 1159 (2d Dist. 2008) (trial court erred by excluding expert testimony that the complainants' claims were unreliable due to the circumstances surrounding their statements and the interviewing techniques used by authorities; although an expert may normally not give an opinion concerning the credibility of witnesses, the experts were discussing factors affecting the ability of children to remember alleged sexual abuse and applying those factors to this case; such evidence was not common to lay jurors, dealt specifically with this case, and "was relevant to whether the investigative techniques and . . . circumstances . . . created distorted memories or misconceptions").

People v. Chambers, 259 Ill.App.3d 631, 631 N.E.2d 817 (2d Dist. 1994) As a matter of plain error, the trial judge erred by admitting a psychiatrist's extensive testimony about defendant's criminal history. Although an expert testifying on the issue of sanity may explain the basis of his opinion by disclosing materials on which he relied, the detailed recital of defendant's criminal past given here had at best only marginal relevancy to the issue of sanity. The trial court's ruling "essentially allowed [the State expert] to offer generally inadmissible evidence, containing a high degree of unfair prejudice, to shore up a conclusion that was not disputed." See also, **People v. Solis**, 275 Ill.App.3d 346, 655 N.E.2d 954 (1st Dist. 1995) (the trial judge erred by allowing the State's expert to disclose inadmissible evidence to explain the basis of his opinion; though expert opinions may be based on inadmissible evidence, that evidence may not be disclosed if its probative value is substantially less than its prejudicial effect).

People v. Jakupcak, 275 Ill.App.3d 830, 656 N.E.2d 442 (3d Dist. 1995) 1. In most cases, conflicting testimony by experts merely raises a factual question to be decided by the trier of fact. Where the State's expert failed to rely on generally accepted scientific theories, however, there was an insufficient foundation for admission of the expert's opinion.

2. Northwestern University's traffic accident reconstruction manual could be considered on appeal though it had not been introduced at trial. Scholarly works to which the parties and witnesses referred at trial are properly considered on appeal, even if they were not actually introduced. Here, the defense expert testified that he had written one of the chapters in the manual, and the State's expert conceded that the manual

was an authoritative treatise.

People v. Lowitzki, 285 Ill.App.3d 770, 674 N.E.2d 859 (1st Dist. 1996) A defense witness who was a professor of criminal justice with a Ph.D in psychology, but who was not a psychiatrist, medical doctor psychologist or social worker, was incompetent to testify as an expert concerning defendant's state of mind at the time of the offense. In Illinois, only a psychiatrist or licensed clinical psychologist may testify as an expert regarding insanity or mental illness (730 ILCS 5/5-2-5).

Similarly, under §5-2-5 a "clinical psychotherapist" was not competent to testify as an expert.

People v. Shelton, 303 Ill.App.3d 915, 708 N.E.2d 815 (5th Dist. 1999) Under **People v. Jacquith**, 129 Ill.App.3d 107, 472 N.E.2d 107 (1st Dist. 1984), a police officer with training in the detection of drug use and experience with drug users may be qualified to testify as an expert concerning his or her belief that a person is under the influence of drugs. Here, however, the arresting officer had only limited training in detecting drug use and repeatedly used the pronoun "we" when discussing his experiences, suggesting that at least part of his knowledge was based on the experience of others. Under these circumstances, the State failed to establish that the officer had sufficient experience with drug users to admit his opinion that defendant was under the influence of drugs.

Cumulative Digest Case Summaries **§19-23(b)**

People v. Becker, 239 Ill.2d 215, 940 N.E.2d 11311 (2010)

When determining the admissibility of expert testimony, a trial judge should balance the probative value of the testimony against its prejudicial effect. In the exercise of his or her discretion, the trial judge should carefully consider the necessity and relevance of the expert testimony in light of the facts of the case before admitting it for the jury's consideration. Expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its decision.

In a prosecution of defendant for predatory criminal sexual assault and criminal sexual assault of his three-year-old daughter, the defense sought to introduce the testimony of an expert who reviewed the out-of-court statements of the child and reached the conclusion that the techniques employed to interview the child adversely affected the accuracy of the child's statements. The expert did not interview the child herself because in her opinion "[t]here's no clean evidence left to get."

The Supreme Court found that the trial court did not abuse its discretion in excluding the testimony of the defense expert. One basis for exclusion of the expert testimony was that its admission would violate the rule that it is generally improper to ask one witness to comment on the credibility of another. The expert's testimony would constitute direct, adverse comment on the credibility of the child. Its practical effect would be to advise the jury to disregard not only the out-of-court statements of the child, but the child's in-court testimony as well.

A separate and independent basis for exclusion of the expert's testimony was that her testimony was not beyond the ken of the average juror. It is a matter of common understanding that children are subject to suggestion, that they often answer in a way that they believe will please adults, and that they are inclined to integrate fictional notions with reality. Defendant could, and did, apprise the jury of the circumstances surrounding the child's statements and these principles through examination of the witnesses and summation to the jury. Therefore, the expert's testimony had limited probative value and was unnecessary. This limited value was outweighed by the prejudice that the expert would have interjected into the trial by commenting directly and extensively on the credibility of the child witness and informing the jurors that her testimony should be disregarded.

People v. Lerma, 2016 IL 118496 (No. 118496, 1/22/16)

1. The rights to due process and a fair trial include the right to present witnesses in one's behalf. Generally, expert testimony is permitted if by virtue of experience and qualifications the witness possesses knowledge which is not common to lay persons and the testimony will aid the trier of fact in reaching a conclusion. In determining whether expert testimony is admissible, the trial court must balance the probative value of the evidence against its prejudicial effect. The trial court should also carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case.

The trial court is given broad discretion to decide whether to admit expert testimony, and its decision is reviewed for abuse of discretion. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.

In **People v. Enis**, 139 Ill. 2d 264, 564 N.E.2d 1135 (1990), the Illinois Supreme Court recognized developing authority in some jurisdictions that expert testimony concerning eyewitness identification should be admissible in certain circumstances, but suggested caution against the overuse of such testimony. Here, the court recognized that in the decades since **Enis** there has been a dramatic shift in the legal landscape such that the admission of expert testimony concerning the reliability of eyewitness testimony has become widely accepted. The court concluded, "[T]oday we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony."

2. The court concluded that the trial court abused its discretion by denying defendant's motion to admit expert testimony concerning the reliability of eyewitness identification testimony. Defendant initially presented a pretrial motion *in limine* to allow a witness who was an attorney and a licensed psychologist to testify as an expert on the topic of memory and eyewitness identification. The trial court denied the motion, stressing that the eyewitnesses knew defendant prior to the shooting.

Defense counsel filed a motion to reconsider and indicated that the expert would testify that misidentifications have occurred where witnesses knew the person who was identified beforehand. The trial court denied the motion to reconsider, stating that the most "glaring" reason was that the witnesses claimed to have known defendant before the offense. The court also noted that according to an Ohio Court of Appeals opinion, some 12 years earlier the defense's expert witness testified that the factors which indicate that eyewitness identification testimony is unreliable apply where the eyewitness is viewing a stranger. The trial court acknowledged that the expert contested the accuracy of the Ohio court's description of his testimony in that case, but stated that where an Appellate Court justice made such a description, "I am not going any further down that road."

Defendant then filed a second motion to reconsider, tendering the report of a second expert who was a professor of psychology and a widely recognized expert in the field of human perception and memory. Before the second motion to reconsider was filed, the original expert had passed away. The new expert testified that although it would seem "intuitive to a jury" that a witness's identification would be more accurate if he or she is acquainted with the suspect, "this is not necessarily true."

The trial court again denied the motion to reconsider, stating that it was ruling for the same reasons it set forth in denying the admission of the original witness's testimony.

In finding an abuse of discretion, the Supreme Court stated that expert testimony on the reliability of eyewitness identification was both relevant and appropriate because the only evidence against defendant consisted of eyewitness identifications made by two witnesses, one of whom was deceased at the time of trial and whose identification was admitted as an excited utterance. In addition, most of the factors which both experts identified as potentially contributing to the unreliability of eyewitness testimony "are either present or possibly present in this case." These factors include the stress of the event itself, the use and/or presence of a weapon, the use of a partial disguise, exposure to post-event information, the fact that the event occurred at night, and the fact of cross-racial identification.

Furthermore, because one of the eyewitnesses had died, only one of the two eyewitnesses was subject to cross-examination. It was also unclear whether the witness who did testify actually knew the defendant before the identification, as she stated that she had seen him either 10 times or only once or twice, and in any

event had only viewed him from across the street without ever speaking to him or being in the same room or house. When asked directly how long she had known the defendant before the shooting, she responded, "I did not know him." Under these circumstances, expert eyewitness testimony on the reliability of eyewitness identification would have been probative.

3. The court also concluded that the trial judge abused his discretion by denying admission of the second expert's testimony based on its rejection of the proposed testimony of the expert who died before trial. The original witness's proposed testimony was rejected because of the judge's "personal conviction" that mistaken identifications are unlikely where the witness and perpetrator knew each other before the offense.

The Supreme Court criticized the trial court's reasoning, noting that the first expert's report specifically addressed the issue of the likelihood of mistaken identifications where the witness and suspect knew each other and rebutted the trial court's assumptions about what the expert would say. In addition, the reasons for excluding the first expert's testimony had nothing to do with the testimony of the second expert, whose report flatly contradicted the trial court's beliefs and whom the parties agreed was a qualified and highly respected expert. By relying on its personal beliefs concerning eyewitness identifications as the primary basis for denying the admission of the second witness's testimony, the trial court not only ignored the explicit contents of the report of the expert but substituted its own opinion on a matter of uncommon knowledge for that of a respected and qualified expert. The court also noted that the trial court's ruling was undercut by the conflict in the record concerning the extent to which the surviving eyewitness actually knew defendant before the offense.

Finally, the court rejected the trial court's belief that the first expert's testimony could be rejected based on a single sentence in an Ohio court opinion describing the expert's testimony in an earlier trial. Not only did the expert contest the accuracy of the Ohio court's summary of the evidence, but the testimony occurred some 13 years before the trial in this case. Rather than allow the witness to testify, however, the trial court chose to treat a one-sentence summary of the witness's testimony 13 years earlier "not only as indisputably accurate but also as a binding and authoritative representation" of the expert's opinion at the time of trial.

4. The erroneous exclusion of expert testimony concerning the reliability of the eyewitness identification was not harmless. The trial court's ruling prevented the jury from hearing relevant and probative expert testimony concerning the State's sole testifying eyewitness in a case in which there was no physical evidence connecting defendant to the crime, the remaining evidence of guilt was not overwhelming, and the excluded testimony was neither duplicative nor cumulative of other evidence.

Defendant's convictions for first degree murder and aggravated discharge of a weapon were reversed and the cause remanded for a new trial.

(Defendant was represented by Supervisor Linda Olthoff, Chicago.)

People v. Lovejoy, 235 Ill.2d 97, 919 N.E.2d 843 (2009)

1. The decision to qualify an expert rests in the sound discretion of the trial, whose decision will be reversed only where it was so arbitrary, fanciful or unreasonable that no reasonable person would have taken the same view. A person is permitted to testify as an expert where his or her experience and qualifications afford knowledge that is not common to the average layperson and which will assist the jury in evaluating the evidence and reaching a conclusion. An expert is not required to meet any precise requirements regarding experience, education, scientific study, or training.

The trial court did not abuse its discretion by accepting a forensic scientist as an expert in the field of fabric pattern impressions. Although the witness had participated in only two weeks of training in this area some ten years prior to trial and had not been qualified as an expert in this field before the instant trial, he had extensive experience comparing other, analogous types of impressions and possessed knowledge of the process by which impressions are left on objects. Furthermore, such knowledge was not common to the average layperson and was helpful to the jury.

2. Other crimes evidence is admissible if relevant for any purpose other than to show the defendant's propensity to commit crimes. Other crimes evidence can be admissible to show motive to commit the crime charged, so long as the probative value of the evidence is not outweighed by the prejudicial effect.

Where the defendant was charged with the first degree murder of his stepdaughter, the trial court properly admitted, as evidence of motive, the stepdaughter's allegations that the defendant had sexually assaulted her. The court noted that the trial court weighed the probative value and prejudicial effect of such evidence, limited the testimony that was admitted, and gave a limiting instruction.

Admission of such evidence did not violate the right to confrontation under **Crawford v. Washington**, which holds that testimonial hearsay is inadmissible unless the witness is unavailable for trial and there was a prior opportunity for cross-examination. The statements fell outside the **Crawford** rule because they were admitted not to prove the truth of the matter asserted – that the defendant had assaulted the decedent – but to prove a possible motive for the murder.

3. Nor was **Crawford** violated where a medical examiner was allowed to testify concerning the results of toxicology testing done by an outside laboratory, where the examiner did not know the identity of the person who performed the testing or whether the equipment was in proper operating condition.

Under Illinois law, experts may both consider medical and psychological records commonly relied upon by members of their profession and testify about the contents of those records at trial. Because the medical examiner testified that it was common practice to rely on toxicological reports prepared by an outside laboratory when drawing conclusions related to the cause of death, and testified that he was trained to interpret such test results, those results were admissible. The court also noted that the statements were not admitted for the truth of the matter asserted – that the decedent had specified levels of substances in her blood – but to explain the expert's opinion concerning cause of death.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

People v. Williams, 238 Ill.2d 125, 939 N.E.2d 268 (2010)

At defendant's sexual assault trial, a State Police scientist testified that she compared defendant's DNA profile with a profile developed from evidence at the crime scene, and concluded that the samples matched. The crime scene profile was developed not by the ISP lab, but by Cellmark, a private company.

1. The court found that the State was not required to show that the Cellmark profile was reliable by producing evidence that the Cellmark equipment was operating properly at the time of the testing. Under **Wilson v. Clark**, 84 Ill. 2d 186, 417 N.E.2d 1382 (1981), an expert may base an opinion on facts that are typically relied upon by experts in the field, even where those facts are not in evidence. However, the facts underlying an expert opinion may be introduced to explain the opinion, and the opposing party may choose to elicit those facts when cross-examining the expert.

Here, the witness used her independent expertise to evaluate evidence (including the Cellmark report) of a type generally relied upon by forensic experts in forming opinions. Because the relevant evidence was the expert's opinion, not the Cellmark report, testimony concerning the reliability of Cellmark's equipment was not required.

The court also noted the witness's testimony that: (1) Cellmark is an accredited lab and required to comply with certain protocols, (2) there was no indication of a problem in the chain of custody, and (3) there did not appear to have been any degradation of the crime scene samples before Cellmark was able to develop the profile.

2. Under **Crawford v. Washington**, 541 U.S. 36 (2004), admission of "testimonial" hearsay violates the Confrontation Clause unless the declarant is unavailable and the defense had a prior opportunity to cross-examine. **Crawford** applies only if the evidence in question is hearsay, however.

The court found that the Cellmark report was not hearsay, because it was used to explain the basis of an expert opinion rather than to prove the truth of the matter asserted. Therefore, **Crawford** did not apply.

The court distinguished this case from **Melendez-Diaz v. Massachusetts**, 174 L. Ed. 2d 314, 129 S. Ct. 2527 (2009), in which the prosecution introduced analysts' affidavits at a cocaine trafficking trial to

provide *prima facie* evidence of the seized substance's composition, quality and weight. The U.S. Supreme Court held that the affidavits were "testimonial" evidence, and that **Crawford** therefore applied.

Here, by contrast, the expert used her own skill and expertise to analyze evidence, including the Cellmark report, and arrive at an independent opinion that defendant's DNA profile matched the profile developed from the crime scene. By contrast, the affidavits in **Melendez-Diaz** were evidence of the defendant's guilt, and were thus "categorically different" from the Cellmark report at issue here.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010)

In a prosecution for predatory criminal sexual assault, a child welfare supervisor who worked for a private social services agency testified to the characteristics of child-sexual-abuse-accommodation syndrome that are often observed in children who have been sexually abused. The Appellate Court addressed three issues related to the admissibility of that evidence.

1. **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923), requires that the methodology or scientific principle upon which an expert opinion is based be sufficiently established to have gained general acceptance in its particular field. **Frye** is the test for admissibility of scientific evidence in Illinois. A court may determine the general acceptance of a methodology or principle by holding a **Frye** hearing, or by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject. Relying exclusively on prior judicial decisions to establish general scientific acceptance can be a hollow ritual, however, if the underlying issue of scientific acceptance has not been adequately litigated. A reviewing court can conduct a **Frye** hearing as well as a trial court because under the **Frye** standard, a court does not determine the validity of a particular scientific technique, only whether there is a general consensus in the relevant scientific community regarding the reliability of the technique.

A **Frye** hearing on the admissibility of evidence of child-sexual-abuse-accommodation syndrome was not necessary. In **People v. Nelson**, 203 Ill.App.3d 1038, 561 N.E.2d 439 (5th Dist. 1990), the court considered numerous scholarly articles on the syndrome and concluded that it was generally accepted in the psychological community that children who have been sexually abused behave differently than those who have not been abused. As this is exactly the underlying basis of the syndrome, the **Nelson** decision supported the determination that evidence pertaining to the syndrome was generally accepted.

2. The adequacy of the qualifications of an expert witness is a matter within the sound discretion of the trial court. Expertise is not measured by a given level of academic qualification, but by whether the proposed expert has knowledge and experience beyond that of the average citizen that would assist the jury in evaluating the evidence. It does not matter whether the expert acquired specialized knowledge through education, training, experience, or a combination of each.

The trial court did not abuse its discretion in allowing a child welfare supervisor to testify as an expert regarding child-sexual-abuse-accommodation syndrome, even though she was not a psychologist or expert in the field of psychology. The witness worked with staff members who worked with sexually-abused children. She had a bachelor's degree in law enforcement, a master's degree in human and family resources, and was studying for a doctorate in education. She had worked with victims and offenders as a sexual abuse therapist, and dealt with emotionally disturbed, neglected, and abused adolescents as a child care worker. She was familiar with child-sexual-abuse-accommodation syndrome through reading articles on the subject and her work with children.

3. Evidence is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Evidence is considered relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence.

Testimony regarding child-sexual-abuse-accommodation syndrome was relevant. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually-abusive relationship. The defense attacked the credibility of the child witness by introducing evidence of her delayed reporting

and inconsistencies in her testimony. The syndrome evidence aided the trier of fact in weighing that evidence.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Burgund, 2016 IL App (5th) 130119 (No. 5-13-0119, 11/22/16)

Defendant was convicted of predatory criminal sexual assault of his two children. The State's case consisted of his confession and the testimony of his estranged wife and mother-in-law. The trial court excluded several key pieces of evidence defendant wanted to introduce to show that his confession was false and the testimony of his wife and mother-in-law was not believable.

1. First, the trial court excluded the testimony of a clinical psychologist who would have supported defendant's claim that he gave a false confession due to psychological pressure, manipulation, and suggestion by his wife and mother-in-law. The psychologist would have testified that defendant had the type of personality that made him highly suggestible and easily led, especially by his wife and mother-in-law.

A witness is permitted to testify as an expert if his experience and qualifications give him knowledge that lay people do not have and such testimony will aid the trier of fact. When the State presents evidence of a defendant's confession, the defendant has the right to present evidence that affects the weight a trier of fact will give to the confession.

The Appellate Court held that the psychologist should have been allowed to testify about his opinion that defendant had a personality that was subject to easy manipulation. An average juror would not readily understand why an innocent person might falsely believe he committed a crime. The expert's testimony would have thus aided the jury in evaluating the effect of the psychological environment that defendant claimed made him falsely confess. And it would have touched directly on the credibility of defendant's confession.

The court rejected the State's argument that the expert's testimony was properly excluded because he did not diagnose defendant as having any particular psychological or personality disorder. The jury was not required to find that defendant had a disorder before it could disbelieve his confession.

2. Second, the trial court excluded as hearsay the testimony of two witnesses who would have corroborated defendant's testimony that his wife claimed to have a supernatural power of discernment and was obsessed with making false accusations of lustful behavior. The court also excluded as hearsay the testimony of a witness who dated defendant's wife before she married defendant and would have described numerous instances where the wife accused the witness of being immoral and lustful.

Illinois Rule of Evidence 801 defines hearsay as an out of court statement offered to prove the truth of the mater asserted. Ill. R. Evid. 801(c). An out of court statement is not hearsay if it is offered merely to show that the statement was made, not that it was true.

The Appellate Court held that the testimony was not offered to prove the truth of the matters asserted in the out of court statements made by defendant's wife. Defendant was not trying to prove that his wife actually had a supernatural power of discernment or that one of the witnesses actually had a problem with immoral and lustful behavior. Defendant instead offered the testimony only to prove that his wife had made the statements. Since the statements supported his defense that his wife treated defendant in a similar manner, the trial court erred in precluding this testimony.

3. Third, the trial court excluded the testimony of the ex-husband of defendant's mother-in-law. He would have testified that defendant's wife falsely told people that the ex-husband had sexually abused the mother-in-law. Defendant wanted to introduce this evidence to show that his wife would fabricate sexual abuse allegations to gain sympathy and acceptance within their church community.

Illinois law generally prohibits the impeachment of a witness with specific past instances of untruthfulness. But such evidence may be used to impeach a witness if the past act shows bias, interest, or motive to testify falsely.

The Appellate Court held that this evidence was admissible to show the wife's potential motive, interest, and bias in testifying against defendant. The trial evidence showed that defendant's marriage was

tumultuous, with accusations that defendant had lust issues, physical violence stemming from those accusations, and discussions of divorce. Evidence that the wife had made false accusations in the past to gain acceptance in her church as it related to divorce was relevant to show that she may have believed that she would personally benefit again from making false accusations against defendant.

The court granted defendant a new trial.

People v. Burhans, 2016 IL App (3d) 140462 (No. 3-14-0462, 7/27/16)

To lay a foundation for expert testimony the proponent must show that the facts or data the expert relies upon are reasonably relied upon by experts in that particular field. Experts may rely upon information and opinions obtained from reading "standard publications" on which their opinion is based.

Here the State's expert testified that "numerous research studies" supported her opinion, but never identified these studies or testified that the general consensus of experts in the field recognized these studies. The court held that the State failed to lay an adequate foundation for these studies. While an expert does not need to name the publications on which she relies, the expert must show that the general consensus of the expert community recognizes the validity of the publications. Here the State did neither.

The court, however, affirmed defendant's convictions since the State's other evidence overwhelmingly supported his conviction and made any error harmless.

(Defendant was represented by Assistant Defender Editha Rosario-Moore, Ottawa.)

People v. Cook, 2014 IL App (1st) 113079 (No. 1-11-3079, 5/8/14)

Under the general acceptance test of **Frye v. United States**, 293 F. 1013 (D.C. 1923), scientific evidence is admissible only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in its particular field. The trial court may determine if the scientific principle or methodology meets the general acceptance test by: (1) conducting a **Frye** hearing; or (2) taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings that address the issue. The focus of the **Frye** test is on the underlying methodology that led to the opinion, not on the opinion itself.

Defendant argued that at his trial for involuntary manslaughter arising from the death of his four-month-old son, the trial court erroneously took judicial notice of the general acceptance of shaken baby syndrome (SBS) as a medical diagnosis because no **Frye** hearing has been held in Illinois to determine if an SBS diagnosis has gained general acceptance. The Appellate Court rejected this argument, holding that the State's expert testimony about SBS was not subject to the **Frye** standard because SBS it is a conclusion reached through observations and medical training and not a methodology.

The State's experts were physicians who testified that based on their observations, the injuries that caused death resulted from blunt trauma which exerted severe forces on the brain and were consistent with SBS. These opinions were based on an application of medical training to their observations. Defendant did not challenge the medical methodology relied upon to reach the experts' conclusions; instead defendant challenged the conclusions themselves.

Because the expert testimony was based on the witnesses' medical knowledge and experience and not on a theory of SBS or any other novel scientific theory, no **Frye** hearing was required.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

People v. Johnson, 394 Ill.App.3d 1027, 915 N.E.2d 845 (1st Dist. 2009)

1. The court reiterated precedent that **Crawford v. Washington** is not violated where an expert who did not perform DNA analysis testifies about the test results as part of explaining her expert opinion. (See **People v. Williams**, 385 Ill.App.3d 359, 895 N.E.2d 961 (1st Dist. 2008) (leave to appeal granted 1/28/09 as No. 107550 and **People v. Johnson**, 389 Ill.App.3d 618, 906 N.E.2d 70 (1st Dist. 2009)).

2. The court rejected the argument that the State failed to establish a proper foundation for admission of the DNA profile where there was no evidence that the equipment used to prepare the profile was

adequately calibrated and functioning properly. Under **Wilson v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981), an expert is allowed to give his opinion based on matters that are not in evidence, if such matters are reasonably relied upon the experts in the particular field. Where expert testimony is based on an electronic or mechanical device, however, the expert must provide some foundational proof that the device was functioning properly at the time it was used.

Because the expert testified that she had worked as laboratory director at the facility which performed the DNA analysis, described extensively the laboratory's accreditations and the review required to obtain such accreditations, and stated that the file indicated specific notations which showed that proper procedures for DNA analysis had been followed, her testimony provided a sufficient foundation of the procedures and specifications on which her expert opinion could reasonably be based.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Johnson, 406 Ill.App.3d 114, 940 N.E.2d 264 (1st Dist. 2010)

A DNA analyst, who worked as the laboratory director for Cellmark, testified to the lab process performed to create a DNA profile from a swab recovered from the scene of the crime, based on her review of notes and documentation in the lab folder. She testified that Cellmark was an accredited laboratory and proper procedures were followed with the appropriate control tests. An Illinois State Police forensic scientist then compared the profile prepared from the swab by Cellmark to the DNA profile obtained from a buccal swab taken from the defendant, and concluded that the profiles matched to a reasonable degree of scientific certainty.

1. Relying on **People v. Williams**, 238 Ill.2d 125, ___ N.E.2d ___, 2010 WL 2780344 (2010), the court concluded that the Cellmark analyst's testimony did not constitute testimonial hearsay because it was not offered for its truth but only as a basis for the experts' opinions that proper procedures were followed in the analysis and that the profiles matched. As in **Williams**, the court concluded that **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527 (2009), is distinguishable because the Cellmark witness presented more than a bare-bones statement about the procedures employed at Cellmark.

2. As in **Williams**, the testimony of the Cellmark witness was not inadmissible on the ground that the State failed to prove that the Cellmark equipment was functioning properly at the time that the tests were performed. The Cellmark witness was the laboratory director and testified about Cellmark's accreditation and procedures. Any challenge to her testimony went to its weight, rather than its admissibility.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Jones, 2015 IL App (1st) 121016 (No. 1-12-1016, mod. op. 4/22/15)

1. Expert testimony is admissible if the witness is qualified, a foundation is established to show the basis for the expert's opinions, and the testimony will assist the trier of fact in understanding the evidence. An adequate foundation includes the requirement that the proponent show that the expert's testimony is based on reliable information of the type reasonably relied upon by experts in the particular field. The court concluded that whether or not firearm/toolmark analysis is a "hard" or "strict" science, Illinois courts have recognized "that the facts relied upon by experts in toolmark and firearm comparison are of a type reasonably relied upon by experts in the field in order to establish a proper foundation."

2. Here, there was an insufficient evidentiary foundation to admit an expert's opinion that a bullet had been fired from defendant's weapon. The expert testified that he compared test bullets fired from defendant's handgun with the bullet obtained from the decedent's body and concluded that there was sufficient "agreement" to conclude that all of the bullets had been fired from the same weapon. However, the witness conceded that the State Police Crime Lab does not use any specific standard to determine when bullets markings match, but instead relies on an "overall pattern based on class and individual characteristics." The witness stated there is no "set number of how many lines" that are required for a match and that not all of the "striations . . . have to line up" in order for there to be a match.

Noting that the expert "gave no reason at all to support his expert opinion that there was sufficient

agreement and a match between the bullet recovered by the victim and defendant's gun," the court held that the evidentiary foundation was insufficient. The court noted that the expert gave no testimony concerning any individual characteristics of either the firearm or the bullet. In addition, where there is no evidence to explain how an expert reached an opinion, the defense is deprived of any meaningful opportunity to challenge the expert's findings on cross-examination.

3. The admission of the improper expert testimony was not harmless beyond a reasonable doubt where there were no eyewitnesses, defendant's statements to police were consistent with his innocence, and the expert testimony placed the murder weapon in defendant's hands. "Other than perhaps DNA evidence, we can think of no evidence more prejudicial than evidence literally placing the murder weapon in a defendant's hands."

Defendant's conviction for first degree murder was reversed and the cause remanded for a new trial.

People v. Leach, 391 Ill.App.3d 161, 908 N.E.2d 120 (1st Dist. 2009)

1. Under **Crawford v. Washington**, "testimonial" hearsay may be admitted at trial only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination.

2. The medical examiner's records concerning an autopsy are not "testimonial" hearsay, and therefore are not subject to **Crawford**. Among the types of records deemed by **Crawford** to be "historically nontestimonial" are business records, which are similar to the type of records prepared during an autopsy. In addition, there is a "public records" hearsay exception for records required or authorized to be maintained by a public officer, and records of the medical examiner are a species of "public documents" which are subject to a statutory hearsay exception under 725 ILCS 5/115-5.1.

Because autopsy records are non-testimonial, defendant's right to confrontation was not violated when an expert witness gave an opinion of the cause of death based on autopsy records compiled by a retired pathologist. In the course of its holding, the court noted that the medical examiner's office is not a law enforcement agency, but an agency empowered to investigate deaths and perform autopsies in a number of situations, only one of which concerns the possibility that a death resulted from a criminal act.

3. In addition, autopsy records are the type of record normally used by experts to form the basis of an opinion. Thus, autopsy records are admissible under **Wilson v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981), which holds that an expert may base an expert opinion on facts that are not in evidence if the facts are of a type reasonably relied upon by experts in the field. Under **Clark**, an expert may testify concerning the findings of non-testifying experts.

People v. Leach, 405 Ill.App.3d 297, 939 N.E.2d 537 (1st Dist. 2010)

1. Under **Crawford v. Washington**, "testimonial" hearsay may be admitted at trial only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination. Although **Crawford** did not definitively define the term "testimonial," it did note that certain records are historically deemed to be nontestimonial, including records prepared in the normal course of business. Because such records are routinely prepared and relied upon for the conduct of business, they are unlikely to be falsified.

Similarly, Illinois law recognizes a "public records" hearsay exception for records required or authorized to be maintained by a public officer and evincing matters properly required to be noted and maintained. Medical examiner records are a type of "public document," and are generally admissible. Furthermore, autopsy records are specifically admitted under the statutory hearsay exception adopted in 725 ILCS 5/115-5.1.

Because autopsy records are nontestimonial, **Crawford** does not apply to their admission. Thus, **Crawford** was not violated at a murder trial when an expert witness testified concerning the contents of the records of an autopsy that had been performed by a pathologist who had retired by the time of trial.

In the course of its holding, the court noted that the medical examiner's office is not a law enforcement agency, but an agency empowered to investigate deaths and perform autopsies in a number of situations, only one of which concerns the possibility that a death resulted from a criminal act.

2. Even if the autopsy records were testimonial, they would have been admissible because they were offered for a purpose other than to prove the truth of the matter asserted. **Crawford** holds only that the confrontation clause bars testimonial hearsay which is offered to prove the truth of the matter asserted. (**People v. Williams**, ___ Ill.2d ___, ___ N.E.2d ___ (2010) (No. 107550, 7/15/10).

Here, the testifying expert relied on the autopsy reports in reaching her own expert opinion concerning the cause of death, and testified about those records to explain her own opinion. Because the records were not offered for the truth of the matters asserted, **Crawford** did not apply.

3. The court also noted that the expert's testimony about the autopsy records was admissible under **Wilson v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981). Under **Wilson**, an expert may base her expert opinion on records of a type reasonably relied upon by experts in the field, and may testify concerning those records in order to explain that opinion.

(Defendant was represented by Assistant Defender Maya Szilak, Chicago.)

People v. Lerma, 2014 IL App (1st) 121880 (No. 1-12-1880, 9/8/14)

1. A witness may testify as an expert if his experience and qualifications give him knowledge which is not common to lay persons, and his testimony would aid the trier of fact. Expert testimony addressing matters of common knowledge is not admissible unless the subject is difficult to understand and explain. In deciding whether expert testimony is admissible, the trial court should balance the probative value of the evidence against its prejudicial effect, and it must carefully consider and scrutinize the proffered testimony in light of the facts of each case. The trial court has broad discretion in determining the admissibility of expert testimony and its decision is reviewed for an abuse of discretion.

2. Defendant attempted to have an expert testify about eyewitness identifications. The trial court denied the request on the basis that this case involved an identification by a witness who knew defendant. The court believed that under those circumstances an expert's testimony would not be helpful because "it is a fact" that people are less likely to misidentify someone they know, and it would not require an expert to explain this fact to the jury. The court also feared that the expert's testimony would be prejudicial by generating a referendum of the accuracy of eyewitness testimony generally, and possibly providing an opinion on the credibility of the eyewitness in this case.

Defendant obtained another expert who would have directly addressed the trial court's concerns. The second expert would specifically testify that under certain circumstances even identifications by acquaintances can be inaccurate. The expert also stressed that he would not issue judgements about the accuracy of any particular witness's identification or about the ultimate question of defendant's guilt. The trial court again denied defendant's request, referring to its earlier decision.

3. The Appellate Court held that the trial court by relying on its prior ruling failed to carefully consider or scrutinize the second expert's testimony, which directly contradicted the court's prior finding that it is common knowledge that an eyewitness is less likely to misidentify an acquaintance. The trial court thus failed to conduct a meaningful inquiry into the proposed testimony.

The trial court also abused its discretion by relying on its personal belief that "everybody knows" identifications by acquaintances are less likely to be inaccurate. The second expert directly contradicted this belief by concluding that it is not necessarily true that acquaintance identifications are accurate. The trial court also exercised improper judicial protectionism for the State by fearing that the expert would voice his opinion on the credibility of witnesses when the second expert specifically stated he would not do this."

Since the eyewitness identification was central to the State's case, the improper exclusion of expert testimony could have contributed to defendant's conviction and thus was reversible error. The conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

People v. Morris, 2013 IL App (1st) 110413 (No. 1-11-0413, 11/15/13)

Before his trial for first degree murder, defendant successfully moved for suppression of a video statement which he made following his arrest. The suppression was based on a violation of **Miranda.** There was no allegation that the statement was involuntary.

In the suppressed confession, defendant admitted throwing a metal pole or dumbbell at the decedent. In addition, an eyewitness testified that he saw defendant throw the dumbbell, and a search of defendant's car after the offense disclosed a dumbbell.

The defendant filed a motion *in limine* asking that the trial court prohibit the State from introducing evidence of the confession as impeachment. Defense counsel stated that defendant would not testify, but that the defense would call as expert witnesses medical personnel who treated defendant at the Cook County Jail. The expert witnesses would testify that they diagnosed defendant with "Hill-Sachs deformity," a shoulder condition that would have prevented defendant from throwing the dumbbell.

The trial court denied the motion *in limine*. Although defense counsel represented in an offer of proof that the experts would testify that they based their diagnosis on physical observations of defendant and examination of x-rays rather than by relying on defendant's statements, the trial court ruled that the State could use the suppressed confession to impeach the experts concerning defendant's physical ability to throw a dumbbell. After the motion *in limine* was denied, the defendant elected not to call the experts to testify.

On appeal, defendant argued that the trial court erred by ruling that defendant's suppressed confession could be used to impeach expert defense witnesses concerning their diagnoses of defendant and their opinions of his ability to throw a dumbbell.

1. The court rejected the State's argument that the issue was not properly before the court because the defendant failed to call the experts after his motion *in limine* was denied. Under **Luce v. U.S.**, 469 U.S. 38 (1984) and its progeny, a defendant who fails to testify waives any issue concerning the denial of a motion *in limine* to bar use of his prior convictions as impeachment.

The court concluded that **Luce** does not apply here. First, the trial court made a definitive ruling that the expert witnesses could be impeached with defendant's statements, and the State made clear that it would impeach the experts if they testified. Second, the ruling did not turn on factual considerations, but involved a legal issue - whether an expert witness's testimony may be impeached with a defendant's suppressed statement. Third, the record was sufficient to permit the court to consider the issue. Under these circumstances, the issue was properly before the court although defendant did not call the experts to testify.

2. On the merits, the court concluded that the trial court abused its discretion by denying the motion *in limine*. An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, unreasonable, or would not be adopted by any reasonable person.

Under the exclusionary rule, evidence seized in violation of a defendant's constitutional rights is generally inadmissible at trial. However, an exception to the exclusionary rule permits the admission of illegally obtained evidence for the limited purpose of impeaching the credibility of the defendant's testimony at trial.

In **James v. Illinois**, 493 U.S. 307 (1990), the U.S. Supreme Court declined to extend this exception to permit use of a defendant's suppressed statement to impeach the testimony of witnesses other than the defendant, finding that such use would not promote the truth-seeking function of a criminal trial and would significantly undermine the deterrent effect of the exclusionary rule. The **James** court also noted that the threat of being prosecuted for perjury is sufficient to deter false testimony by a witness who is not the accused, and that impeachment with a third party's statement is unnecessary. Furthermore, allowing impeachment of witnesses other than the accused with a suppressed statement might chill some defendants from presenting a defense through the testimony of others.

3. However, the court concluded that the error was harmless beyond a reasonable doubt because the defendant's offer of proof was weak, counsel never outlined exactly what the experts' opinions would be, and defendant was tried on an accountability theory under which he need not have thrown the dumbbell in order to be convicted. In addition, whether defendant threw the dumbbell was at best a minor part of the

State's case, and three eyewitnesses identified defendant as participating in the offense. Under these circumstances, defendant would have been found guilty beyond a reasonable doubt even had the medical experts testified that he was unable to throw the dumbbell.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Starks, 2014 IL App (1st) 121169 (No. 1-12-1169, 6/4/14)

At defendant's trial for first degree murder, a police officer testified that while she and other officers were investigating an unrelated case at an apartment building, they observed defendant exit the back of the building and run through an alley while wearing a t-shirt and no shoes. When the officer stopped defendant and learned his name, she realized that he was the subject of an investigative alert.

A second officer testified that as part of the unrelated investigation, he entered an apartment where the door was ajar. He observed three handguns on the kitchen counter. One of the handguns was subsequently determined to have been the weapon used in the shooting with which defendant was charged.

DNA analysis revealed that the weapon used in the shooting contained the mixed DNA profiles of at least three people and that defendant could not be excluded as the primary contributor of the DNA. The shooting had occurred two months before the weapon was seized from the apartment.

1. The Appellate Court held that the trial judge erred by admitting evidence of weapons that were found in the apartment but which were not shown to have any connection to the offense. Evidence is generally admissible if it is relevant, but even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence is relevant if it has any tendency to make any fact of consequence to the action more or less probable than it would be without the evidence.

A weapon found in the defendant's possession is generally inadmissible unless it has some connection to the crime charged. For a weapon to be admitted, there must be evidence to connect it to both the defendant and the crime. Evidence that the weapon is suitable for commission of the crime satisfies the second element.

Here, it was error to admit the weapons because there was no evidence to connect them to the defendant. Not only was there no evidence to show that defendant possessed the weapons, there was no evidence to connect him to the apartment where the weapons were found. Defendant was stopped because, while police were investigating an unrelated offense, they saw him running barefoot through the alley. He was not seen leaving the apartment where the weapons were found, and there was no evidence to connect him to either the apartment or the two weapons that were not suitable for committing the offense. Under these circumstances, those weapons were irrelevant and should not have been admitted.

2. Because the evidence was closely balanced, admission of the weapons constituted error under the first prong of the plain-error doctrine. Even viewed most favorably to the State, the DNA evidence concerning the weapon merely established that defendant could not be excluded as one of three DNA contributors. The weapon which contained DNA was found some two months after the offense. The evidence against defendant consisted primarily of the testimony of three eyewitnesses who provided inconsistent accounts and only one of whom identified defendant in both the photo array and the physical lineup.

In addition, the State emphasized the erroneously admitted evidence in closing argument. Finally, the trial court's remarks at sentencing demonstrated the prejudice resulting from the erroneously admitted evidence. Under these circumstances, the introduction of weapons which had no connection to the defendant or to the offense constituted plain error.

3. The court noted that numerous studies have indicated that there is significant potential for error in eyewitness identifications and that jurors have misconceptions about the reliability of eyewitness testimony. In addition, whether trial courts should admit expert testimony on the reliability of eyewitness identification is a rapidly evolving area of the law.

Although the trial court has broad discretion in determining the admissibility of expert testimony, the record showed that the judge rejected the motion without considering the relevance of the evidence in light of the facts of this case. Because the conviction was being reversed on other grounds, the court directed

the trial court to give serious consideration to defendant's request to present expert testimony on eyewitness identification.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Wright, 2012 IL App (1st) 073106 (Nos. 1-07-3106 & 1-07-3464 (cons.), 3/30/12)

Rule 705 of the Illinois Rules of Evidence, which codified existing law, permits an expert to give an opinion without divulging the basis for it. Rule 705 shifts the burden to the opposing party to elicit and explore the underlying facts or data on cross-examination. An unnecessary curtailment of cross-examination undercuts the burden-shifting scheme embodied in Rule 705.

Rule 703 provides that even if facts or data are not admissible in evidence, the expert may be asked to offer an opinion based on them, if they are disclosed at or before trial and if they are of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject.

The State's witness was qualified as an expert in the field of forensic DNA analysis and testified that there was a nine-loci match between defendant's DNA profile and a male DNA profile derived from the complainant's rectal swab, and that he had not seen a nine-loci match result in an exclusion upon comparison of further loci. This evidence was the primary evidence of defendant's guilt. The court then blocked the defense from asking any questions about a forensic DNA study from Arizona that the defense had provided the witness prior to trial that found 120 nine-loci matches in that state's database of over 65,000 offenders.

Cross-examination regarding the Arizona study was relevant to the jury's determination of the weight to be given to the expert's testimony regarding the statistical probability of the nine-loci match by showing that such matches were not uncommon. Even if the Arizona study was not independently admissible at trial, the expert could have been cross-examined about it. The defense was denied the opportunity to ask the expert whether the study was the type of data usually relied on by experts in his field. As this ruling limited the ability of the defense to expose potential errors or discrepancies in the crucial DNA test results, it was an abuse of the court's discretion and not harmless.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

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§19-24
Other Crimes Evidence

§19-24(a)
General Rules

Huddleston v. U.S., 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) Under Federal Rule of Evidence 404(b), the prosecution is not required to prove defendant's commission of a prior crime by a preponderance of the evidence. Such evidence is relevant and admissible, however, "only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."

People v. McDonald, 62 Ill.2d 448, 343 N.E.2d 489 (1975) Evidence showing that defendant committed a crime for which he is not on trial is improper when its purpose is to show defendant's propensity to commit crime. See also, **People v. Baptist**, 76 Ill.2d 19, 389 N.E.2d 1200 (1979).

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) Evidence of other crimes is admissible to prove modus operandi, intent, identity, motive, absence of mistake or "if it is relevant for any purpose other than to show the propensity to commit crime." See also, **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989).

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) The list of proper uses for other crime evidence set out in prior decisions (such as modus operandi, intent, identity, motive or absence of mistake) "should not be considered as exclusive" or "taken to mean that these are the only purposes for which testimony of other crimes may be admitted." Instead, evidence of other crimes "is admissible if it is relevant to establish any fact material to the prosecution." See also, **People v. Kimbrough**, 138 Ill.App.3d 481, 485 N.E.2d 1292 (1st Dist. 1985) (examples of various purposes for which other crimes evidence may be used).

When evidence of other crimes is offered, "it is incumbent upon the trial judge to weigh the relevance of the evidence to establish the purpose for which it is offered against the prejudicial effect the introduction of such evidence may have upon the defendant." See also, **People v. Copeland**, 66 Ill.App.3d 556, 384 N.E.2d 391 (1st Dist. 1978) (judge must balance relevance against the tendency to inflame and prejudice the jury).

People v. Romero, 66 Ill.2d 325, 362 N.E.2d 288 (1977) Evidence of other crimes may not be introduced to enhance the credibility of witnesses. See also, **People v. Turner**, 78 Ill.App.3d 82, 396 N.E.2d 1139 (1st Dist. 1979).

People v. Lehman, 5 Ill.2d 337, 125 N.E.2d 506 (1955) Evidence of other crimes is objectionable "not because it has no appreciable probative value, but because it has too much." The law distrusts the inference that because a man committed other crimes he is more likely to have committed the current crime. Thus, where the testimony has no value beyond that inference, it is excluded.

People v. Robinson, 167 Ill.2d 53, 656 N.E.2d 1090 (1995) Evidence of other crimes is generally inadmissible because it tends to "overpersuade" the jury that defendant is a bad person deserving punishment. However, such evidence is admissible where it is relevant for some purpose other than to show defendant's propensity to commit crimes. Before admitting such evidence, the trial court must weigh its prejudicial effect against its probative value; the evidence must be excluded if the former substantially outweighs the latter.

By allowing the State to choose which two of several crimes it wished to admit, the trial court did not fail to independently weigh the probative value and prejudicial effect. Although the trial judge allowed the State to select which two crimes to present, he reserved the right to review those crimes to determine whether they were admissible. Further, any offense that occurred 13 years earlier was not too remote to be admitted where defendant had been incarcerated for all but two of the years between the crimes.

Finally, defendant waived any argument that the trial court improperly allowed the State to introduce details of the other crimes, because defense counsel failed to object to the extraneous testimony. The plain error doctrine did not apply because the State presented "persuasive identification testimony."

People v. King, 109 Ill.2d 514, 488 N.E.2d 949 (1986) Evidence of another crime was properly admitted because it was relevant to establish the accuracy of defendant's confession and to rebut defendant's contention that the confession had been coerced.

People v. Bartell, 98 Ill.2d 294, 456 N.E.2d 59 (1983) Evidence of subsequent, as well as prior, offenses may be used to show intent or *modus operandi*. See also, **People v. Kimbrough**, 138 Ill.App.3d 481, 485 N.E.2d 1292 (1st Dist. 1985).

People v. Hall, 194 Ill.2d 305, 743 N.E.2d 521 (2000) The trial judge erred by allowing the State to show that a defendant charged with murder physically abused his wife after the offense, because such evidence improperly informed the jury that defendant had committed unrelated crimes. However, the plain error rule was inapplicable because the evidence of guilt was not closely balanced and a fair trial was not denied.

People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 (1980) Evidence of another crime was improperly admitted to show that defendant was near the scene of the crime on trial. The State could have established defendant's presence without mentioning the other crime - "the same witness could testify to time and place proximity without mentioning a distinct crime . . . [and such] a limitation hinders the prosecution in no legitimate way." See also, **People v. Spiezio**, 105 Ill.App.3d 769, 434 N.E.2d 837 (2d Dist. 1982) (defendants could have been placed at the crime scene without reference to the unrelated crime); **People v. Bailey**, 88 Ill.App.3d 416, 410 N.E.2d 545 (3d Dist. 1980) ("Illinois law also requires that otherwise admissible evidence must be purged of references to other crimes if it is at all possible to do so without doing violence to the probative value of the evidence").

People v. Phillips, 127 Ill.2d 499, 538 N.E.2d 500 (1989) To introduce other crimes evidence, the State must make a threshold showing that a prior crime occurred and that defendant participated in it. Such proof need not be made beyond a reasonable doubt.

People v. Jones, 105 Ill.2d 342, 475 N.E.2d 832 (1985) Defendant's possession of items taken during the prior burglary, and the testimony of witnesses denying that they sold the items to defendant, as defendant claimed, was sufficient to show that defendant participated in the prior burglary.

People v. Nieves, 193 Ill.2d 513, 739 N.E.2d 1277 (2000) The trial judge erred by permitting the prosecutor to read into the record portions of a pretrial statement indicating that when defendant surrendered to New York law enforcement authorities, he discussed crimes that had occurred in both Chicago and New York. Defendant's New York crimes were not relevant to explain the manner in which he was placed in custody by Chicago police.

Other crimes evidence may be admissible to show "steps in the investigation of the crime and events leading to it," but only if the evidence specifically connects defendant with the crimes for which he is being tried. Defendant's criminal activities in New York had no relevance to whether he committed a murder in Illinois. In view of the other evidence of guilt, however, the error was harmless beyond a reasonable doubt.

Also, the trial court did not improperly admit other crimes evidence by allowing testimony that the decedent's body was found with his pants pockets turned inside out. Defendant argued that such evidence showed a robbery, an offense with which he was not charged. Evidence concerning the condition of the decedent's clothing was admissible to show the nature of the murder with which defendant was charged. Such evidence did not show an uncharged crime; instead, it showed "part of the very same crime at issue before the court."

People v. Thingvold, 145 Ill.2d 441, 584 N.E.2d 89 (1991) Defendant was convicted of solicitation for asking a man named Nalan to kill defendant's second wife. To show intent and motive, the State was allowed to introduce the testimony of three other men regarding defendant's solicitations to commit the same or similar crimes.

It was improper to admit testimony of a witness who claimed that the solicitation had occurred more than 10 years before this offense and concerned defendant's first wife. Such testimony was not relevant to intent or motive regarding defendant's second wife, but merely established a propensity to commit crime.

However, the trial court properly admitted evidence that defendant had more recently solicited two other men to kill his second wife so that defendant could collect insurance money, because such evidence tended to show intent and motive.

Finally, the State should not have been allowed to introduce evidence that on a previous occasion the second wife had been subjected to a violent attack, because defendant was never shown to have been involved in the incident. For the same reason, the State should not have been allowed to show that the second wife in fact died as the result of a violent attack.

People v. Placek, 184 Ill.2d 370, 704 N.E.2d 393 (1998) Although other crimes evidence is admissible if relevant to establish a material question other than defendant's mere propensity to commit a crime, before admitting such evidence the trial court must determine that its prejudicial effect does not substantially outweigh its probative value. The decision to admit other crimes evidence will be overturned only if there is a clear abuse of discretion.

To be admissible to disprove an entrapment defense, other crimes evidence must involve offenses that are "specifically relevant to the defendant's claim of entrapment." Specific relevance may be demonstrated by showing that the other crime is similar to the crime with which defendant is charged or is "proximate in time" to the charged offense.

The trial judge abused his discretion by admitting evidence that defendant dealt in stolen auto parts, because auto theft crimes were not specifically relevant to the drug offenses at issue. Theft of auto parts is not sufficiently similar to the delivery of controlled substances to supply the necessary relevance.

A jury instruction limiting consideration of the evidence to defendant's "design and predisposition" did not cure the error. Because the instruction allowed the jury to consider the evidence for predisposition, on which it was inadmissible, it "was . . . erroneous under the facts of this case, and certainly did nothing to cure the improper admission of the other-crimes evidence."

People v. Richardson, 123 Ill.2d 322, 528 N.E.2d 612 (1988) Defendant, for the first time on appeal, contended that the jury should have been specifically instructed to compare the characteristics of the offense on trial with the other offense allegedly committed by defendant and to determine whether they were sufficiently similar to permit a reciprocal inference of identify. Because the jury was given IPI 1.02 and IPI 3.14, "the jury was properly instructed regarding the other-crimes evidence [and] there most certainly was not a substantial defect by which defendant was denied due process."

People v. Donoho, 204 Ill.2d 159, 788 N.E.2d 707 (2003) By enacting 725 ILCS 5/115-7.3, which provides that where a defendant is charged with specified crimes (including criminal sexual assault and aggravated criminal sexual abuse), evidence that defendant committed another such offense "may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant," the legislature intended to authorize admission of other crimes evidence to establish defendant's propensity to commit sexual offenses.

People v. Walters, 69 Ill.App.3d 906, 387 N.E.2d 1230 (1st Dist. 1979) Before evidence of another crime may be introduced, it must be shown that the crime actually occurred and that defendant committed it or participated in its commission, though such proof need not be beyond a reasonable doubt. See also, **In re L.F.**, 119 Ill.App.3d 406, 456 N.E.2d 646 (2d Dist. 1983).

People v. Smith, 122 Ill.App.3d 609, 461 N.E.2d 534 (3d Dist. 1984) At defendant's trial for an armed robbery at a tavern, the State introduced testimony of defendant's ex-wife connecting him to a prior armed robbery of another tavern. The testimony was improperly introduced because there was insufficient evidence presented to show that defendant committed the prior offense. Defendant was not identified at the time of the prior offense, he was not connected to the crime, and the description given by the tavern owner "differ[ed] greatly" from the description of defendant.

People v. Gugliotta, 81 Ill.App.3d 362, 401 N.E.2d 262 (2d Dist. 1980) It was improper, at defendant's trial for arson, for the State to introduce evidence of three other arsons allegedly committed by defendant. The State failed to show that the other fires were of an incendiary origin or that they had been committed by defendant.

Evidence of other crimes cannot be admitted for any purpose until it is shown that such crimes actually took place and that defendant committed them or participated in their commission. See also, **People**

v. Miller, 55 Ill.App.3d 421, 370 N.E.2d 1155 (1st Dist. 1977).
People v. Connors, 82 Ill.App.3d 312, 402 N.E.2d 773 (1st Dist. 1980) When evidence of another crime is introduced, the jury should be instructed as to the purpose for which it may be used.

People v. Leaks, 179 Ill.App.3d 231, 534 N.E.2d 491 (1st Dist. 1989) An overbroad instruction regarding the limited use of other crimes evidence was harmless error. The instruction included the use of "identification," which was not in issue.

People v. Haywood, 250 Ill.App.3d 371, 621 N.E.2d 47 (1st Dist. 1993) At his trial for first-degree murder, defendant claimed to have shot the decedent in self-defense. Defendant testified that shortly before the shooting, the decedent attempted to rob him and struck him in the head with a gun because he had no money.

Defendant then joined several friends who were looking for a person who had just robbed another member of the group. As the men searched, the decedent ran from a gangway. Defendant fired one shot because he believed that the decedent was pulling a gun from his pocket. Defendant claimed that he yelled "Give up" before he fired.

Two other witnesses testified that the decedent did not have a weapon in his hands. One witness was unsure whether defendant yelled "Give it up," and the other denied telling police that defendant had done so. According to a police officer, the latter witness said that defendant had yelled "Give it up."

A bag containing .6 grams of cocaine was found near the body. The State introduced the cocaine as evidence of motive, theorizing that the decedent had taken the bag from defendant during the earlier robbery and that defendant intended to kill the "person who took his dope." The trial court admitted the cocaine but sustained defense objections to the State's closing argument, which repeatedly asserted the alleged motive.

The cocaine should not have been admitted because there was no evidence connecting it to defendant. To establish that the cocaine proved motive, the State was required to show that defendant once possessed it and had been robbed of it by the decedent. Although there was evidence that the decedent attempted to rob defendant, there was no evidence that defendant ever possessed the cocaine. Even if defendant did yell before he fired, a point on which the evidence conflicted, his statement "falls far short" of establishing that he had possessed the cocaine and that it had been stolen from him. The evidence was "simply too slim a thread" on which to base an argument on motive.

People v. Pitts, 257 Ill.App.3d 949, 629 N.E.2d 770 (4th Dist. 1994) At the scene of the offense, police found a key that fit the door of defendant's apartment. Before trial, the State announced that it intended to call defendant's probation officer to testify about defendant's address. The prosecutor refused defense counsel's offer to stipulate to the address and conceded that he also intended to call defendant's building manager to confirm the address and to testify that the key fit defendant's lock. The trial court allowed the probation officer's testimony but instructed the jury to consider it only on the issue of identification.

The probation officer's testimony constituted inadmissible evidence of other crimes. By presenting the building manager's testimony that the key fit defendant's door, the State convincingly proved that defendant lived at the address in question. Thus, there was no legitimate question about identity, and the only conceivable purpose for the probation officer's testimony was to advise the jury of defendant's prior criminal record.

People v. Hansen, 313 Ill.App.3d 491, 729 N.E.2d 934 (1st Dist. 2000) Evidence of other crimes generally is inadmissible to establish that a defendant has the propensity to commit crimes, but is admissible for any proper purpose, including to establish motive, intent, identity, absence of mistake, existence of a plan or design, and modus operandi. Even where such evidence is relevant to legitimate issues, however, it is admissible only if it is shown that: (1) the other crime actually occurred and (2) defendant participated in its

commission. Although these showings need not be beyond a reasonable doubt, they must be proven by more than mere suspicion.

Further, other crimes evidence should be excluded if the prejudicial effect substantially outweighs the probative value. Whether other crimes evidence should be admitted lies in the trial court's discretion, which will not be reversed absent a clear abuse.

Evidence of defendant's pedophilia was not admissible for any proper purpose at his trial for the murder of three boys. The evidence was not admissible to prove motive and intent, because most of the evidence pertained to incidents that occurred in the 20-year-period after the decedents' murders. Nor was the evidence relevant to the issue of common design or plan; the mere presence of factual similarities between crimes does not justify an inference of a common design or scheme.

The evidence established that over 20 years defendant either "picked up, or directed others to pick up, numerous young male hitchhikers" with whom he engaged in sexual activity, but did not establish that defendant committed any particular, identifiable act of sexual assault against any person, including the victims here.

People v. Bedoya, 325 Ill.App.3d 926, 758 N.E.2d 366 (1st Dist. 2001) At defendant's trial for the first degree murder of a bouncer in a bar, the State was allowed to introduce evidence that before the altercation defendant (an off-duty Milwaukee police officer) fired shots at several buildings, including two hotels and the residence of Cardinal Bernadine. The trial judge erred by admitting the other crimes evidence.

The uncharged crimes were not sufficiently similar to the charged offense to be admitted. Defendant was charged with killing the bouncer by firing at him at close range during a struggle, while the prior incidents involved shots fired randomly from a moving car and did not involve intent to shoot persons in the buildings. There were no common victims between the charged and uncharged offenses, which were separated by 45 minutes to an hour and did not occur in the same geographical area.

Even if the evidence had some slight probative value, it should have been excluded because it was unfairly prejudicial. The uncharged crimes had only "slight probative value" but were extremely prejudicial, especially in light of the "excruciating detail[s]" that were presented, the prosecutor's argument focusing on the uncharged crimes, the trial court's failure to give a limiting instruction when the evidence was admitted, and the refusal to inform the jury that at a previous trial defendant had been acquitted of the uncharged offenses. Concerning the latter point, in interests of fairness, the jury should be informed when defendant has been acquitted of charges concerning criminal conduct that is admitted as other crimes evidence.

People v. Miller, 311 Ill.App.3d 772, 725 N.E.2d 48 (5th Dist. 2000) At a trial for the sexual abuse of a child, the trial judge erred by admitting evidence that defendant told police he had "done a lot of bad things." Such testimony was misleading; defendant actually said that he had done a lot of bad things "in the past," a qualification that was omitted when the statement was introduced. In addition, admission of the evidence placed defendant in the "untenable position" of being able to explain the meaning of the statement only by revealing a prior juvenile adjudication that the trial court had ruled inadmissible.

The statement also constituted evidence of other crimes and therefore could be admitted only if relevant to establish a material point other than defendant's propensity to commit crime. The statement had no probative value on any material question and was highly prejudicial; it should have been excluded.

People v. Chambers, 259 Ill.App.3d 631, 631 N.E.2d 817 (2d Dist. 1994) As a matter of plain error, the trial judge erred by admitting a psychiatrist's extensive testimony about defendant's criminal history. Although an expert testifying on the issue of sanity may explain the basis of his opinion by disclosing materials on which he relied, the detailed recital of defendant's criminal past given here had at best only marginal relevancy to the issue of sanity. Defendant's prior criminal acts related mainly to whether he possessed a violent personality, an issue on which both sides agreed. The insanity defense, by contrast, turned on whether the combination of intoxication and personality disorders rendered defendant incapable

of forming the required criminal intent. Because defendant's prior criminal conduct was not directly relevant to the issue of insanity, and the experts agreed as to defendant's general psychiatric condition, the trial court's ruling "essentially allowed [the State expert] to offer generally inadmissible evidence, containing a high degree of unfair prejudice, to shore up a conclusion that was not disputed."

The prejudicial effect of the details of defendant's prior criminal history clearly outweighed any probative value, and the State psychiatrist's opinion would have retained its evidentiary value without a detailed discussion of defendant's criminal past. Finally, the error was prejudicial because the properly admitted evidence was not so overwhelming on the issue of sanity that no fair-minded jury could have voted to acquit.

People v. McMillen, 281 Ill.App.3d 247, 666 N.E.2d 812 (1st Dist. 1996) Plain error occurred where the State presented evidence of an unrelated burglary and defendant's confessions to two other murders. The State argued that the evidence of other crimes was properly admitted because defendant raised an insanity defense. The State argued that where defendant's sanity is in issue, "practically every event in a defendant's life is relevant . . . including [his] criminal history." Quoting **People v. Glenn**, 233 Ill.App.3d 666, 599 N.E.2d 1220 (1st Dist. 1992).

Despite **Glenn**, even where an insanity defense is raised evidence of past criminal conduct must be "relevant to the sanity dispute at trial." The probative value of the evidence must outweigh its prejudicial effect, and to the extent possible, references to other crimes must be purged. Otherwise, there exists an unacceptable risk that the jury will reject the insanity defense in the belief that defendant is an evil person rather than because guilt has been proven.

People v. Grabbe, 148 Ill.App.3d 678, 499 N.E.2d 499 (4th Dist 1986) Defendant was convicted of the murder of his wife. The wife disappeared in July 1981, and her body was never found. The only evidence that directly linked defendant to his wife's death came from a woman, McCalister, who was dating defendant at that time - she testified that she was present and saw defendant kill his wife and burn her body. Defendant testified and denied the killing.

Over objection, McCalister was allowed to testify that while defendant was burning his wife's body, he said he had previously killed three other people. In admitting this statement, the trial judge informed the jury that it was to be considered "solely on the issue of defendant's intent." However, the jury was later given IPI 3.14, which stated that the above evidence was "received solely on the issue of defendant's motive."

The above evidence was improperly admitted. "Defendant's admission of prior murders had no relevance to either his intent or motive in regard to the crime with which he was charged. The evidence as explained and limited by the instructions merely had the purpose of 'overpersuading' the jury that defendant was a very bad person."

People v. Harris, 288 Ill.App.3d 597, 681 N.E.2d 602 (1st Dist. 1997) Defense counsel was not ineffective although he failed to request a limiting instruction when other crimes evidence was admitted. However, because evidence of other crimes carries a severe risk of unfair prejudice, trial judges should recognize the "potential peril, whether or not defense counsel first proposes a limiting instruction." The court should give IPI 3.13 both at the time the other crimes evidence is presented to the jury and at the close of the case.

People v. Brown, 319 Ill.App.3d 89, 745 N.E.2d 173 (4th Dist. 2001) Even where other crimes evidence is admissible, the trial court must carefully limit the evidence to that which is relevant to the case. Cumulative evidence of uncharged conduct may prejudice defendant by "overpersuading" the jury that defendant is a bad person and may lead to a conviction for reasons other than defendant's guilt of the crime charged.

The admission of excessive other crimes evidence "switched the focus of the trial to the prior incident." Four of the State's 12 witnesses testified only about the prior incident, and two others testified

about the prior incident in addition to the charged crime. Thus, half of the State's witnesses testified about the uncharged conduct. Much of the testimony about the prior crime was repetitive.

In addition, the trial court erred by omitting the word "only" from IPI 3.14, which informed the jury of the purposes for which the other crimes evidence could be considered. The instruction given by the judge failed to convey correct principles of law and caused the jury to ask a question during deliberations.

Finally, because "other-conduct evidence poses a risk of significant prejudice . . ., this court has suggested trial courts not only instruct the jury . . . at the close of the case, but also at the time the evidence is first presented to the jury."

People v. Lewis, 305 Ill.App.3d 665, 712 N.E.2d 401 (2d Dist. 1999) At defendant's trial for child pornography, the trial judge erred by admitting evidence suggesting that defendant was prone to commit crimes against children. Such evidence was not relevant to show defendant's intent when he took the photograph in question, as it did not relate to the elements of child pornography and defendant's intent was not at issue.

People v. Cardamone, 381 Ill.App.3d 462, 885 N.E.2d 1159 (2d Dist. 2008) 725 ILCS 5/115-7.3 provides that when a defendant is accused of certain sexual offenses against children, evidence of similar offenses are admissible for any relevant purpose, provided that the probative value of the evidence is not outweighed by the prejudicial effect.

Such evidence was relevant in this case to show defendant's propensity to commit the charged offenses, but the prejudicial effect of the evidence far outweighed the probative value. Defendant, a gymnastics coach, was convicted of nine counts of aggravated criminal sexual abuse against seven girls. However, the seven complainants testified not only to the 26 acts that were charged, but that defendant also committed between 158 and 257 uncharged offenses. In addition, the trial court admitted evidence of additional uncharged acts committed against persons other than the complainants. Because no reasonable person could have believed that the probative value of such evidence was greater than the prejudicial effect, the trial court abused its discretion by admitting the evidence.

The other crimes evidence forced defendant to account for his whereabouts and behavior almost every day of a three-year period. In addition, some of the allegations appeared to have been disclosed for the first time at trial, making it almost impossible for defendant to defend himself.

In view of the extensive other crimes evidence submitted, the trial court erred by refusing defendant's request to instruct the jury that it was required to unanimously find defendant's guilt as to each crime charged. The instructions defining the charges did not provide dates of the alleged conduct or describe the allegations clearly enough that the jury would necessarily base its verdicts on findings concerning the same acts. "[W]here the majority of the State's case involved uncharged offenses that allegedly occurred in the same time frame as the charged offenses, a separate instruction that the jury had to be unanimous regarding the charges was warranted."

People v. Holmes, 383 Ill.App.3d 506, 890 N.E.2d 1045 (1st Dist. 2008) Under common law, other crimes evidence was generally prohibited to show one's propensity to commit the charged crime. By enacting 725 ILCS 5/115-7.3, which in sex offense prosecutions allows other crimes evidence for any purpose for which it is relevant, the legislature intended to modify the traditional rule and permit propensity evidence in certain circumstances. In determining whether propensity evidence is admissible under §115-7.3, the court must weigh probative value and prejudicial effect in light of several statutory factors, including: (1) the proximity in time between the charged and uncharged offenses; (2) the degree of factual similarity between the offenses; and (3) any other relevant facts and circumstances. The trial court's decision to admit or deny propensity evidence is reviewed under the abuse of discretion standard.

The trial court abused its discretion by excluding a prior sexual battery conviction. Although nine years elapsed between the prior and charged offenses, defendant was incarcerated for five of those years. In

addition, the sexual battery conviction had a number of similarities to the charges for which defendant was being tried, including that both victims were women who had relationships with defendant but refused to continue those relationships, both offenses occurred in broad daylight, and both women were assaulted at knife point. In addition, defendant punched both victims to immobilize them and brought both to his parents' home during or after the attack. Other similarities included that defendant claimed both women consented to having sex and medical documentation supported the claims of physical assaults and sexual trauma.

In determining that the probative value of the nine-year-old conviction was greater than the prejudice, the credibility issue raised by the complainant's response to the supplemental discovery motion was an appropriate factor to consider. Propensity evidence is disfavored not because it is irrelevant, but because it is overly persuasive to the point of enticing a jury to convict only because defendant is a bad person who deserves punishment. The existence of motive or bias on the part of the complainant reduces the likelihood that defendant would be convicted merely because of the propensity evidence, and therefore makes propensity evidence less prejudicial.

Also, a conviction for attempted forcible rape which occurred seven years before the offense for which defendant was on trial was properly excluded by the trial court. Because the details of the assaults were not similar and the conviction was entered as part of a plea negotiation involving other charges, "admitting this conviction would be more prejudicial than probative." See also, **People v. Taylor**, 383 Ill.App.3d 591, 890 N.E.2d 1108 (1st Dist. 2008) (trial court abused its discretion by excluding evidence of prior sexual offenses under §115-7.3; the offenses occurred only six years apart and had several similarities).

Cumulative Digest Case Summaries **§19-24(a)**

People v. Dabbs, 239 Ill.2d 277, 940 N.E.2d 1088 (2010)

725 ILCS 5/115-7.4 provides that in prosecutions for domestic violence, evidence that the defendant committed other offenses of domestic violence may be admitted on any matter for which it is relevant. In determining whether to admit such evidence, the trial court must weigh the probative value of the evidence against any undue prejudice, considering such factors as the proximity in time between the offenses, the degree of factual similarity between the offenses, and any other relevant facts and circumstances.

The Supreme Court rejected defendant's argument that §115-7.4 violates due process.

1. Generally, evidence of other crimes may be admitted if relevant for any purpose other than to show a defendant's propensity to commit crimes. However, such evidence will not be admitted if its prejudicial effect substantially outweighs its probative value. The rationale for the exclusion of other crimes evidence is not that it is irrelevant, but that it is likely to prejudice the jury.

Section 115-7.4 abrogates the common law rule and authorizes a trial court, in its discretion, to admit other crimes evidence in domestic violence prosecutions even on the issue of propensity to commit domestic violence offenses.

2. The court rejected the argument that under §115-7.4, such evidence must be admitted without regard to its relevance or prejudice. Because §115-7.4 abrogates a common law rule of evidence, it is to be interpreted most narrowly in favor of those against whom it is directed. The court concluded that §115-7.4 retains the common law requirement that such evidence is admissible only if it is relevant and only if the probative value is not substantially outweighed by the risk of undue prejudice.

3. The court rejected the argument that §115-7.4 violates due process. In the course of its holding, the court noted that the exclusion of other crimes evidence to show propensity is based on a common law rule, and not a rule of constitutional magnitude.

Where a statute does not affect a fundamental constitutional right, the rational basis test is used to determine whether substantive due process is violated. Thus, the statute will be upheld so long as it bears a rational relationship to a legitimate State interest and is not arbitrary or unreasonable.

The court concluded that §115-7.4 serves the legitimate State interest of permitting the prosecution

of recidivist domestic violence offenders. The court found that domestic violence frequently involves victims who are vulnerable and reluctant to testify, and that a domestic abuser is frequently "adept at presenting himself as a calm and reasonable person and his victim as hysterical or mentally ill." Because the admission of evidence of prior, similar offenses might persuade a trier of fact that the present victim is worthy of belief because her experience is corroborated, §115-7.4 is rationally related to the interest of allowing the effective prosecution of domestic abuse.

4. The court found that the defendant abandoned an equal protection claim which he raised in the petition for leave to appeal but failed to argue in the opening or reply brief or at oral argument.

(Defendant was represented by Assistant Defender Michelle Zalisko, Mt. Vernon.)

People v. Pikes, 2013 IL 115171 (No. 115171, 11/21/13)

1. Evidence is generally admissible if it is relevant. Relevant evidence is any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The rule that evidence of the commission of other crimes by the accused is inadmissible for the purpose of showing a propensity to commit crimes is an aspect of the rule that the prosecution may not introduce evidence of a character trait of the accused. The concern is not that such evidence is lacking in probative value, but that it may over persuade the jury, which might convict the accused because it believes he is a bad person.

The concerns underlying the admission of other-crime evidence are not present when the uncharged crime was not committed by the defendant. There is no danger that the jury will convict the defendant because it believes he has a propensity to commit crimes. The admissibility of such evidence is analyzed under ordinary principles of relevance, not according to rules governing the admission of other-crime evidence.

2. Defendant was charged with a murder that allegedly arose out of a conflict between two gangs. The feud began with the shooting of a member of defendant's gang. Then on the day prior to the murder, a rival gang member rode a scooter into the territory of defendant's gang. When Donegan, a member of defendant's gang, shot at the person on the scooter, he was struck by a car containing other rival gang members that was following the scooter. Donegan then recruited defendant to assist him in exacting revenge by committing a drive-by shooting, which led to the murder for which defendant was convicted.

The Appellate Court reversed the conviction, finding that evidence of the scooter shooting was improperly admitted as other-crime evidence where there was no evidence connecting defendant to that incident.

3. The Illinois Supreme Court reversed the Appellate Court. Because it is undisputed that defendant was not involved in the scooter shooting, the scooter shooting is not evidence of another crime for purposes of evaluating its admissibility. The scooter incident was relevant to show defendant's motive for the subsequent murder. The fact that defendant may have had a secondary motive, the rival gang's shooting of defendant's fellow gang member, did not mean that he was not also motivated to retaliate for the scooter incident.

The defendant was not prejudiced by a jury instruction that directed the jury to determine whether defendant was involved in conduct other than that charged in the indictment. There was evidence at trial that at the time of the murder defendant and Donegan drove a car stolen by use of a "jiggler" key. Since the evidence at trial clearly showed that defendant was not involved in the scooter shooting, the instruction must have referred to the stolen car.

The Supreme Court also rejected defendant's argument that evidence of the scooter shooting should have been excluded because the motive for the murder was not the scooter shooting, but rather the subsequent striking of Donegan with the car. This was not a random incident in which Donegan was struck by a car. The car followed the gang member on the scooter. There was a continuing gang war between the

two gangs. These two events were linked and it would be illogical to separate them and give the jury only half the story.

Defendant was not prejudiced by the admission of evidence of the scooter shooting. Any concern about an implied inference of guilt by association would more likely come from the evidence of defendant's gang membership than from the scooter shooting in which defendant was clearly not involved.

The Supreme Court remanded for the Appellate Court's consideration of the remaining issues raised by defendant.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Ward, ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 108690, 6/16/11)

If a defendant is tried on certain enumerated sex offenses, the State may introduce evidence that the defendant also committed another of the specified sex offenses. Such evidence may be admitted for any relevant purpose, including defendant's propensity to commit the charged offense. 725 ILCS 5/115-7.3(b). The statute also permits admission of "evidence to rebut that proof or an inference from that proof." A balancing test is applied to determine if a court should admit evidence pursuant to the statute, weighing the probative value of the evidence against the undue prejudice it may produce against the defendant. 725 ILCS 5/115-7.3(c).

Enhancement of the jury's truth-finding function is also a consideration in judging the admissibility of evidence pursuant to §115-7.3. To perform its function of assessing the credibility of witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from the evidence, the jury must have access to as much relevant, admissible evidence as possible. Without that evidence, the reliability of the jury's conclusions are called into question.

At defendant's trial, the circuit court admitted evidence of defendant's commission of a separate sex offense as propensity evidence pursuant to §115-7.3, but barred the admission of evidence that defendant had been acquitted of that offense. Applying the balancing test of §115-7.3(c), the Illinois Supreme Court concluded that it was error to bar the acquittal evidence.

The probative value of the acquittal evidence was its ability to provide a more complete context for the testimony of the other-crime complainant. The similarities between the two crimes greatly enhanced the probative value of the other-crime evidence. Excluding evidence that defendant had been acquitted of the other crime limited the jury's ability to assess the testimony of the other-crime complainant and may have enhanced her credibility because the jury did not hear all of the evidence leading to defendant's prior acquittal that could have affected the jurors' consideration of her credibility. The complete absence of any reference to the outcome in that case severely restricted defendant's ability to provide context for her allegations. The highly inflammatory nature of those allegations and the grave danger of excessive sympathy for the alleged victim added to defendant's need to counter the impact of that evidence with the acquittal evidence.

There was also a readily-apparent potential for unfair prejudice to the defendant from the other-crime complainant's detailed testimony, followed by her statement that she had previously testified in another case. Given the graphic nature of her depiction of the attack, the jury would naturally assume that the State had pressed charges against the defendant, and the jury would be left to speculate whether those charges were ongoing or had been resolved. Evidence that defendant had been acquitted of that assault would put to rest that speculation.

The jury would likely react to the testimony of the other-crime complainant with sympathy for her and hatred for the defendant. That evidence also seriously undercut defendant's consent defense. Due to the overly-persuasive probative value of propensity evidence, the need to avoid unfair prejudice by providing a full context for that evidence is evident. Fairness therefore required disclosure of the acquittal.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Abernathy, 402 Ill.App.3d 736, 931 N.E.2d 345, 2010 WL 2673073 (4th Dist. 2010)

1. Evidence of other crimes is admissible if relevant for any reason other than to show propensity to commit crime. Such evidence may be admitted to show motive, intent, identity, absence of mistake, or *modus operandi*. Evidence of other crimes may also be admitted as part of a continuing narrative of events and to show consciousness of guilt.

Even where other crimes evidence is introduced for a permissible reason, it should be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. Although the trial court did not explicitly state that it balanced prejudice and probative value before deciding to admit the other crimes evidence, it was clear that the judge performed the required balancing test because it limited the State to introducing the evidence most closely related to the charged offense.

2. Other crimes evidence may be admitted if it is part of a "continuing narrative" of the events giving rise to the offense. Thus, evidence may be admitted if it is intertwined with the offense charged, even if an uncharged offense is disclosed.

Where defendant was charged with an aggravated domestic battery in his residence, evidence that a fire was set at the same location a few minutes later was part of a continuing narrative of the circumstances surrounding the battery, rather than evidence of a separate and distinct crime. The court stressed that the battery and fire occurred at the same location, the fire destroyed some of the evidence of the battery, the fire was started within minutes after the battery, and two of the officers assigned to investigate the battery began their inquiry at the scene of the fire. Under these circumstances, the continuing narrative theory applied.

3. Under the "consciousness of guilt" theory for admitting other crimes evidence, evidence that the defendant attempted to conceal his involvement in a crime, either by destroying evidence or attempting to eliminate a witness, is admissible even if an uncharged crime is disclosed. Here, the trial court properly admitted evidence that defendant committed arson in order to conceal evidence that he had committed domestic aggravated battery.

4. The better practice is for the trial court to instruct the jury of the limited purpose of other crimes evidence both at the time the evidence is admitted and at the close of the case. However, reversal was not required where the trial court gave only an instruction at the close of trial.

(Defendant was represented by Assistant Defender Stuart Shiffman, Springfield.)

People v. Baldwin, 2014 IL App (1st) 121725 (No. 1-12-1725, 8/15/14)

725 ILCS 5/115-7.3 provides that where a defendant is accused of certain sex offenses, evidence of the commission of another sex offense may be admitted and considered for its bearing on any matter to which it is relevant. In weighing the probative value of the evidence against the risk of undue prejudice, the court may consider the proximity in time to the charged or predicate offense, the degree of factual similarity between the offenses, and any other relevant facts or circumstances. If the trial court admits the other crimes evidence, defendant is entitled to present rebuttal evidence. §115-7.3(b).

Defendant argued that at his trial for aggravated criminal sexual assault, the trial court erred by admitting evidence of a prior aggravated criminal sexual assault where defendant was acquitted on one count of aggravated criminal sexual assault concerning the earlier offense and the jury could not reach a verdict on the other count.

The court held that the trial judge did not err by admitting the prior offense. The plain language of the statute does not base the admissibility of the other crimes evidence on the existence of a conviction, and does not preclude admission of such evidence where the defendant was acquitted of the other offense. Furthermore, the fact that defendant was acquitted did not necessarily mean that the evidence was inadmissible, because the State's inability to prove every element of its case beyond a reasonable doubt did not mean that it could not meet the standard for admissibility of other crimes evidence, which requires only that there be more than a mere suspicion that the other crime was committed by the defendant.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Barnes, 2013 IL App (1st) 112873 (No. 1-11-2873, 12/18/13)

1. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action either more or less probable than it would be without the evidence. However, even relevant evidence should be excluded where the prejudice outweighs any probative value. Prejudice is defined as an undue tendency to suggest that a decision be made on an improper basis such as emotion.

The trial court's ruling on evidentiary issues is reviewed for abuse of discretion. An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the same position.

Defendant was charged with heinous battery and aggravated battery of a child after a four-year-old child in his care suffered severe burns when he was exposed to hot water. The court concluded that the trial court abused its discretion by allowing the assistant State's Attorney to use the child as an exhibit by pulling down his pants, picking him up, and showing the jury the scars on his side and legs.

Although permanent disfigurement is an element of heinous battery, using the child as an exhibit was cumulative where the State had already established permanent disfigurement through photographs and expert testimony. The court also found that due to the risk of inflaming the jury's passions, the prejudicial effect of using the child as an exhibit outweighed any probative value.

2. Evidence of other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes. Even where other crimes evidence is admissible for a proper purpose, it should be excluded if the prejudice substantially outweighs the probative value.

Before presenting evidence of other crimes, the State must meet the threshold requirement of showing that a crime took place and that defendant participated in it. It is unnecessary to prove beyond a reasonable doubt that the defendant participated in the crime, but the State is required to present more than a mere suspicion of defendant's involvement.

The court acknowledged a split of authority in the First District concerning whether evidence of a crime which is intrinsic to the charged offense may be admitted under general relevancy principles, even if there is no evidence that the defendant committed the other crime. In **People v. Pikes**, 2013 IL 115171, the Supreme Court found it unnecessary to address this question, but noted that other crimes analysis is appropriate only if the defendant is alleged to have committed the separate offenses.

Here, the court concluded that whether analyzed as other crimes evidence or under general relevancy principles, the trial court erred by admitting evidence that the four-year-old victim suffered a liver contusion at some point. Defendant was charged with injuring the child by exposing him to hot water. The State's expert testified that the child's blood work indicated that he had suffered a liver contusion at some point within the 24 to 36-hour-period before he was examined at the emergency room. The State's expert also admitted that the liver contusion may have had an explanation other than child abuse and that there were no signs of bruising on the child's abdomen. Defendant did not have sole custody of the child in the 24 to 36-hour-period preceding the examination.

In finding an abuse of discretion, the court concluded that the probative value of the evidence was tenuous and that there was only mere suspicion that defendant was responsible for the injury. In addition, the evidence was highly prejudicial because the jury would be more likely to convict the defendant of the charged crimes if it believed that he was also responsible for a separate injury.

3. The court concluded that the combination of errors caused manifest prejudice to the defense. The alleged justification for using the child as an exhibit was to establish the permanent disfigurement element of heinous battery. However, defendant did not dispute the cause or extent of the child's injuries, and the only issue was whether the defendant acted intentionally. Under these circumstances, it was unnecessary to display the child to the jury.

In addition, the evidence of defendant's intent was closely balanced. The jury chose to acquit of heinous battery, and there was testimony that defendant had cared for the child on several prior occasions without incident. Under these circumstances, the combined prejudice of displaying the four-year-old's physical scars and admitting evidence of an injury which could have been inflicted by someone other than the defendant could well have affected the verdict.

Defendant's conviction was reversed and the cause remanded for a new trial.
(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Cervantes, 2014 IL App (3d) 120745 (No. 3-12-0745, 12/3/14)

When a defendant raises a theory of self-defense, the victim's violent character is relevant to the issue of which party was the initial aggressor. But evidence of defendant's violent character is admissible only when the defendant puts his own character at issue by introducing evidence that he is peaceful. **People v. Devine**, 199 Ill. App. 3d 1032 (3rd. Dist. 1990); **People v. Harris**, 224 Ill. App. 3d 649 (3rd. Dist. 1992).

In his jury trial for first degree murder, defendant raised self-defense and argued that the victim was the initial aggressor. To support his defense, he introduced evidence that the victim had a violent character. In rebuttal, the State was allowed to introduce three prior convictions of defendant for crimes of violence.

The Appellate Court held that the introduction of the prior crimes evidence was improper. The defense strategy focused on the victim's violent character but did not attempt to prove defendant's peaceful character. Accordingly, defendant's prior convictions were not admissible. The court specifically rejected the State's argument that when a defendant remains silent about his own character he is suggesting that he is peaceful. This argument ignores, and is contrary to, the presumption of innocence and the right to remain silent.

The erroneous admission of other crimes evidence creates a high risk of prejudice and ordinarily calls for reversal. Here the prejudice caused by the improper introduction of three prior convictions for violent crimes was magnified when the trial court gave an improper jury instruction that allowed the jury to consider as substantive evidence three other prior convictions that were properly admitted only to impeach defendant. Consequently, the Appellate Court reversed defendant's conviction and remanded for a new trial.

The dissenting justice would have held that **Devine** and **Harris** were wrongly decided and that the prior convictions were admissible. A defendant who raises an initial aggressor self-defense argument, but remains silent about his character at trial, necessarily suggests that he is peaceful. It would be "illogical and unfair" to allow defendant to introduce evidence of the victim's past violent acts but prevent the State from introducing similar evidence about the defendant.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Dabbs, ___ Ill.App.3d ___, ___ N.E.2d ___ (3d Dist. 2009) (No. 3-08-0709, 10/15/09)

The Appellate Court found that 725 ILCS 5/115-7.4, which allows prior acts of domestic battery to be admitted in a domestic battery trial, does not violate due process and equal protection. The court stressed that domestic violence defendants are not a suspect class under the equal protection clause, and found that the statute has a rational basis because it attempts to address difficulties of proof unique to the prosecution of domestic violence cases by strengthening the evidence in such cases. The court also noted that due process does not prohibit the admission of other crimes evidence so long as the trial court determines that the evidence is relevant and that the probative value outweighs any prejudicial effect.

(Defendant was represented Assistant Defender Michelle Zalisko, Mt. Vernon.)

People v. Everhart, 405 Ill.App.3d 687, 939 N.E.2d 82 (1st Dist. 2010)

1. 725 ILCS 5/115-7.3 provides that in prosecutions for specified sex-related offenses, evidence that the defendant has committed similar crimes may be admitted for any relevant purpose, including to show a propensity to commit sex-related offenses. In deciding whether the probative value of the other crimes evidence outweighs any undue prejudice to the defendant, the trial court should consider several factors including the proximity in time between the charged and predicate offenses, the degree of factual similarity between the offenses, and any other relevant facts or circumstances. The key to balancing the probative value and prejudicial effect of other crimes evidence offered to prove propensity is to avoid admitting evidence which might entice the jury to convict the defendant only because he is a bad person and deserves punishment.

2. Here, evidence of a prior sex offense was properly admitted on the issue of defendant's propensity to commit sex crimes. First, the prior offense was not too remote to be admitted although it occurred nearly 11 years before the current offense. There is no bright line rule governing whether prior convictions are too old to be admitted under § 115-7.3; instead, the age of the prior conviction is one factor to be considered in evaluating probative value.

The court noted that when defendant's in-custody time was deducted, the lapse between the offenses was less than six years. "We do not believe the gap of six years renders the prior offense too remote as to be an abuse of discretion on this factor alone."

Furthermore, there was sufficient similarity between the offenses to justify admission of the prior offense to show propensity. Where evidence is offered for some purpose other than *modus operandi*, only general areas of similarity are required to justify admission. Here, the offenses were sufficiently similar because both attacks occurred after midnight while the complainants were alone (in a parking lot or unlocking an apartment door), both women were moved to secluded locations, both women were told to remove the same items of clothing, and both women were positioned to face away from the defendant and threatened with what each believed to be a firearm. Furthermore, the perpetrator spoke to both women during the assault, tried to prevent both women from seeing his face, and took the purses of both women after the offense.

The court rejected the argument that significant differences between the cases rendered them insufficiently similar to be probative. For example, although the ages of the complainants differed by 15 years, the court noted that each complainant was approximately the same age as the defendant when the offenses occurred. Similarly, the fact that the attacks differed in length was insignificant because neither complainant knew exactly how long the assault had lasted. Finally, the court concluded that the differences in the type of penetration in each case did not negate the factual similarities between the crimes.

3. The court rejected the argument that § 115-7.3 violates due process. In **People v. Donoho**, 204 Ill.2d 159, 788 N.E.2d 707 (2003), the Illinois Supreme Court upheld § 115-7.3 when challenged on equal protection grounds, and implicitly held that the statute also satisfies due process. In addition, § 115-7.3 satisfies due process because the trial court retains discretion to weigh probative value against prejudicial effect and deny admission of prejudicial evidence.

Defendant's conviction for aggravated criminal assault was affirmed.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Fields, 2013 IL App (3d) 080829-B (No. 3-08-0829, 8/22/13)

In a prosecution of the defendant for predatory criminal sexual assault of a child, aggravated criminal sexual assault, and aggravated criminal sexual abuse, 725 ILCS 5/115-7.3 authorized the admission of evidence of defendant's commission of another aggravated criminal sexual abuse to demonstrate his propensity to commit the charged offenses.

A certified statement of the aggravated criminal sexual abuse conviction was properly admitted under §115-7.3. Nothing in §115-7.3 limits the admission of evidence of the other crime to testimonial evidence. Section 115-7.3 authorizes the admission of evidence of defendant's "commission of another offense" and a certified conviction statement proves that defendant committed another offense. The mere fact that the other offense is proved by a certified conviction statement does not demonstrate that the prejudicial effect of the evidence outweighs its probative value.

Subsequent to defendant's conviction, his conviction on the aggravated criminal sexual abuse admitted under §115-7.3 was reversed and the State elected not to reprosecute. The Appellate Court declined to reach the question of whether the subsequent reversal of a conviction that was admitted as propensity evidence entitles defendant to a new trial. The reversal of the conviction constitutes new evidence that was developed after defendant's conviction, and therefore defendant's claim can only appropriately be brought in a post-conviction petition.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Fields, 2013 IL App (3d) 080829-B (No. 3-08-0829, modified on denial of rehearing 10/2/13)

In a prosecution of the defendant for predatory criminal sexual assault of a child, aggravated criminal sexual assault, and aggravated criminal sexual abuse, 725 ILCS 5/115-7.3 authorized the admission of evidence of defendant's commission of another aggravated criminal sexual abuse to demonstrate his propensity to commit the charged offenses.

A certified statement of the aggravated criminal sexual abuse conviction was properly admitted under §115-7.3. Nothing in §115-7.3 limits the admission of evidence of the other crime to testimonial evidence. Section 115-7.3 authorizes the admission of evidence of defendant's "commission of another offense" and a certified conviction statement proves that defendant committed another offense. The mere fact that the other offense is proved by a certified conviction statement does not demonstrate that the prejudicial effect of the evidence outweighs its probative value.

Subsequent to defendant's conviction, his conviction on the aggravated criminal sexual abuse admitted under §115-7.3 was reversed and the State elected not to reprosecute. The Appellate Court declined to reach the question of whether the subsequent reversal of a conviction that was admitted as propensity evidence entitles defendant to a new trial. The reversal of the conviction constitutes new evidence that was developed after defendant's conviction. Unlike the Supreme Court, the Appellate Court lacks supervisory authority. Its reviewing authority is limited to matters presented in the trial court. Therefore defendant's claim can only appropriately be brought in a postconviction petition.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Fields, 2015 IL App (3rd) 080829-C (No. 3-08-0829, 3/5/15)

725 ILCS 5/115-7.3 provides that in prosecutions for certain offenses, evidence of other instances in which defendant committed one of the specified offenses may be admitted to show defendant's propensity to commit such crimes. Where defendant was tried for predatory criminal sexual assault of a child, criminal sexual assault, and aggravated criminal sexual abuse, the State was allowed to introduce a certified copy of defendant's prior conviction for aggravated criminal sexual abuse against a different complainant and in a different county. The State was also allowed to present testimony by the complainant in the prior offense.

As a matter of first impression, the Appellate Court held that the conviction in this case must be reversed because after trial, the conviction in the case which was introduced as other crimes evidence was reversed. The court concluded that the reversal of the prior conviction constituted "new" evidence and required reversal because it undermined confidence in the outcome of the trial.

Noting that the instant case involved a credibility contest between defendant and the complainant and that there was no eyewitness testimony or physical evidence, the court concluded that the result of the trial would probably have been changed had the prior conviction been excluded. The court also noted that the facts of the cases were similar. Under these circumstances, admission of the underlying conviction was critical to the State's ability to secure a conviction.

The court rejected the State's argument that admission of the subsequently reversed conviction was harmless because in addition to presenting the certified conviction, the State presented the testimony of the complainant describing the circumstances of the earlier conviction. The court noted that at trial the State argued that admission of the prior conviction was "extremely probative" on the issue of propensity although the complainant's testimony was also being admitted. The court stated that in light of such argument in the lower court it would not accept the State's claim on appeal that the prior conviction "did not truly matter."

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Gist, 2013 IL App (2d) 111140 (No. 2-11-1140, 3/11/13)

1. Generally, evidence of other crimes is admissible if relevant for some purpose other than to show defendant's propensity to commit crimes. However, 725 ILCS 5/115-7.4(a) provides that in a prosecution for domestic violence, evidence of the defendant's commission of other offenses of domestic violence is

admissible and may be considered on any matter to which it is relevant, including propensity. The statute also provides that in weighing the probative value of the evidence against any undue prejudice, the court may consider the proximity in time of the other crimes to the charged offense, the degree of factual similarity between the offenses, and any other relevant facts and circumstances.

Where defendant was charged with aggravated battery of a child, aggravated domestic battery, and aggravated battery for allegedly striking his son in the chest, the trial court did not abuse its discretion by denying the State's motion *in limine* to admit prior acts of domestic violence which defendant allegedly committed against his son. The State's proffer stated that defendant's older son would testify that he had seen defendant strike the victim with a belt, defendant's wife would testify that she had seen defendant punch the victim in the stomach and hit him with a belt, and a witness from DCFS would testify that defendant had admitted disciplining the victim with a belt. The State argued that the evidence was relevant to show defendant's intent, motive and propensity to commit acts of domestic violence. At the trial court's direction, the defendant's wife testified at the hearing on the motion to admit the other crimes evidence, but testified only about one incident in which defendant struck the victim but the witness could not see the blow.

The court rejected the State's argument that *de novo* review applied because the trial court mistakenly believed that a witness's credibility is relevant to whether other crimes evidence is more probative than prejudicial. The court concluded that the trial judge excluded the evidence not because he believed the witness to be incredible, but because the evidence was unduly prejudicial in that the witness had not actually seen the blow and because a single incident does not establish a pattern of violence. Because the trial court's ruling was not an abuse of discretion, the order denying the motion *in limine* was affirmed.

2. The court noted that the trial court has vast discretion in conducting a hearing on a motion *in limine*, including discretion to require witnesses to testify. Thus, the trial court did not err by ordering the defendant's wife to testify instead of deciding the question on the State's proffer.

3. The State waived any argument that evidence of the second incident of domestic violence, which was included in the State's notice and proffer but not the subject of any testimony at the hearing, should have been admitted. In the trial court, the State failed to argue that evidence of the second incident was admissible separately from the first incident. In addition, the State failed to raise the argument in its motion to reconsider.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Hale, 2012 IL App (1st) 103537 (No. 1-10-3537, 9/18/12)

1. Evidence of other crimes is admissible if it is part of the continuing narrative of the event giving rise to the offense, is intertwined with the event charged, or explains an aspect of the crime charged that would otherwise be implausible. Evidence of other crimes may be admissible where it sets the stage for the charged offense and explains circumstances about the charged offense that might appear improbable. Other-crime evidence may not be admitted under the continuing-narrative exception, even when the crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at a different place at a separate time. A trial court's ruling on the admissibility of other-crime evidence is reviewed for an abuse of discretion.

2. Defendant made a statement to the police admitting his involvement in two shootings. According to the statement, defendant and his companions were driving around armed with guns with the intent to retaliate against a person named Mario. When they exited their car to look for Mario, they were fired upon, and fired back in self-defense. Defendant believed that someone had been shot during that exchange of gunfire, and in fact an innocent bystander was struck by bullets. Several minutes later and several blocks from the first shooting, defendant and his companions fired at a car they believed to contain Mario.

The trial court denied the State's motion *in limine* to admit evidence of the first shooting at defendant's trial for the second shooting under the continuing-narrative exception, finding it more prejudicial than probative. The court noted that it would reconsider its ruling if the defense attacked the integrity of defendant's statement in any way.

3. The Appellate Court held that the trial court abused its discretion in excluding the other-crime evidence. The evidence of the first shooting was offered to prove the ongoing motive of defendant and his companions to locate and shoot Mario. Even though they did not initiate the gunfire in the earlier shooting, they had exited their car with the intent to locate and shoot Mario. Therefore, the two shootings were not separate and distinct. The evidence of the earlier shooting proved defendant's intent and a common criminal design supporting defendant's accountability for the later shooting.

The other-crime evidence was also admissible to corroborate defendant's confession as the police were not aware of his participation in the first shooting at the time he made the admission. Although the trial court had ruled that it would allow admission of the other-crime evidence if the defendant challenged the statement, the State was entitled to establish the accuracy and reliability of the statement in its case- in-chief. The trier of fact must determine the weight and reliability of the statement regardless of whether defendant challenges its reliability.

The Appellate Court further held that any danger that the case would become a mini-trial on the first shooting would be avoided by holding the State to its proffer that it only intended to offer the testimony of the victim of the earlier shooting that she heard gunshots and was shot at a particular location, but was unable to identify the perpetrator. The probative value of this evidence substantially outweighed its risk of unfair prejudice.

Cunningham, J., dissented. The abuse-of-discretion standard is the most deferential standard of review. An abuse of discretion occurs only when no reasonable person would agree with the trial court's decision. The majority simply substituted its judgment for that of the trial court. There was no legitimate reason to admit the evidence of the earlier shooting. Taking defendant's statement at face value, the exclusion of evidence of the first shooting created no risk of jury confusion. The only commonality between the two shootings was the search for Mario. The trial court's judgment that the probative value of the evidence of the first shooting was outweighed by its prejudicial effect of creating the impression of a crime spree was not an abuse of discretion.

People v. Harding, 401 Ill.App.3d 482, 929 N.E.2d 597 (1st Dist. 2010)

1. Evidence of crimes other than the offense with which the defendant is charged may not be admitted to show general criminal propensity, but may be admitted if relevant for other purposes, including intent. Other crimes evidence should be admitted only if sufficiently relevant concerning a proper issue to avoid the risk that the jury will consider it merely as showing propensity.

One factor in determining relevancy is whether the uncharged crimes are sufficiently similar to the charged crime to be probative of a contested issue. Only "general similarity" between the charged and prior offenses is required when other crimes evidence is admitted on the issue of intent.

The prosecution's statement of its purpose for introducing other crimes evidence does not remove the need for the trial court to make an independent determination of relevance.

2. Where the defendant was charged with child abduction for attempting to lure children to his car by offering them rides, evidence of prior convictions for attempted aggravated criminal sexual assault and attempted criminal sexual assault was insufficiently similar to the charged crime to justify admission on the issue of intent. The prior crimes involved forcible attacks on adult women who were followed on foot as they left bars, and offered no insight into defendant's intentions when he offered rides to elementary school girls in broad daylight. Instead, the prior offenses merely showed a propensity to commit sexual crimes.

The court rejected the State's arguments that the crimes were sufficiently similar to be admissible because all of the victims were females who were strangers to the defendant; "[w]e are aware of no authority permitting the admission of prior crimes on the basis of such broad generalities."

Defendant's convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Jacobs, 2016 IL App (1st) 133881 (No. 1-13-3881, 9/29/16)

Defendant was charged with possession of a stolen motor vehicle. At trial, the son of the owners of the vehicle testified that jewelry was taken from his parents' house at the same time the vehicle was stolen. The son testified that when he went to a pawn shop to see if he could find his mother's jewelry, he saw defendant drive the stolen car away from the store.

Before trial, the trial court granted a motion in limine excluding the evidence that jewelry had been taken from the home. However, the trial court overruled defense objections when the prosecutor mentioned the jewelry in opening argument. The trial judge then stated that the evidence was admissible to show that the car had been stolen.

The Appellate Court held that the evidence was improperly admitted as other crimes evidence, and was especially prejudicial where the trial court refused to allow defendant to present evidence that another person had been arrested for burglarizing the house.

1. Other-crimes evidence is inadmissible if used merely to show defendant's propensity to commit crimes. Evidence of other crimes may be admitted for other purposes, such as proving motive, opportunity, intent, preparation, planning, knowledge, identity, or absence of mistake or accident. In addition, under the continuing-narrative exception, defendant's other bad acts are admissible when those acts are part of a continuing narrative which concerns the circumstances of the entire transaction and are not separate and distinct crimes. The continuing-narrative exception will not apply, even where crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at different places and times.

The Appellate Court concluded that even if the continuing narrative exception applied, the probative value of the evidence that jewelry was stolen was substantially outweighed by the prejudicial effect. The court noted that the State could have established that the son saw defendant driving the stolen vehicle without stating that the car had been at a pawn shop and creating an inference that defendant had been involved with the burglary and theft of the jewelry. The evidence was prejudicial to defendant not only because it created an unmistakable inference that he was involved in a crime for which he was not on trial, but also because it directly impacted his defense that he had been allowed to drive the car by an acquaintance and did not know it had been stolen.

2. In addition, defendant was improperly precluded from introducing evidence that another person had been arrested for the burglary of the home. First, the trial judge erred by finding that the excluded evidence was hearsay where it referred only to the fact of an arrest, and not to any out-of-court assertion. Second, the concerns underlying the admission of other-crimes evidence are not present where the uncharged crime was committed by someone other than the defendant. Exclusion of the evidence here was critical because the fact that another person was arrested for the burglary could have dispelled much of the prejudice created by the admission of evidence of the burglary and theft of the jewelry.

3. The evidentiary errors were not harmless. The improperly admitted evidence created an inference that defendant had committed a burglary of the home and therefore likely stole the car which he was charged with possessing, directly contradicting his claim that he did not know the vehicle was stolen. In addition, the trial court failed to give a limiting instruction concerning the other crimes evidence. Finally, the risk of prejudice was increased because defendant was impeached with a prior conviction for residential burglary, the offense to which he was improperly linked by the other crimes evidence.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Johnson, 406 Ill.App.3d 805, 941 N.E.2d 242 (1st Dist. 2010)

1. Generally, evidence of other crimes is inadmissible if offered merely to prove a defendant's propensity to commit crime. Under 725 ILCS 5/115-7.3(c), however, certain uncharged sex-related offenses may be admitted to show the criminal propensity of a defendant who is charged with a sex offense. Before admitting evidence under §7.3, the trial court must determine whether the probative value of the evidence is substantially outweighed by any undue prejudice in light of the proximity in time of the charged and uncharged offenses, the degree of factual similarity, and any other relevant facts.

In weighing the probative value and prejudicial effect of other crimes evidence, the key is to avoid admitting evidence which persuades the jury to convict merely because it believes the defendant is a bad person who deserves punishment. In addition, other crimes evidence is improper if it will become a focal point of the trial. Finally, other crimes evidence must have a threshold similarity to the crime charged in order to be admitted; the probative value of evidence is greater where there are more factual similarities between the offenses.

2. For two reasons, the trial court erred at a trial for aggravated criminal sexual assault when it admitted evidence that 18 months after the charged offense, defendant and another man sexually assaulted a different complainant. First, the trial court considered only whether the other crimes evidence was probative, and did not weigh the probative value against any undue prejudice. Second, there were substantial dissimilarities between the offenses. In the charged offense, the complainant was accosted by a single man as she walked past an alley. In the uncharged offense, the complainant was forced into a car and assaulted by two men who blew cocaine in her face and gave her alcohol. In addition, the type of penetration differed between the cases.

In view of the "significant dissimilarities" between the offenses, the court concluded that the probative value of the uncharged offense was substantially outweighed by the prejudicial effect. Thus, the trial court abused its discretion by admitting the evidence.

3. However, the error was harmless because it did not likely influence the jury's verdict. The court concluded that a rational trier of fact could easily have convicted defendant based on the complainant's testimony identifying him, the properly admitted medical evidence, and an expert opinion based on DNA analysis.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Johnson, 2014 IL App (2d) 121004 (No. 2-12-1004, mod. op. 1/23/15)

At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The Appellate Court agreed with defendant that the other crimes evidence was inadmissable for the asserted purposes, but found that it was properly admitted as propensity evidence.

1. Generally, evidence of other crimes is inadmissible to show propensity to commit a crime, but is admissible if relevant for any other purpose such as *modus operandi*, intent, motive, identity, or absence of mistake. Subsequent bad acts may be used as other crimes evidence.

725 ILCS 5/115-7.3(b) creates an exception to the general rule in certain sex offense prosecutions. Under §115-7.3(b), in a prosecution for one of the specified offenses the State may introduce evidence that defendant committed another of the specified offenses. Such evidence is admissible for any relevant purpose, including defendant's propensity to commit sex crimes.

Before evidence may be admitted under §115-7.3(b), the trial court must weigh the probative value of the evidence against the undue prejudice it might cause. The admissibility of the evidence rests within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion.

2. Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

3. The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant

to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

Defendant's convictions for first degree murder and aggravated criminal sexual assault were affirmed.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

People v. Lopez, 2013 IL App (1st) 102938 (No. 1-10-2938, 5/8/13)

1. Evidence of uncharged crimes is inadmissible if relevant merely to show the defendant's propensity to commit crime. Such evidence is admissible, however, if it is relevant for proper purposes, including to prove motive, intent, identity, *modus operandi*, or absence of mistake. When other crimes evidence is offered, the trial court must weigh the relevance of the evidence for the purpose on which it is offered against the prejudicial impact it could have on the defense.

Because other crimes evidence is so prejudicial, such evidence cannot be admitted unless the State shows that a crime occurred and that the defendant participated. The defendant's involvement need not be proven beyond a reasonable doubt, but more than a mere suspicion is required.

2. Defendant was charged with murder occurring in the parking lot of a factory. The trial court admitted evidence that some three weeks earlier, a man was beaten and property damaged in the same parking lot. There was no evidence that defendant participated in the earlier crimes, although three of his co-defendants on the murder charge were identified as having participated in the uncharged offenses and defendant was seen on a nearby corner before and after the offenses.

The Appellate Court held that in the absence of evidence that defendant had been involved in the earlier offenses, the trial court erred by admitting evidence of the uncharged crimes. Noting a conflict in First District Appellate Court authority, the Appellate Court rejected the holding of **People v. Morales**, 2012 IL App (1st) 101911 and followed **People v. Pikes**, 2012 IL App (1st) 102274. **Morales** held that where a co-defendant in the charged crime was shown to have participated in the uncharged offense, the uncharged offense was part of the intrinsic evidence leading to the charged crime and could be admitted against co-defendants who were not shown to have been involved in the uncharged crime. **Pikes** agreed that prior intrinsic incidents might be admissible under general principles of relevancy, but rejected the holding that such intrinsic incidents are admissible against a co-defendant who was not shown to have been involved in the earlier offense.

In following the reasoning of **Pikes**, the court stated, "We agree with the better reasoned and less circumstantial approach . . . that absent a showing, beyond a mere suspicion, that a defendant was a participant in a previous crime or bad act, evidence about that crime is inadmissible."

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Moore, 2012 IL App (1st) 100857 (No. 1-10-0857, 2/1/12)

1. Evidence of crimes for which a defendant is not on trial is inadmissible if relevant merely to establish the defendant's disposition or propensity to commit crime. Evidence of other crimes is objectionable not because it has little probative value, but because it has too much. Such evidence overpersuades the jury, which might convict the defendant only because it feels that defendant is a bad person who deserves punishment. The erroneous admission of evidence of other crimes carries a high risk

of prejudice and ordinarily calls for reversal.

Given these concerns, when evidence of unrelated offenses is contained in an otherwise competent statement or confession, it must be deleted when the statement or confession is read to the jury, unless to do so would seriously impair its evidentiary value.

2. The completeness doctrine provides that where one party introduces part of an utterance or a writing the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury. The right to introduce an entire conversation or writing is not absolute, but depends on the relevancy of the additional parts that the party seeks to introduce. Otherwise inadmissible evidence may be admitted only where a defendant opens the door to such material and its exclusion would mislead the jury.

3. A videotape of a police interrogation of defendant contained references to: (1) a prior incident of domestic violence in which defendant punched a woman and broke her jaw after finding her with another man; defendant apparently pled guilty to this charge; (2) defendant's prior history of robberies; and (3) defendant's prior history as a drug dealer and membership in a street gang. This other-crime evidence was irrelevant and unfairly prejudicial. Had defense counsel objected to this evidence, it would have been excluded.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Pikes, 2012 IL App (1st) 102274 (No. 1-10-2274, 9/27/12)

1. Evidence of uncharged crimes is inadmissible if relevant merely to show the defendant's propensity to commit crimes. Such evidence is admissible, however, if relevant for a proper purpose, including to prove motive in the charged crime, intent, identity, *modus operandi*, or absence of mistake related to the charged crime. When other crimes evidence is offered, the trial court must balance the probative value of the evidence for its proper purposes and the prejudicial impact the evidence might have on the defense. Even if the evidence is relevant for a permissible purpose, it should not be admitted if the prejudicial effect outweighs the probative value.

Other crimes evidence is subjected to a special standard of admissibility because of the concern that it might "over persuade the jury," which may convict because it believes that the defendant committed the uncharged crime or is a bad person who deserves to be punished.

2. Before the trial court considers the probative value and prejudice of other crimes evidence or whether the evidence is relevant for a proper purpose, the State must lay a foundation showing that the uncharged crime occurred and that the defendant participated. The defendant's involvement in the offense need not be shown beyond a reasonable doubt, but must be shown by more than a mere suspicion.

3. Defendant and his co-defendant were charged with first degree murder, and were tried jointly but by separate juries. The State sought to introduce evidence that the co-defendant had engaged in a shooting a few days before the charged offense. The State conceded that it had no evidence that defendant was present during the shooting by the co-defendant, and no evidence that he participated.

The Appellate Court concluded that the State failed to make a threshold showing that defendant had been involved in the offense, and that the trial court therefore erred by admitting the evidence against the defendant. The court rejected the State's argument that the uncharged shooting was admitted not as other crimes evidence, but as evidence of the defendant's motivation in the subsequent murder, with which he was charged. The court noted that at trial, the State explicitly sought to introduce the shooting as other crimes evidence. Furthermore, the uncharged shooting "exemplifies the definition of other crimes evidence," because it was evidence of an uncharged crime and was introduced against the defendant at his trial. The court also noted that in deciding to admit the evidence, the trial court weighed the factors relevant to the admission of other crimes evidence.

Defendant's conviction for first degree murder was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Raymond, 404 Ill.App.3d 1028, 938 N.E.2d 131 (1st Dist. 2010)

Other-crime evidence may be admitted to show defendant's propensity to commit predatory criminal sexual assault of a child pursuant to 725 ILCS 5/115-7.3. Unlike evidence offered to prove *modus operandi* or common scheme or design, the level of similarity between the charged and uncharged offenses need not be sufficient to earmark both as the handiwork of a single offender; mere general areas of similarity are enough.

The court concluded that the following similarities were sufficient to uphold admission of the other crime evidence, even though some dissimilarities did exist between the offenses and some of the similarities were generic: the offenses occurred within four years of each other; both victims were female, in the same age range of 12-14; defendant was significantly older (19 and 23); the encounters were in places where defendant was not permitted to be, but were places the victims were familiar with; and the encounters began as consensual and involved vaginal penetration.

(Defendant was represented by Assistant Defender Sean Southern, Chicago.)

People v. Smith, 406 Ill.App.3d 747, 941 N.E.2d 419 (3d Dist. 2010)

In derogation of common law, 725 ILCS 5/115-7.3 allows admission of evidence of other sex offenses committed by defendant for any proper purpose, including proof of his propensity to commit sex offenses, where defendant is charged with sex offenses. The statute also provides that when weighing the probative value of the other-offense evidence against undue prejudice, the court may consider: (1) the proximity in time to the charged offense; (2) the degree of factual similarity to the charged offense; and (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3(c).

Defendant was charged with fondling his granddaughter's vagina outside of her clothing in 2005. The State sought to admit evidence that defendant had committed: (1) forced acts of sexual intercourse with his sisters in the 1960s and 1970s; (2) acts of digital penetration and rubbing of the vaginal area under the clothing of his daughters in the 1970s and 1980s; and (3) acts of touching the vaginal area of another granddaughter outside of her clothing five years before the charged offense.

The court did not abuse its discretion in excluding evidence of the sex offenses committed against the defendant's sisters and daughters. Evidence of those offenses was not only stale due to their extreme remoteness in time, they constituted evidence of uncharged and unproven allegations of sexual offenses dissimilar to and more heinous than the charged offense. The court did allow the State to admit evidence of the offense committed against the other granddaughter, which was most similar to and therefore most probative of the charged offense.

The sheer volume of other-crime evidence proffered by the State also created a risk that evidence would become a focal point of the trial and lead the jury to convict defendant based on those crimes alone, rather than the charged offense. Contrary to **People v. Watson**, 386 Ill.App.3d 598, 900 N.E.2d 267 (2d Dist. 2008), this concern is not inconsequential where the other-crime evidence is offered to prove propensity. The court must still take care to ensure that it admits only so much evidence as is reasonably necessary to prove propensity.

The Appellate Court affirmed the trial court's order excluding evidence of the offenses committed against defendant's sisters and daughters.

People v. Smith, 2015 IL App (4th) 130205 (No. 4-13-0205, 3/26/15)

1. Evidence of other crimes is generally inadmissible to demonstrate the defendant's propensity to commit the charged criminal conduct. Such evidence, while relevant, is excluded because it has too much probative value and to ensure that guilt and innocence is decided solely on the basis of the charged conduct and not because the defendant is a bad person.

However, evidence of other offenses may be used to demonstrate propensity under 725 ILCS 5/115-7.3 when the defendant is charged with one of several enumerated sex offenses and the probative value of the evidence is not substantially outweighed by its prejudicial effect. Among the factors to be considered

when balancing the probative value and the prejudicial effect are: (1) the proximity in time to the charged offense, (2) the degree of factual similarity to the charged offense, and (3) other relevant facts and circumstances.

In addition, in order to be admitted under §115-7.3 the other offenses must have a threshold similarity to the charged conduct. However, because no two crimes are identical, the existence of some differences does not necessarily defeat admission of the evidence.

2. At defendant's trial for predatory criminal sexual assault of a child, aggravated criminal sexual abuse, and sexual exploitation of a child, the trial court found that §115-7.3 authorized the admission of evidence of similar conduct which defendant committed against other children some 12 to 18 years earlier. The Appellate Court found that the trial judge did not abuse its discretion by admitting the evidence, noting that the offenses were "remarkably similar" to the charges in this case and that the mere passage of time does not necessarily make the admission of prior offenses unduly prejudicial.

The court also noted that the trial court acted to limit the prejudice of the prior crime evidence when it barred testimony concerning prior conduct that was not similar to the allegations in the present case and twice read limiting instructions that were repeated by the State in closing argument. In addition, on cross-examination defense counsel was able to establish that no charges had been filed concerning the prior offenses. Finally, the State did not unduly emphasize the prior crimes evidence in closing argument.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

People v. Sundling, 2012 IL App (2d) 070455-B (No. 2-07-0455, 1/31/12)

1. In **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2011), the Supreme Court held that the defense has an adequate opportunity to cross-examine, and the Confrontation Clause is therefore satisfied, where the witness testifies on direct examination in sufficient detail to establish each element of the charged offenses. Here, the Confrontation Clause was satisfied where the victim testified and was subject to cross-examination, although the witness had gaps in his memory, because those gaps did not reach the point that the witness provided insufficient detail to permit cross-examination. The eight-year-old witness, who was four years old at the time of the alleged sexual abuse, testified that he remembered meeting the defendant and remembered wrestling with him, but could not remember where the defendant touched him or whether defendant said anything.

Because the witness testified and willingly responded to all questions asked on direct examination, and was available for cross-examination had defense counsel sought to question him, the fact that he had trouble remembering some aspects of the incident did not make him unavailable for cross-examination. The court distinguished **People v. Learn**, 396 Ill.App.3d 891, 919 N.E.2d 1042 (2nd Dist. 2009), in which the witness "shut down emotionally and was unable to answer questions," because in this case the witness answered all the questions he was asked and provided enough detail to permit cross-examination.

2. Generally, other crimes evidence is inadmissible to demonstrate the defendant's propensity to commit the charged crime. Evidence regarding other crimes is admissible, however, if offered to prove intent, *modus operandi*, identity, motive, absence of mistake, or some relevant fact other than propensity. Before admitting evidence of other crimes, the trial court must weigh probative value against prejudicial effect. Other crimes evidence may be excluded if the prejudicial effect substantially outweighs the probative value.

In addition, 725 ILCS 5/115-7.3(a)(1) permits the admission of some other crimes evidence in prosecutions for certain sex offenses. However, §115-7.3(a)(1) also requires a balancing of probative value and prejudicial effect.

To be admissible, other crimes evidence must have some threshold similarity to the crime charged. As factual similarities increase, the probative value of the evidence also increases. Where the evidence is not offered to show *modus operandi*, mere general areas of similarities are sufficient to support admissibility.

Defendant was charged with aggravated criminal sexual abuse against two children. The court concluded that the trial judge erred by admitting three prior convictions for sex offenses against children.

The court held that it was error to admit a 1984 Cook County conviction for indecent liberties and a 1997 Michigan conviction for attempted criminal sexual conduct with a person under the age of 13, because the only evidence consisted of certified copies and a docketing statement for the Cook County case and a copy of the charge and sentencing order in the Michigan case. Because the supporting evidence was insufficient to permit the trial court to determine that there were similarities between the prior offenses and the instant charges, the evidence should have been excluded.

Similarly, the trial court erred by admitting a 1997 Indiana conviction for child molestation. Although the State introduced a probable cause affidavit from the Indiana case, the affidavit should have been excluded for two reasons. First, the affidavit lacked sufficient indicia of reliability concerning the conduct underlying the conviction because it related to the original charges, not to a subsequent guilty plea which defendant entered after an Appellate Court in Indiana overturned the original conviction.

Second, the affidavit was inadmissible hearsay because it was an out-of-court statement offered to prove the truth of the matters asserted. The court found that the affidavit could not qualify for the business record exception to the hearsay rule; the business record exception does not apply to documents which are prepared in anticipation of litigation, and a probable cause affidavit is clearly created for purposes of litigation.

However, the court concluded that the erroneous admission of the other crimes evidence was not plain error. The defendant did not claim that the error was so serious that it affected the fairness of the trial and challenged the integrity of the process, and the court concluded that the evidence was not closely balanced.

Defendant's convictions for aggravated criminal sexual abuse were affirmed.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Torres, 2015 IL App (1st) 120807 (No. 1-12-0807, 5/27/15)

When the State seeks to admit evidence of prior acts of domestic violence under section 115-7.4, "it must disclose the evidence, including statements of witnesses or a *summary of the substance of any testimony*, at a reasonable time in advance of trial." 725 ILCS 5/115-7.4(c) (emphasis added). The term "summary" is not defined.

Defendant argued that the State provided an inadequate summary in its motion in limine to introduce evidence of prior acts of domestic violence, and thus prevented the trial court from properly analyzing the evidence and defendant from adequately opposing its admission.

As a matter of first impression, the Appellate Court held that the term "summary" involves "something less than a full disclosure of every detail of a witness's testimony," and "need not contain all that is required by an offer of proof." Here, the State's motion in limine provided details as to time, place, the victim, and the acts committed by defendant. The Court thus found no error in admitting the prior acts, and affirmed defendant's convictions.

(Defendant was represented by former Assistant Defender Carson Griffis, Chicago)

People v. Young, 2013 IL App (2d) 120167 (No. 2-12-0167, 9/24/13)

Where defendant was charged with unlawful possession of less than 15 grams of cocaine, and evidence of defendant's previous drug use and drug purchases was admitted on the issues of knowledge and intent, it was plain error to instruct the jury that it could consider the prior drug crimes in determining "defendant's knowledge and possession." Because the defendant was charged with possession of a controlled substance, allowing the previous drug offenses to be considered on the issue of possession erroneously implied that the other drug crimes could be used to show a propensity to commit drug offenses. The court stressed that the trial court should have ensured that the instructions limited the jury's use of the evidence to properly admitted purposes.

However, the court concluded that the error was harmless where the evidence was not closely balanced and there was no serious risk that the jurors convicted defendant because they did not understand

the law.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

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People v. Carlson, 92 Ill.2d 440, 442 N.E.2d 504 (1982) Defendant was convicted of delivery of a controlled substance to an undercover officer at a bowling alley. Defendant presented an alibi defense in which five witnesses testified that he was at a party at the time of the alleged delivery.

Over objection, the State was allowed to ask a defense witness whether defendant smoked marijuana at the party. The witness answered yes. He was again asked the same question, and answered probably. And, finally upon being asked again, the witness said "no, not really."

The questioning about defendant's use of marijuana constituted evidence of a collateral crime and was improperly admitted because it was not relevant to show defendant's knowledge, intent, motive, design, plan or identification. However, the error was held to be harmless.

People v. Senez, 80 Ill.App.3d 1021, 400 N.E.2d 928 (2d Dist. 1980) At defendant's trial for bribery, the State improperly introduced evidence that defendant had previously been involved in stealing a car. Such evidence was not probative in regard to motive, intent, identity, absence of mistake or modus operandi. Additionally, it related to conduct "long before the crime charged in this case."

People v. Hughes, 51 Ill.App.3d 985, 367 N.E.2d 485 (3d Dist. 1977) At defendant's aggravated battery trial, it was error for the State to introduce a statement by defendant that he had been involved in a similar shooting incident in another state, since it could only suggest to the jury that defendant had a propensity to commit such offenses.

People v. McKee, 52 Ill.App.3d 689, 367 N.E.2d 1000 (2d Dist. 1977) At a bench trial, the court committed prejudicial error by considering evidence of an alleged public indecency offense that occurred the day before the indecent liberties incident for which defendant was being tried.

People v. Brunning, 95 Ill.App.3d 673, 420 N.E.2d 587 (1st Dist. 1981) Where defendant was charged with rape while using a gun, the State erred by introducing a possession of weapon charge on which defendant had been acquitted. The testimony was "not relevant to establish motive, common design, identity, intent, knowledge or a fact material to an issue on trial," and the combined effect of the cross-examination and rebuttal testimony "amounted to relitigating the . . . weapon possession charge, despite the fact that he had already been acquitted thereof." See also, **People v. Butler**, 31 Ill.App.3d 78, 334 N.E.2d 448 (2d Dist. 1975) (permitting extensive inquiry into details of prior crime was error even where limiting instruction was given and jury was informed that defendant was found not guilty of the prior crime).

People v. Osborn, 53 Ill.App.3d 312, 368 N.E.2d 608 (1st Dist. 1977) The State was properly allowed to introduce testimony concerning a prior attempt rape committed by defendant, though the charges had been dismissed after a preliminary hearing.

People v. Bain, 10 Ill.App.3d 909, 295 N.E.2d 295 (5th Dist. 1973) It was reversible error to bring out that

defendant had previously pleaded guilty to the crime for which he was on trial. See also, **People v. Haycraft**, 76 Ill.App.2d 149, 221 N.E.2d 317 (2d Dist. 1966).

People v. Paull, 176 Ill.App.3d 960, 531 N.E.2d 1008 (1st Dist. 1988) At defendant's trial for aggravated incest, the complainant admitted that she was a drug addict. The State then introduced evidence that defendant sold drugs from his home.

Defendant's alleged drug sales were not relevant, and were not made relevant by the admission of evidence that complainant was a narcotics addict. The other crimes evidence "served only to suggest that defendant was a criminal, a poor parent, and the appropriate person to blame for complainant's addiction. Since such suggestion is improper in a criminal trial, the evidence should not have been admitted."

People v. Mikyska, 179 Ill.App.3d 795, 534 N.E.2d 1348 (2d Dist. 1989) At defendant's trial for reckless homicide, it was reversible error for the State to introduce evidence that defendant had used illegal drugs and smoked marijuana the night before the accident. This evidence was not relevant to whether defendant was under the influence of drugs at the time of the accident; furthermore, the evidence was "highly prejudicial" because it "created an image of defendant as a bad person."

People v. Denny, 241 Ill.App.3d 345, 608 N.E.2d 1313 (4th Dist. 1993) Defendant was convicted of aggravated criminal sexual assault and home invasion after his former girlfriend testified that he hid in her closet and forced her to have intercourse at knifepoint. Over defense objection, the trial court admitted evidence that during an altercation eight months earlier, defendant had threatened the complainant with the same knife.

The trial court erred by admitting the prior offense. The only issue in the case was consent, and the prior assault had no possible relevance to that question. The prior assault was not relevant to modus operandi (no issue of identity was presented and the incidents were not sufficiently similar to justify the inference that the same person committed both), common design (the offense was not part of a larger criminal scheme), intent (defendant's intent to be in the home and engage in intercourse was not disputed), or relationship and familiarity (the complainant and defendant had dated for eight years and lived together for four years, and there was no need to further clarify their relationship). The jury was likely to consider the evidence as showing criminal propensity, especially since the trial judge failed to give any limiting instructions.

People v. Nunley, 271 Ill.App.3d 427, 648 N.E.2d 1015 (1st Dist. 1995) Defendant was convicted, in a jury trial, of the murder and armed robbery of a drug dealer. At trial the State introduced testimony that defendant had confessed to the offenses some 16 months after they happened, while he was in custody on unrelated charges of stabbing his mother and killing her dog.

Two police officers and an assistant State's Attorney testified that defendant said he attacked his mother and the dog because they were possessed by Satan. Defendant said he felt better because he had confessed, and one of the officers asked whether defendant had committed any other crimes. Defendant then confessed to the murder and armed robbery charged here.

The trial judge erred by admitting evidence of the unrelated crimes against defendant's mother and her dog. Although some evidence of these offenses would have been admissible to show that defendant's confession was voluntary, the "detail and repetitive manner" with which the evidence was presented "greatly exceeded" its relevance and "subjected defendant to a mini-trial over conduct far more grotesque than that for which he was on trial."

People v. McGee, 286 Ill.App.3d 786, 676 N.E.2d 1341 (1st Dist. 1997) Defendant testified on direct examination that after he was shot in the face several years earlier, he began to carry a gun. The prosecutor asked whether defendant had been a convicted felon at the time and whether he realized that he committed a felony every time he carried a gun outside his home. The prosecutor also asked how long defendant had

carried the gun.

The prosecutor's questioning was prejudicial error. "[E]vidence that the defendant might have been committing a weapons felony every day for more than two years bore no relevance to the murder charge being tried . . ., [and] the only purpose of the evidence was to unfairly prejudice the defendant in the minds of the jurors."

People v. Cardamone, 381 Ill.App.3d 462, 885 N.E.2d 1159 (2d Dist. 2008) 725 ILCS 5/115-7.3 provides that when a defendant is accused of certain sexual offenses against children, evidence of similar offenses are admissible for any relevant purpose, provided that the probative value of the evidence is not outweighed by the prejudicial effect.

Such evidence was relevant in this case to show defendant's propensity to commit the charged offenses, but the prejudicial effect of the evidence far outweighed the probative value. Defendant, a gymnastics coach, was convicted of nine counts of aggravated criminal sexual abuse against seven girls. However, the seven complainants testified not only to the 26 acts that were charged, but that defendant also committed between 158 and 257 uncharged offenses. In addition, the trial court admitted evidence of additional uncharged acts committed against persons other than the complainants. Because no reasonable person could have believed that the probative value of such evidence was less than the prejudicial effect, the trial court abused its discretion by admitting the evidence.

People v. Holmes, 383 Ill.App.3d 506, 890 N.E.2d 1045 (1st Dist. 2008) Under common law, other crimes evidence was generally prohibited to show one's propensity to commit the charged crime. By enacting 725 ILCS 5/115-7.3, which in sex offense prosecutions allows other crimes evidence for any purpose for which it is relevant, the legislature intended to modify the traditional rule and permit propensity evidence in certain circumstances. In determining whether propensity evidence is admissible under §115-7.3, the court must weigh probative value and prejudicial effect in light of several statutory factors, including: (1) the proximity in time between the charged and uncharged offenses; (2) the degree of factual similarity between the offenses; and (3) any other relevant facts and circumstances. The trial court's decision to admit or deny propensity evidence is reviewed under the abuse of discretion standard.

The trial court abused its discretion by excluding a prior sexual battery conviction. Although nine years elapsed between the prior and charged offenses, defendant was incarcerated for five of those years. In addition, the sexual battery conviction had a number of similarities to the charges for which defendant was being tried, including that both victims were women who had relationships with defendant but refused to continue those relationships, both offenses occurred in broad daylight, both women were assaulted at knife point. In addition, defendant punched both victims to immobilize them and brought both to his parents' home during or after the attack. Other similarities included that defendant claimed both women consented to having sex and medical documentation supported the claims of physical assaults and sexual trauma.

In determining that the probative value of the nine-year-old conviction was greater than the prejudice, the credibility issue raised by the complainant's response to the supplemental discovery motion was an appropriate factor to consider. Propensity evidence is disfavored not because it is irrelevant, but because it is overly persuasive to the point of enticing a jury to convict only because defendant is a bad person who deserves punishment. The existence of motive or bias on the part of the complainant reduces the likelihood that defendant would be convicted merely because of the propensity evidence, and therefore makes propensity evidence less prejudicial.

Also, a conviction for attempted forcible rape which occurred seven years before the offense for which defendant was on trial was properly excluded by the trial court. Because the details of the assaults were not similar and the conviction was entered as part of a plea negotiation involving other charges, "admitting this conviction would be more prejudicial than probative." See also, **People v. Taylor**, 383 Ill.App.3d 591, 890 N.E.2d 1108 (1st Dist. 2008) (trial court abused its discretion by excluding evidence of prior sexual offenses under §115-7.3; the offenses occurred only six years apart and had several similarities).

People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 (2010)

Other-crime evidence may be admitted as part of a continuing narrative if it is part of the circumstances attending the entire transaction and does not involve separate, distinct, and disconnected crimes. The continuing-narrative exception is inapplicable even where offenses occur in close proximity to each other, if the offenses are distinct and undertaken for different reasons at a different place and at a separate time.

Defendant's statement admitting to the commission of other burglaries and describing the technique he used was not admissible under the continuing-narrative exception to the use of other-crime evidence. But this evidence was properly admitted for a purpose other than to prove defendant's propensity to commit burglary. Defendant's statement supported his theory of defense that he committed the burglary but left before any murder, by showing that he had developed a technique to avoid detection and contact with residents of the homes he burglarized.

(Defendant was represented by Assistant Defender Allen Andrews, Supreme Court Unit.)

People v. Chapman, 2012 IL 111896 (No. 111896, 3/22/12)

1. Generally, evidence of other crimes is admissible for purposes other than to show propensity to commit crime. Thus, other crimes evidence is admissible to show motive, intent, identity, lack of mistake, and *modus operandi*, provided that the prejudicial impact of the evidence does not substantially outweigh the probative value. The trial court's ruling on the admissibility of other crimes evidence will not be disturbed absent a clear abuse of discretion.

2. 725 ILCS 5/115-20 provides that:

> [e]vidence of a prior conviction of a defendant for domestic battery, aggravated battery committed against a family or household member . . . stalking, aggravated stalking, or violation of an order of protection is admissible in a later criminal prosecution *for any of these types of offenses* when the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant. (Emphasis added).

Section 115-20 abrogates the common law rule against propensity evidence, provided that the evidence is relevant and its probative value is not substantially outweighed by the risk of undue prejudice.

People v. Dabbs, 239 Ill. 2d 277, 940 N.E.2d 1088 (2010).

3. Defendant argued that at his trial for the first degree murder of his girlfriend, the State should not have been allowed to introduce evidence that defendant had a prior conviction for domestic battery against the decedent. Defendant argued that §115-20 does not authorize admission of the prior conviction in a first degree murder trial, because the phrase "later criminal prosecution for any of these types of offenses" authorizes other crimes evidence only in subsequent prosecutions for the five offenses specified in the statute. Defendant argued that because first degree murder is not specifically listed, §115-20 does not authorize the use of propensity evidence in first degree murder prosecutions.

The court rejected the defendant's argument, finding that the phrase "any of these types of offenses" was intended to include prosecutions for all offenses which share the same general characteristics as the specified offenses. Because murder of a household member can be of the same "kind, class or group" as the offenses enumerated in §115-20, and the charge alleged that defendant murdered his girlfriend in the couple's residence, the charge involved the functional equivalent of domestic battery or aggravated battery committed against a family or household member. Thus, §115-20 authorizes admission of the prior conviction so long as the probative value is not outweighed by the prejudicial effect.

4. The court concluded that evidence of defendant's prior domestic battery conviction was more probative than prejudicial where the prior offense was committed against the same victim, occurred less than 18 months before the alleged murder, and was relevant to the State's theory of the case because it showed defendant's intent and inclination to harm the decedent.

Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Baldwin, 2014 IL App (1st) 121725 (No. 1-12-1725, 8/15/14)

725 ILCS 5/115-7.3 provides that where a defendant is accused of certain sex offenses, evidence of the commission of another sex offense may be admitted and considered for its bearing on any matter to which it is relevant. In weighing the probative value of the evidence against the risk of undue prejudice, the court may consider the proximity in time to the charged or predicate offense, the degree of factual similarity between the offenses, and any other relevant facts or circumstances. If the trial court admits the other crimes evidence, defendant is entitled to present rebuttal evidence. §115-7.3(b).

Defendant argued that at his trial for aggravated criminal sexual assault, the trial court erred by admitting evidence of a prior aggravated criminal sexual assault where defendant was acquitted on one count of aggravated criminal sexual assault concerning the earlier offense and the jury could not reach a verdict on the other count.

The court held that the trial judge did not err by admitting the prior offense. The plain language of the statute does not base the admissibility of the other crimes evidence on the existence of a conviction, and does not preclude admission of such evidence where the defendant was acquitted of the other offense. Furthermore, the fact that defendant was acquitted did not necessarily mean that the evidence was inadmissible, because the State's inability to prove every element of its case beyond a reasonable doubt did not mean that it could not meet the standard for admissibility of other crimes evidence, which requires only that there be more than a mere suspicion that the other crime was committed by the defendant.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Chambers, 2011 IL App (3d) 090949 (No. 3-09-0949, 8/12/11)

725 ILCS 5/115-20 provides that in a prosecution for domestic battery, aggravated battery committed against a family or household member, stalking, aggravated stalking, or violation of an order of protection, the trial court may admit "[e]vidence of a prior conviction" for the same offenses, so long as the alleged victim of the current offense was also the victim of the previous offense. Evidence of the prior conviction is admissible on any matter for which it is relevant, including propensity for criminal activity. However, before admitting the evidence the trial court must determine that the probative value of the evidence outweighs any undue prejudice.

1. The Appellate Court rejected defendant's argument that §115-20 permits admission of only the fact of the prior conviction, and does not authorize evidence of the circumstances of the prior offense. The court found that the legislature intended to allow evidence other than the mere fact of conviction, because it included witness statements within the evidence which the prosecutor was required to disclose under §115-20(d). Had the legislature intended that only the fact of conviction be admitted, it would not have been necessary to require that such statements be disclosed.

The court also noted that §115-20(e) provides that the State may introduce evidence of the prior conviction by showing "specific instances of conduct." By using such language, the legislature contemplated that more than the mere fact of a prior conviction would be admitted.

The court also noted that §115-7.4, which was not cited by either party to the appeal, sets forth a second exception statutory exception for the admission of propensity evidence in domestic violence cases. The court concluded that §115-7.4 would have justified admission of the propensity evidence even had §115-20 been inapplicable.

2. The court rejected defendant's argument that the trial court abused its discretion by admitting

cumulative and unduly prejudicial details concerning the prior crime, resulting in a "trial within a trial" concerning the prior offense. The court acknowledged that three witnesses testified concerning the prior conviction, but found no indication that the prior offense became the focus of the trial.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Everhart, 405 Ill.App.3d 687, 939 N.E.2d 82 (1st Dist. 2010)

1. 725 ILCS 5/115-7.3 provides that in prosecutions for specified sex-related offenses, evidence that the defendant has committed similar crimes may be admitted for any relevant purpose, including to show a propensity to commit sex-related offenses. In deciding whether the probative value of the other crimes evidence outweighs any undue prejudice to the defendant, the trial court should consider several factors including the proximity in time between the charged and predicate offenses, the degree of factual similarity between the offenses, and any other relevant facts or circumstances. The key to balancing the probative value and prejudicial effect of other crimes evidence offered to prove propensity is to avoid admitting evidence which might entice the jury to convict the defendant only because he is a bad person and deserves punishment.

2. Here, evidence of a prior sex offense was properly admitted on the issue of defendant's propensity to commit sex crimes. First, the prior offense was not too remote to be admitted although it occurred nearly 11 years before the current offense. There is no bright line rule governing whether prior convictions are too old to be admitted under § 115-7.3; instead, the age of the prior conviction is one factor to be considered in evaluating probative value.

The court noted that when defendant's in-custody time was deducted, the lapse between the offenses was less than six years. "We do not believe the gap of six years renders the prior offense too remote as to be an abuse of discretion on this factor alone."

Furthermore, there was sufficient similarity between the offenses to justify admission of the prior offense to show propensity. Where evidence is offered for some purpose other than *modus operandi*, only general areas of similarity are required to justify admission. Here, the offenses were sufficiently similar because both attacks occurred after midnight while the complainants were alone (in a parking lot or unlocking an apartment door), both women were moved to secluded locations, both women were told to remove the same items of clothing, and both women were positioned to face away from the defendant and threatened with what each believed to be a firearm. Furthermore, the perpetrator spoke to both women during the assault, tried to prevent both women from seeing his face, and took the purses of both women after the offense.

The court rejected the argument that significant differences between the cases rendered them insufficiently similar to be probative. For example, although the ages of the complainants differed by 15 years, the court noted that each complainant was approximately the same age as the defendant when the offenses occurred. Similarly, the fact that the attacks differed in length was insignificant because neither complainant knew exactly how long the assault had lasted. Finally, the court concluded that the differences in the type of penetration in each case did not negate the factual similarities between the crimes.

3. The court rejected the argument that § 115-7.3 violates due process. In **People v. Donoho**, 204 Ill.2d 159, 788 N.E.2d 707 (2003), the Illinois Supreme Court upheld § 115-7.3 when challenged on equal protection grounds, and implicitly held that the statute also satisfies due process. In addition, § 115-7.3 satisfies due process because the trial court retains discretion to weigh probative value against prejudicial effect and deny admission of prejudicial evidence.

Defendant's conviction for aggravated criminal assault was affirmed.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Johnson, 406 Ill.App.3d 805, 941 N.E.2d 242 (1st Dist. 2010)

1. Generally, evidence of other crimes is inadmissible if offered merely to prove a defendant's propensity to commit crime. Under 725 ILCS 5/115-7.3(c), however, certain uncharged sex-related offenses

may be admitted to show the criminal propensity of a defendant who is charged with a sex offense. Before admitting evidence under §7.3, the trial court must determine whether the probative value of the evidence is substantially outweighed by any undue prejudice in light of the proximity in time of the charged and uncharged offenses, the degree of factual similarity, and any other relevant facts.

In weighing the probative value and prejudicial effect of other crimes evidence, the key is to avoid admitting evidence which persuades the jury to convict merely because it believes the defendant is a bad person who deserves punishment. In addition, other crimes evidence is improper if it will become a focal point of the trial. Finally, other crimes evidence must have a threshold similarity to the crime charged in order to be admitted; the probative value of evidence is greater where there are more factual similarities between the offenses.

2. For two reasons, the trial court erred at a trial for aggravated criminal sexual assault when it admitted evidence that 18 months after the charged offense, defendant and another man sexually assaulted a different complainant. First, the trial court considered only whether the other crimes evidence was probative, and did not weigh the probative value against any undue prejudice. Second, there were substantial dissimilarities between the offenses. In the charged offense, the complainant was accosted by a single man as she walked past an alley. In the uncharged offense, the complainant was forced into a car and assaulted by two men who blew cocaine in her face and gave her alcohol. In addition, the type of penetration differed between the cases.

In view of the "significant dissimilarities" between the offenses, the court concluded that the probative value of the uncharged offense was substantially outweighed by the prejudicial effect. Thus, the trial court abused its discretion by admitting the evidence.

3. However, the error was harmless because it did not likely influence the jury's verdict. The court concluded that a rational trier of fact could easily have convicted defendant based on the complainant's testimony identifying him, the properly admitted medical evidence, and an expert opinion based on DNA analysis.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Johnson, 2012 IL App (1st) 091730 (No. 1-09-1730, 3/23/12)

1. Other-crimes evidence is generally inadmissible where its sole relevance is to establish defendant's propensity to commit crimes.

In a first-degree-murder prosecution, eliciting evidence on cross-examination of defense witnesses that they were aware that defendant was incarcerated on drug charges had no admissible bearing on his guilt or innocence other than to promote jury bias.

2. The general rule is that prior consistent statements are inadmissible to corroborate the trial testimony of a witness because the statements serve to unfairly enhance the credibility of the witness. The jury is likely to attach disproportionate significance to them as people tend to believe that which is most often repeated, regardless of its intrinsic merit.

Prior consistent statements are not admissible merely because the testimony of a witness has been discredited, or opposing counsel has sought to challenge his testimony. They may be introduced to rebut an allegation that the witness was motivated to testify falsely, or otherwise to rebut an allegation of recent fabrication. To qualify for this exception, the prior consistent statements must have been made prior to the existence of the alleged motive to testify falsely or the alleged fabrication.

Prior consistent statements of a prosecution witness were not properly admitted to rebut an allegation that the witness was motivated to testify falsely. Although the State elicited evidence that defendant and the witness were in rival factions of the same gang, defense counsel did not argue that the witness had a motive to falsely implicate the defendant in the crime. The defense position was that the witness's identification of defendant was honest, but mistaken. A charge of mistake or inaccuracy is not sufficient to render admissible the prior consistent statements of a witness.

Even if the defense had chosen to argue that the witness had a motive to falsify due to their gang

rivalry, the State could only have introduced the prior consistent statement upon a showing that the statement predated the existence of the rivalry. There is no question here that the gang rivalry, as well as any motive to fabricate that might have arisen from that gang rivalry, preexisted the offense.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Johnson, 2014 IL App (2d) 121004 (No. 2-12-1004, mod. op. 1/23/15)

At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The Appellate Court agreed with defendant that the other crimes evidence was inadmissable for the asserted purposes, but found that it was properly admitted as propensity evidence.

1. Generally, evidence of other crimes is inadmissible to show propensity to commit a crime, but is admissible if relevant for any other purpose such as *modus operandi*, intent, motive, identity, or absence of mistake. Subsequent bad acts may be used as other crimes evidence.

725 ILCS 5/115-7.3(b) creates an exception to the general rule in certain sex offense prosecutions. Under §115-7.3(b), in a prosecution for one of the specified offenses the State may introduce evidence that defendant committed another of the specified offenses. Such evidence is admissible for any relevant purpose, including defendant's propensity to commit sex crimes.

Before evidence may be admitted under §115-7.3(b), the trial court must weigh the probative value of the evidence against the undue prejudice it might cause. The admissibility of the evidence rests within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion.

2. Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

3. The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

Defendant's convictions for first degree murder and aggravated criminal sexual assault were affirmed.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

People v. McGee, 2015 IL App (1st) 122000 (No. 1-12-2000, 1/23/15)

Defendant was convicted of stalking a CTA employee based on two incidents where he approached her, banged on the windows of her kiosk, and verbally threatened her. The State, over defendant's objection, was also allowed to introduce evidence of a physical altercation between defendant and the CTA employee's husband which occurred two hours after the second incident, when defendant returned to the train station.

During that altercation, defendant stabbed the husband with a box cutter. The police later recovered a box cutter from defendant's backpack.

The court held that the admission of altercation between defendant and the husband was improper other crimes evidence and reversible error. The court rejected the State's argument that evidence was admissible as a continuing narrative of the charged offense and to show defendant's intent to harm the CTA employee.

1. Other-crimes evidence is admissible if it is part of a continuing narrative of the events giving rise to the charged offense or is intertwined with the offense. When facts about the uncharged criminal conduct are part of a continuing narrative of the charged criminal conduct, they do not constitute separate, distinct, and unconnected crimes.

Here, defendant's altercation with the husband was a distinct event that was not part of a continuing narrative. It occurred two hours after his last contact with the CTA employee and did not involve any contact with her. Instead, when defendant returned to the station, the husband approached him and the two began fighting. The incident was thus inadmissible as a continuing narrative.

2. The incident was also inadmissible to establish defendant's intent to harm the CTA employee since it showed that he arrived at the station with the box cutter. Even though evidence of the box cutter may have been admissible, the State could have done this by simply showing that the box cutter was found in defendant's backpack at the station. It had no need to introduce evidence of the altercation to prove the existence of the box cutter.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

People v. Moore, 2012 IL App (1st) 100857 (No. 1-10-0857, 2/1/12)

1. Evidence of crimes for which a defendant is not on trial is inadmissible if relevant merely to establish the defendant's disposition or propensity to commit crime. Evidence of other crimes is objectionable not because it has little probative value, but because it has too much. Such evidence overpersuades the jury, which might convict the defendant only because it feels that defendant is a bad person who deserves punishment. The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal.

Given these concerns, when evidence of unrelated offenses is contained in an otherwise competent statement or confession, it must be deleted when the statement or confession is read to the jury, unless to do so would seriously impair its evidentiary value.

2. The completeness doctrine provides that where one party introduces part of an utterance or a writing the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury. The right to introduce an entire conversation or writing is not absolute, but depends on the relevancy of the additional parts that the party seeks to introduce. Otherwise inadmissible evidence may be admitted only where a defendant opens the door to such material and its exclusion would mislead the jury.

3. A videotape of a police interrogation of defendant contained references to: (1) a prior incident of domestic violence in which defendant punched a woman and broke her jaw after finding her with another man; defendant apparently pled guilty to this charge; (2) defendant's prior history of robberies; and (3) defendant's prior history as a drug dealer and membership in a street gang. This other-crime evidence was irrelevant and unfairly prejudicial. Had defense counsel objected to this evidence, it would have been excluded.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Raymond, 404 Ill.App.3d 1028, 938 N.E.2d 131 (1st Dist. 2010)

Other-crime evidence may be admitted to show defendant's propensity to commit predatory criminal

sexual assault of a child pursuant to 725 ILCS 5/115-7.3. Unlike evidence offered to prove *modus operandi* or common scheme or design, the level of similarity between the charged and uncharged offenses need not be sufficient to earmark both as the handiwork of a single offender; mere general areas of similarity are enough.

The court concluded that the following similarities were sufficient to uphold admission of the other crime evidence, even though some dissimilarities did exist between the offenses and some of the similarities were generic: the offenses occurred within four years of each other; both victims were female, in the same age range of 12-14; defendant was significantly older (19 and 23); the encounters were in places where defendant was not permitted to be, but were places the victims were familiar with; and the encounters began as consensual and involved vaginal penetration.

(Defendant was represented by Assistant Defender Sean Southern, Chicago.)

People v. Smith, 406 Ill.App.3d 747, 941 N.E.2d 419 (3d Dist. 2010)

In derogation of common law, 725 ILCS 5/115-7.3 allows admission of evidence of other sex offenses committed by defendant for any proper purpose, including proof of his propensity to commit sex offenses, where defendant is charged with sex offenses. The statute also provides that when weighing the probative value of the other-offense evidence against undue prejudice, the court may consider: (1) the proximity in time to the charged offense; (2) the degree of factual similarity to the charged offense; and (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3(c).

Defendant was charged with fondling his granddaughter's vagina outside of her clothing in 2005. The State sought to admit evidence that defendant had committed: (1) forced acts of sexual intercourse with his sisters in the 1960s and 1970s; (2) acts of digital penetration and rubbing of the vaginal area under the clothing of his daughters in the 1970s and 1980s; and (3) acts of touching the vaginal area of another granddaughter outside of her clothing five years before the charged offense.

The court did not abuse its discretion in excluding evidence of the sex offenses committed against the defendant's sisters and daughters. Evidence of those offenses was not only stale due to their extreme remoteness in time, they constituted evidence of uncharged and unproven allegations of sexual offenses dissimilar to and more heinous than the charged offense. The court did allow the State to admit evidence of the offense committed against the other granddaughter, which was most similar to and therefore most probative of the charged offense.

The sheer volume of other-crime evidence proffered by the State also created a risk that evidence would become a focal point of the trial and lead the jury to convict defendant based on those crimes alone, rather than the charged offense. Contrary to **People v. Watson**, 386 Ill.App.3d 598, 900 N.E.2d 267 (2d Dist. 2008), this concern is not inconsequential where the other-crime evidence is offered to prove propensity. The court must still take care to ensure that it admits only so much evidence as is reasonably necessary to prove propensity.

The Appellate Court affirmed the trial court's order excluding evidence of the offenses committed against defendant's sisters and daughters.

People v. Smith, 2015 IL App (4th) 130205 (No. 4-13-0205, 3/26/15)

1. Evidence of other crimes is generally inadmissible to demonstrate the defendant's propensity to commit the charged criminal conduct. Such evidence, while relevant, is excluded because it has too much probative value and to ensure that guilt and innocence is decided solely on the basis of the charged conduct and not because the defendant is a bad person.

However, evidence of other offenses may be used to demonstrate propensity under 725 ILCS 5/115-7.3 when the defendant is charged with one of several enumerated sex offenses and the probative value of the evidence is not substantially outweighed by its prejudicial effect. Among the factors to be considered when balancing the probative value and the prejudicial effect are: (1) the proximity in time to the charged offense, (2) the degree of factual similarity to the charged offense, and (3) other relevant facts and

circumstances.

In addition, in order to be admitted under §115-7.3 the other offenses must have a threshold similarity to the charged conduct. However, because no two crimes are identical, the existence of some differences does not necessarily defeat admission of the evidence.

2. At defendant's trial for predatory criminal sexual assault of a child, aggravated criminal sexual abuse, and sexual exploitation of a child, the trial court found that §115-7.3 authorized the admission of evidence of similar conduct which defendant committed against other children some 12 to 18 years earlier. The Appellate Court found that the trial judge did not abuse its discretion by admitting the evidence, noting that the offenses were "remarkably similar" to the charges in this case and that the mere passage of time does not necessarily make the admission of prior offenses unduly prejudicial.

The court also noted that the trial court acted to limit the prejudice of the prior crime evidence when it barred testimony concerning prior conduct that was not similar to the allegations in the present case and twice read limiting instructions that were repeated by the State in closing argument. In addition, on cross-examination defense counsel was able to establish that no charges had been filed concerning the prior offenses. Finally, the State did not unduly emphasize the prior crimes evidence in closing argument.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

People v. Strawbridge, 404 Ill.App.3d 460, 935 N.E.2d 1104 (2d Dist. 2010)

Other crimes evidence is not admissible to bolster the credibility of a State's witness. The trial court erred by allowing the State to introduce pornographic images recovered from defendant's computer in order to corroborate the complainant's testimony that she had been shown those pictures.

The court rejected the argument that the error satisfied the "fundamental error" prong of the plain error rule, however. Because the improper admission of other crimes evidence is subject to harmless error analysis, it is not of such a fundamental nature as to deny a fair trial *per se*. The court also found that the evidence did not deny a fair trial - possession of deviate pornographic images was not "particularly prejudicial" where such evidence was "less reprehensible" than predatory criminal sexual assault of a child and aggravated stalking, the crimes for which the defendant was on trial.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

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§19-24(b)(2)
***Modus Operandi*, Common Scheme or Design**

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) When evidence of another crime is introduced to establish a common design or plan:

> "there must be a degree of identity between the facts of the crime charged and those of

the other offense in which the defendant was involved. The reason, of course, is that the defendant's participation in the crime charged may be inferred from his involvement in the other offense. Thus, to avoid the general rule of nonadmissibility of evidence of other crimes, the two offenses must be so similar that evidence of one

offense tends to prove the defendant guilty of the offense charged."

See also, **People v. Cruz**, 162 Ill.2d 314, 643 N.E.2d 636 (1994) (the "high degree of similarity" requirement is not intended to avoid prejudicing defendant; instead, the basis for the modus operandi exception is that a pattern of criminal behavior is "so distinctive that separate crimes are recognized as the handiwork on the same wrongdoer").

People v. McDonald, 62 Ill.2d 448, 343 N.E.2d 489 (1975) At defendant's trial for burglary, it was proper for the State to present testimony of a subsequent burglary where the modus operandi were similar. The attacks upon both victims were committed in the early morning hours, the burglar in both cases gained entry by removing a window while standing on an overturned refuse basket, and in both cases the burglar wore gym shoes, khaki pants and gloves.

People v. Taylor, 101 Ill.2d 508, 463 N.E.2d 705 (1984) At defendant's trial for murder and armed robbery, the State was allowed to introduce evidence of prior offenses. Defendant contended that this evidence was improper due to the differences between the facts of those offenses with the crimes on trial (the prior offenses took place outside while the instant offenses occurred inside a building, in one prior offense defendant posed as a policeman, and in another defendant attempted to take a victim's car).

Other crimes need not be identical to be admissible. There were a number of "substantial similarities" between the prior crimes and the crimes on trial: they all occurred within a one-block area within a four-day period, each occurred in the early evening hours and involved what appeared to be the same gun, the perpetrator searched each victim, and defendant was identified in each case. These similarities tended to establish defendant's possession of the murder weapon, his intent to commit an armed robbery, and his placement near the scene of the crime, and served to identify him as the murderer.

People v. Tate, 87 Ill.2d 134, 429 N.E.2d 470 (1981) For a separate offense to be admissible as proof of modus operandi, a "strong and persuasive showing of similarity" must be made. Such a showing was not made where the similarities between the offenses were not distinctive, but were "standard shoplifting techniques" (i.e., putting meat inside one's clothes and grabbing for a gun during a struggle). Since there were no distinctive features linking the two offenses, "such as using similar weapons, dressing the same, acting with the same number of people, or even a distinctive method of committing the offense," evidence that another person had committed a similar crime was not admissible. Compare, **People v. Cruz**, 162 Ill.2d 314, 643 N.E.2d 636 (1994) (in murder case, defendant should have been allowed to introduce evidence of a third party's confessions to other crimes as modus operandi evidence; other crimes evidence cannot be excluded on the basis of unfair prejudice where the defense seeks to introduce the evidence; in addition, there was a sufficiently "high degree of similarity" between the offenses); **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989) (absence of injury in one rape did not render offense so dissimilar to rape in which victim killed as to preclude admission).

People v. Evans, 125 Ill.2d 50, 530 N.E.2d 1360 (1988) At defendant's trial for murder and attempt rape, the State introduced evidence of other crimes by defendant.

The charged offenses took place in a housing complex elevator that was stopped between floors. The victim was found with her shirt and sweater pulled up and her pants and undergarments pulled down. She had been stabbed 22 times.

Two women were allowed to testify that they had been attacked, by a person identified as defendant, in the same housing complex within a week of the instant offenses. In both instances the perpetrator was armed with a knife, stopped the elevator between floors and attempted to rape the victims. In one instance the rape was successful; in the other, people outside the elevator started to scream, and the man restarted the elevator and departed. In one instance the woman was beaten about the head, and in the other threats were made to "cut up" the victim.

The other crimes were substantially similar, even virtually identical, to the crimes on trial. "Based on the similarity of the scheme and design of the crimes, the evidence was relevant to the identification of the perpetrator [in the instant case] . . . [and] as to whether defendant possessed the necessary criminal intent."

The prejudicial effect of the other crimes evidence did not outweigh its probative value. The evidence was highly probative of defendant's intent, particularly with respect to the attempted rape charge, and any prejudicial effect was limited by a jury instruction that the other crimes evidence was to be considered for the limited purpose of defendant's identification, intent and design.

People v. Robinson, 167 Ill.2d 53, 656 N.E.2d 1090 (1995) At defendant's trial for armed robbery and armed violence, the victim of the crimes, Lily Barber, testified that she was confronted by a masked man as she left the garage of her home. The man forced Barber back into the garage, and a struggle ensued. Barber pulled the mask from the attacker's face and saw his face from a distance of less than one foot.

Barber testified that the man brandished a switchblade knife, ordered her to lie down, and took her wallet. He then started to remove her clothing, but left when she said that she had a disease and that a neighbor would return home soon. Barber identified defendant as the man who had been in her garage and a knife recovered from defendant's car as the one used in the attack.

The State sought to introduce seven attacks against other women occurring within the previous 13 years. The trial court held that defendant would be unfairly prejudiced by evidence of seven other offenses, but allowed the State to present evidence of two crimes.

The State chose to present evidence concerning attacks on Eloise Law and Louise Collins. Law testified that a week after Barber was attacked, she was knocked down and had her purse stolen as she was leaving her garage. Law was unable to identify the assailant, but later in the day she went to the police station, where she identified credit cards that had been in her purse. The woman from whom the credit cards had been recovered told police that she had obtained the cards from defendant.

Louise Collins testified that 13 years before the attack on Barber, she was attacked in the vestibule of her building. As Collins entered her building, a man approached with a knife and demanded her purse. After surrendering her purse, Collins was forced to remove her clothing and lie on the floor. However, she escaped by stabbing the man with his own knife. Collins testified that she had identified defendant as her assailant during a lineup. She also identified defendant in open court.

The trial judge did not err by admitting the testimony of Law and Collins. Evidence of other crimes is generally inadmissible because it tends to "overpersuade" the jury that defendant is a bad person deserving punishment. However, such evidence is admissible where it is relevant for some purpose other than to show defendant's propensity to commit crimes. Before admitting such evidence, the trial court must weigh its prejudicial effect against its probative value; the evidence must be excluded if the former substantially outweighs the latter.

There were sufficient similarities between the crimes to permit their use as modus operandi evidence. First, the case at bar and the offense against Law occurred within seven days of each other. In addition, both offenses occurred in the early evening in the same geographical area of Chicago. Furthermore, in both attacks the assailant covered his face, selected older woman as targets, and attacked the women as they exited

their garages.

The attack on Collins was sufficiently similar to the offense against Barber to justify its admission; both attacks occurred during the early evening in the same geographical area of Chicago, the assailant surprised both victims as they were returning home, and the assailant used a knife and attempted sexual assaults in both cases.

Furthermore, the offense involving Collins was not too remote to be admitted, although it occurred 13 years earlier, where defendant had been incarcerated for all but two of the years between the crimes. Although the trial judge allowed the State to select which two crimes to present, he reserved the right to review those crimes to determine whether they were admissible.

People v. Jackson, 331 Ill.App.3d 279, 771 N.E.2d 982 (1st Dist. 2002) Evidence of other crimes is admissible if relevant to prove modus operandi, provided the evidence is not more prejudicial than probative, offered to show mere propensity to commit crimes, or used to bolster the testimony of a prosecution witness. Modus operandi refers to a pattern of criminal behavior that is so distinct that separate offenses are recognized as the work of a single person. To establish modus operandi, crimes must share peculiar and distinctive features that are not shared by most offenses of the same type and which earmark the offenses as having been committed by the same person.

At defendant's trial for aggravated criminal sexual assault, evidence of sexual assaults was not sufficiently similar to the charged crime to be admitted as modus operandi. The complainants were assaulted at different times of day, several months apart, in different buildings, and in different parts of Chicago. Although both complainants were forced to engage in vaginal sex, only one was also forced to engage in acts of oral sex. The fact that both offenses took place in dirty, abandoned buildings did not identify the offenses as the work of a single person, as sexual assaults usually occur in isolated areas. In addition, a gun was used in one case while a knife was used in the other.

Furthermore, the perpetrators used entirely different approaches - one complainant was grabbed by a man who jumped out of the bushes, and was dragged to a nearby building; the other was approached by a man who asked if he could accompany her and was then forced into a car and driven to an abandoned building.

Modus operandi was not shown by the fact that the perpetrator of the first offense stole the complainant's Nautica coat, while the perpetrator of the second offense wore a Nautica coat. Because "Nautica apparel is readily available, common and sold throughout the city," it is not distinct or unusual.

The complainants shared no common characteristics except race and gender, and many of the similarities asserted by the State were common to all sexual assaults. Therefore, the evidence did not establish modus operandi. See also, **People v. Thigpen**, 306 Ill.App.3d 29, 713 N.E.2d 633 (1st Dist. 1999) (evidence did not show modus operandi where the second murder was not sufficiently similar to the crime charged to "earmark" both as the work of a single person; one shooting occurred at night at a crowded intersection while the other was a daytime kidnapping followed by a shooting in a deserted area; the probative value of evidence was outweighed by its prejudicial effect concerning the existence of a common plan or scheme or identity, especially where extensive details about the uncharged crime, including photographs of victims, were admitted).

People v. Knight, 309 Ill.App.3d 224, 722 N.E.2d 331 (2d Dist. 1999) To be admissible as modus operandi evidence, the uncharged and charged crimes must share "peculiar and distinctive common features so as to earmark both crimes as the defendant's handiwork." The offense at issue (domestic battery) and defendant's threat six weeks later (that he would break the complainant's leg if she slept with one of his friends) did not share such "peculiar and distinctive" features.

People v. Alford, 111 Ill.App.3d 741, 444 N.E.2d 576 (1st Dist. 1982) Defendant was convicted of aggravated battery following a bench trial. The complainant testified that as he was leaving a store

defendant, who was across the street, fired a gun and wounded him in the arm and side. The complainant identified defendant a few days after the incident.

Over defense objection, the State presented evidence that defendant had been involved in a shooting one block away five days earlier. A witness testified that defendant was involved in an argument with another patron in a tavern, left the tavern, pulled a gun, and fired two shots through the tavern door.

Evidence of the prior shooting was improperly admitted. Neither "common scheme" nor "modus operandi" was applicable in this case. Common scheme or design "refers to a larger criminal scheme of which the crime charged is only a portion." Here, there was no evidence showing that the shooting incident on trial was part of a larger criminal scheme. Modus operandi refers to a "pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrong doer." To qualify as modus operandi evidence, "the State must show that the offenses were so nearly identical in method as to earmark them as the handiwork of the accused." The two shooting incidents were not identical; the prior shooting involved the firing of a gun following an argument, whereas the instant shooting involved no argument whatsoever. Thus, no proper purpose was served by evidence of the prior shooting. See also, **People v. Kimbrough**, 138 Ill.App.3d 481, 485 N.E.2d 1292 (1st Dist. 1985) (discussion of common scheme and modus operandi); **People v. Maness**, 184 Ill.App.3d 149, 539 N.E.2d 1368 (4th Dist. 1989) (same).

People v. Cook, 53 Ill.App.3d 997, 369 N.E.2d 246 (1st Dist. 1977) At defendant's rape trial, testimony concerning the facts surrounding a prior rape committed by defendant was improperly admitted. The testimony had no relevancy or materiality since the two incidents did not have such similarities as to constitute modus operandi. Furthermore, the "obvious effect" of the testimony was to inflame the jury against defendant by making it aware of the prior conviction. Compare, **People v. Uzelac**, 179 Ill.App.3d 395, 534 N.E.2d 1250 (1st Dist. 1989) (evidence of prior attempt rape was proper where it had similar distinctive features as offense on trial).

People v. Barbour, 106 Ill.App.3d 993, 436 N.E.2d 667 (1st Dist. 1982) Defendant was convicted of rape and deviate sexual assault. Defendant testified that an act of intercourse occurred but that it was with the complainant's consent.

Over objection, the State introduced the testimony of two women who alleged that defendant had previously raped them. No charges were filed in those cases. Defendant admitted intercourse with the two women but claimed that both consented.

The evidence concerning the other alleged rapes was erroneously admitted. The similarities between the prior incidents and the one on trial were insufficient to demonstrate modus operandi. In addition, even if modus operandi had been shown the evidence of the other alleged crimes was not probative of any issue in this case. The State contended that the other crimes help to establish the offender's identity; however, identity was not in issue since defendant admitted to the intercourse but claimed consent.

People v. Roberts, 100 Ill.App.3d 469, 426 N.E.2d 1104 (1st Dist. 1981) Defendant, the president of a park district, was convicted of official misconduct for soliciting and accepting fees from a landscaping company in return for awarding contracts. The State introduced evidence concerning other alleged misconduct by defendant: the use of HUD funds to remodel park district offices, requiring the landscaping company to do work at defendant's home, holding a tax referendum to raise money to pay off contractors from whom defendant had received kickbacks, and the fact that defendant was thrown out of office.

Such evidence was not relevant to show the scheme employed by defendant to accomplish the crimes for which he was charged. The above acts were dissimilar to the crimes charged, and in regard to the HUD funds there was no evidence showing any improper use. The admission of this evidence was not cured by the general instruction to disregard other crimes or misconduct, and the evidence was prejudicial since it "may have had the effect of 'overpersuading the jury,' resulting in [defendant's] conviction because [the jurors] felt he was a 'bad person deserving punishment.'"

People v. Triplett, 99 Ill.App.3d 1077, 425 N.E.2d 1236 (1st Dist. 1981) Defendant was convicted of the armed robbery of a Clark service station and the murder of the station manager. The State was allowed to introduce evidence that defendant had committed another armed robbery at a different Clark service station about three months earlier, to show defendant's knowledge of Clark station procedures and common design or modus operandi.

The introduction of the prior crime was reversible error. The need to use this evidence to show defendant's knowledge of Clark station procedures was slight, since such knowledge was clearly established by other evidence (defendant admitted working at Clark stations and knowing their procedures, and the State's evidence showed that defendant managed at least one Clark station, had worked at three, and was familiar with their procedures). Furthermore, the evidence was improperly admitted to show common scheme or modus operandi because there were several dissimilarities between the crime.

People v. Connolly, 186 Ill.App.3d 429, 542 N.E.2d 517 (4th Dist. 1989) At defendant's trial for burglary, the State was allowed to introduce evidence showing that three years earlier, defendant had committed two burglaries. Each of the burglaries, including the one on trial, involved: (1) forced entries into a commercial establishment in the early morning hours, and (2) attempts to disable alarm systems.

The prior crimes were improperly introduced to prove modus operandi. "[W]e cannot say these characteristics were so unusual and distinctive as to be like a signature . . . [rather], those characteristics are common to a great number of burglaries."

People v. Howard, 303 Ill.App.3d 726, 708 N.E.2d 1212 (1st Dist. 1999) Two armed robberies were not sufficiently similar to qualify as *modus operandi* evidence. The fact that both victims were white was "hardly a unique feature of the crime," and the State presented no evidence that the victims were targeted because of their occupation or that the offender asked their professions.

There were also significant differences between the offenses - only one victim was asked for an ATM PIN number, in only one instance did the perpetrator escape in an automobile, and there was nothing unique about the location in which the crimes occurred. The fact that both victims were approached from behind is also not "particularly distinctive," as "armed robbers often attempt to surprise their victims." Displaying a weapon and demanding the victim's wallet are also not unique characteristics of this crime, but describe "the prototypical armed robbery." Finally, the fact that a common epithet was used to address each victim is insignificant as the "earmark" of a particular offender.

People v. Connors, 82 Ill.App.3d 312, 402 N.E.2d 773 (1st Dist. 1980) At defendant's trial for armed robbery the court erred in allowing evidence of defendant's alleged commission of another armed robbery four hours earlier.

The other crime evidence was not admissible to prove *modus operandi*, since the similarities (i.e., both occurred at night near the victim's car, a gun was used, and the perpetrators stated "don't make me shoot you" and "if you move I'll shoot") were not so distinctive as to earmark each as the conduct of the same perpetrator.

There was no evidence to support the State's contention that the prior robbery was accomplished to facilitate the robbery on trial. The crimes were four hours apart, and there was no testimony that the car stolen in the prior robbery was used in the crime on trial.

People v. Rodriquez, 107 Ill.App.3d 43, 437 N.E.2d 441 (2d Dist. 1982) At defendant's trial for the forgery of certain checks, the State, over objection, was allowed to introduce detailed testimony concerning defendant's alleged forgery of unrelated stolen checks.

The probative value of that evidence was outweighed by its prejudicial effect. Such evidence was "entirely unnecessary to prove the charged offenses" and "merely served to raise an inference as to the defendant's propensity to negotiate stolen checks."

People v. Baxter, 74 Ill.App.2d 437, 221 N.E.2d 16 (1st Dist. 1966) At trial for unlawful sale of narcotics, it was reversible error for informer to testify that he had bought narcotics from defendant every day for three months.

People v Sievers, 56 Ill.App.3d 880, 372 N.E.2d 705 (4th Dist. 1978) At defendant's trial for rape and armed robbery, the State was properly allowed to introduce testimony about other attacks by defendant where there were peculiar and distinctive features in all the incidents.

People v. DiGiacomo, 71 Ill.App.3d 56, 388 N.E.2d 128 (2d Dist. 1979) Evidence of prior offense occurring one or two hours earlier, which was almost identical to charged offense, was properly admitted to show modus operandi. See also, **People v. McCambry**, 76 Ill.App.3d 314, 395 N.E.2d 129 (1st Dist. 1979).

People v. Copeland, 66 Ill.App.3d 556, 384 N.E.2d 391 (1st Dist. 1978) At defendant's trial for armed robbery, the State was properly allowed to introduce testimony of defendant's commission of an almost identical crime less than a mile away and two hours later. See also, **People v. Sanders**, 103 Ill.App.3d 700, 431 N.E.2d 1145 (1st Dist. 1982).

People v. Maness, 184 Ill.App.3d 149, 539 N.E.2d 1368 (4th Dist. 1989) At defendant's trial for a sex offense against one daughter (T.M.), the State was properly allowed to introduce the testimony of another daughter (K.M.) regarding defendant's sexual abuse upon her as *modus operandi* evidence.

> "Defendant first sexually abused his daughters at an extremely young age. The sexual abuse progressed from inappropriate fondling to incestuous intercourse. The defendant met the resistance of his daughters with actual and threatened physical violence. To discourage his daughters from reporting the sexual abuse, the defendant mentally played on their normal fear of family separation and parental strife. It therefore follows, given the degree of factual similarity between the crimes, the jury could reasonably infer the defendant had sexually abused T.M. from the sexual misconduct testimony of K.M. describing the 'method of work' of the defendant."

People v. Clauson, 182 Ill.App.3d 268, 537 N.E.2d 1048 (1st Dist. 1989) At defendant's trial for criminal sexual abuse, the State was properly allowed to introduce testimony showing defendant engaged in similar acts, six months earlier, with another person. There were sufficient similar and distinctive features to qualify the offenses as modus operandi evidence: defendant drove a beige van with tinted windows, went to the same private drive on a dead-end street, and engaged in similar homosexual acts. See also, **People v. Williams**, 185 Ill.App.3d 840, 541 N.E.2d 1175 (1st Dist. 1989).

People v. Diaz, 201 Ill.App.3d 830, 558 N.E.2d 1363 (1st Dist 1990) At defendant's trial for criminal sexual assault against his eight-year-old daughter, the State was properly allowed to present testimony of defendant's prior sexual conduct with the same daughter. The sexual conduct of defendant with his daughter disclosed "a pattern of sexual abuse" and was proper to show modus operandi, as well as the relationship of the parties, defendant's intent, defendant's design or course of conduct, and to corroborate the complainant's testimony. See also, **People v. Williams**, 202 Ill.App.3d 495, 559 N.E.2d 1158 (1st Dist. 1990).

People v. Jendras, 216 Ill.App.3d 149, 576 N.E.2d 229 (1st Dist. 1991) At defendant's trial for aggravated criminal sexual abuse, the State was permitted to introduce testimony from two brothers that defendant had sexually abused them nine to 15 years earlier.

This testimony was admissible to show modus operandi where all three victims were males in seventh or eighth grade, defendant was their teacher, all the victims went alone to defendant's apartment

where they were given swimming trunks and invited to swim, the acts of touching and fondling were similar, and defendant stopped when the boys said they had to leave.

The court was concerned about the remoteness of the evidence. However, admission of other crimes evidence is within the discretion of the trial judge, and in general remoteness should go to the weight of the evidence rather than its admissibility.

People v. Woltz, 228 Ill.App.3d 670, 592 N.E.2d 1182 (5th Dist. 1992) At defendant's trial for aggravated criminal sexual assault for allegedly committing an act of sexual penetration against V.J., evidence that defendant had also committed a sexual assault against J.S. was not admissible to show absence of mistake. The only act which defendant claimed had been accidental was touching the complainant's breast, while the charge involved penetration of the vagina. In addition, it is improper to admit acts of sexual misconduct with other children to show intent, guilty knowledge or lack of accident or mistake, because those facts are shown by the acts themselves. The evidence was not admissible to show common design or scheme, either, because there was no indication that either offense was part of a larger scheme.

People v. Overton, 281 Ill.App.3d 209, 666 N.E.2d 753 (1st Dist. 1996) Defendant was charged with armed robbery of a gas station in McCook on December 10, 1990. Before trial, the defense filed a motion *in limine* to exclude evidence that on December 26, 1990, defendant was arrested in Countryside after he drove at a high speed from a gas station that had just been robbed.

The trial court ruled that the State could introduce evidence of the police pursuit and stop. In addition, the trial court allowed the defense to introduce evidence that defendant had been acquitted of the Countryside armed robbery. However, the judge refused to admit the facts concerning the armed robbery at the Countryside station.

During opening argument, the prosecutor referred to the fact that, on December 26, a radio dispatch was received regarding the Countryside armed robbery. A police officer then testified that at approximately 5:45 p.m. on December 26, 1990, he saw a white Pontiac drive erratically out of a gas station and run a red light. As the officer pursued the car, he received a dispatch that the vehicle and occupants were wanted for the armed robbery of the gas station. During the pursuit, the officer saw a metal object come out of the passenger's window, strike the pavement and cause a spark.

The officer also testified that defendant and the other two occupants of the vehicle were arrested. Other evidence showed that a .32 caliber handgun was found one-half mile from the scene of the arrest.

The radio dispatch concerning the Countryside armed robbery constituted improper evidence of other crimes. The evidence was not admissible to show modus operandi. Not only did the State fail to argue that theory at trial, but modus operandi testimony "must be tailored so that the jury is apprised only of the behavior and not the commission of a crime, and the prosecutor may not indicate that such behavior constituted the commission of a crime." In addition, the circumstances of the Countryside armed robbery were not sufficiently similar to those surrounding the crime charged to permit admission as modus operandi evidence. Finally, defendant had been acquitted of the Countryside robbery. See also, **People v. Brunning**, 95 Ill.App.3d 673, 420 N.E.2d 587 (1st Dist. 1981) (State erroneously used charge on which defendant had been acquitted as other crimes evidence).

Cumulative Digest Case Summaries **§19-24(b)(2)**

People v. Antonio, 404 Ill.App.3d 391, 935 N.E.2d 540 (1st Dist. 2010)

1. **Crawford v. Washington**, 541 U.S. 36, 55 (2004), identified business records as among the well-established hearsay exceptions that by their nature are not testimonial and subject to the Sixth Amendment cross-examination requirement.

Relying on 725 ILCS 5/115-5.1, the Appellate Court concluded that reports of postmortem examinations are business records that may be admitted without the requirement of an opportunity to cross-examine the declarant. Section 115-5.1 provides in pertinent part that "the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court in this State, to the extent permitted by this Section."

Because postmortem examinations are business records, a medical examiner properly testified to the results of examinations conducted by another medical examiner and a forensic anthropologist. The medical examiner who performed the autopsy of a decomposed, headless body found no trauma other than dismemberment, and could not determine the cause or manner of death. The anthropologist examined the skeletal remains, found no antemortem injuries, and also could not determine a cause of death.

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009), did not change this result. The United States Supreme Court concluded that reports of experts who tested controlled substances were comparable to affidavits offered to prove a fact at issue, and therefore among the core class of testimonial statements for which cross-examination was required. In contrast, the reports of the medical examiner and the anthropologist reached no conclusion as to the cause and manner of death, and did not prove the identity of the victim. There was little or nothing to confront in either report.

2. Generally, other crime evidence is admissible where relevant to a material issue other then propensity.

Defendant was charged with first degree murder but convicted of involuntary manslaughter based on his statement to the police that he and the deceased argued, he became angry and pushed her, and she fell and struck her head on a piece of furniture. At trial, the State offered evidence that three years earlier defendant had threatened the life of his ex-wife with a gun.

The other crime evidence was properly admitted to prove intent, absence of mistake, and *modus operandi*. The similarities of the two offenses were unmistakable, despite their differences. The evidence of the other crime illustrated defendant's manner of handling stressful or upsetting situations.

People v. Johnson, 2014 IL App (2d) 121004 (No. 2-12-1004, mod. op. 1/23/15)

At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The Appellate Court agreed with defendant that the other crimes evidence was inadmissable for the asserted purposes, but found that it was properly admitted as propensity evidence.

1. Generally, evidence of other crimes is inadmissible to show propensity to commit a crime, but is admissible if relevant for any other purpose such as *modus operandi*, intent, motive, identity, or absence of mistake. Subsequent bad acts may be used as other crimes evidence.

725 ILCS 5/115-7.3(b) creates an exception to the general rule in certain sex offense prosecutions. Under §115-7.3(b), in a prosecution for one of the specified offenses the State may introduce evidence that defendant committed another of the specified offenses. Such evidence is admissible for any relevant purpose, including defendant's propensity to commit sex crimes.

Before evidence may be admitted under §115-7.3(b), the trial court must weigh the probative value of the evidence against the undue prejudice it might cause. The admissibility of the evidence rests within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion.

2. Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi*

nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

3. The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

Defendant's convictions for first degree murder and aggravated criminal sexual assault were affirmed.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

People v. Littleton, 2014 IL App (1st) 121950 (No. 1-12-1950, 6/26/14)

At defendant's trial for robbery, the State presented other crimes evidence to prove *modus operandi.* As part of that evidence, the State presented testimony from two retired police officers recounting statements from nine people concerning offenses to which defendant entered guilty pleas several years earlier. The State contended that the statements were not hearsay because they were offered as proof of *modus operandi* rather than to prove the truth of the matters asserted. The Appellate Court rejected this argument and held that the testimony contained inadmissible hearsay.

1. Hearsay consists of an out of court statement offered to prove the truth of the matter asserted. An out-of-court statement is not hearsay if it is offered for some reason other than to prove the truth of the matter asserted.

Thus, out-of-court statements concerning other crimes are not hearsay if offered to prove something other than that the crime occurred. For example, in **People v. Moss,** 205 Ill.2d 139, 792 N.E.2d 1217 (2001) and **People v. Lovejoy**, 235 Ill.2d 97, 919 N.E.2d 843 (2009), statements concerning alleged sexual assaults were properly admitted at murder trials not to show that the sexual assaults had occurred, but to show the defendants' motives to kill persons who could have been witnesses at trials for sexual assaults.

2. By contrast, statements about unrelated crimes are hearsay if offered to prove that in fact the other crimes occurred. The *modus operandi* exception to the rule against other crimes evidence allows admission of other crimes to prove the identity of a perpetrator, on the theory that if one crime is committed in a unique way it is likely that another crime committed in the same way was the work of the same person. A pattern which gives rise to an inference of the perpetrator's identity exists only if the statements about the other crimes are true. If the statements about the other crimes are not true, there is no unique pattern of crime that would support the *modus operandi* exception.

Thus, statements presented in support of the *modus operandi* exception are offered to prove the truth of the matter asserted - that the other crimes occurred in a particular fashion. Such statements constitute hearsay and are inadmissible unless a hearsay exception applies.

3. Noting that no Illinois court has recognized an exception to the hearsay rule for statements offered to prove *modus operandi*, the court declined to create such an exception.

4. However, the erroneous admission of hearsay in this case was clearly harmless where the improper evidence was not a significant factor in the conviction, the properly-admitted evidence was overwhelming, and the improper evidence was largely cumulative. Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

People v. Quintero, 394 Ill.App.3d 716, 915 N.E.2d 461 (3d Dist. 2009)

1. Due to the likelihood of prejudice, evidence of other crimes is generally inadmissible. However, such evidence may be admitted for purposes other than to show a defendant's propensity for criminal activity. Thus, other crimes evidence may be admitted to show *modus operandi*, intent, identity, motive, or absence of mistake.

In order to be admissible, other crimes evidence must have some threshold similarity to the charged crime. Where evidence is offered on the theory of *modus operandi*, which refers to a pattern of criminal behavior so distinctive that separate crimes are recognized as the work of the same person, a high degree of factual similarity between the crimes is required. In other words, the crimes must have distinctive features that are not common to most offenses of the same type.

2. At defendant's trial for murder, the trial judge erred by admitting, on the issue of identification, evidence of a second murder which had been committed some 20 months earlier. Because there was nothing about the earlier offense which connected defendant to the charged offense, the evidence was not probative on identification.

The court found that the evidence was admissible, if at all, only to show *modus operandi* – that the offenses were so similar as to mark them as the handiwork of a single perpetrator. The court found there were insufficient similarities between the offenses to justify admission of the evidence to show *modus operandi*; the State's theory of the crime was similar to a scene from the movie "The Godfather," and was not a distinctive method of committing crimes which could be traced to a single criminal. The court stated that the differences between the two offenses "outweigh the unremarkable similarities. . . such that there was no demonstrated pattern of criminal behavior so distinctive that the separate crimes could be recognized as the handiwork of the defendant."

3. The improper admission of other crimes evidence may be harmless if the defendant is not prejudiced or denied a fair trial. The State has the burden of persuasion, and to establish harmlessness must show beyond a reasonable doubt that the result would have been the same without the error.

Here, the erroneous admission of other crimes evidence could not be deemed harmless. The evidence of guilt was not overwhelming, and the outcome of the trial depended largely on the credibility of a witness whose believability was suspect.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Fletcher Hamill, Ottawa.)

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§19-24(b)(3)
Intent, Knowledge, Absence of Mistake

People v. Alexander, 93 Ill.2d 73, 442 N.E.2d 887 (1982) Defendant was convicted of theft for exerting unauthorized control over the complainant's automobile, in Will County, on November 11, 1979. The complainant was allowed to testify about events that occurred in Cook County on October 31, 1979, when defendant stole the automobile from her. The complainant's testimony included the fact that defendant invaded her home, stole jewelry and money, and abducted her. That evidence was properly admitted to show defendant's knowledge that his use and possession of the automobile was unauthorized and his intent to permanently deprive the complainant of the use of the automobile.

People v. Friedman, 79 Ill.2d 341, 403 N.E.2d 229 (1980) At defendant's trial for conspiracy to commit

theft by deception, the State presented a witness who testified that defendant told her he had been previously convicted of mail fraud.

The Supreme Court stated that evidence of a substantially similar transaction is admissible to show specific intent or guilty knowledge when the "underlying facts of the extra-indictment offense are established with sufficient clarity to demonstrate that they are in fact substantially similar." Here, however, there was no evidence of the underlying facts of the alleged prior conviction and no proof of its substantial similarity. Therefore, it was inadmissible. Reversed and remanded.

People v. Tiller, 94 Ill.2d 303, 447 N.E.2d 174 (1982) Defendant was charged with the armed robbery and murder of a store owner. The evidence showed that defendant and codefendant entered a cleaning establishment. The codefendant shot the proprietor and took money from the cash register. The State introduced evidence showing that, a short time before entering the store, defendant and codefendant murdered and robbed another person on the street a few blocks away. Defendant shot the victim on the street.

Evidence of the prior crime was properly admissible since it "tended to show that defendant was probably aware that the cleaners would be robbed and supported the inference that defendant and [the co-defendant] robbed the cleaners pursuant to an agreed plan." Defendant's intent was the critical issue in this case, and the other crime was admissible to prove that intent. While certain details about the prior crime were irrelevant, there was no prejudice because the details did not "introduce anything new to the jury, but merely corroborated what the jury must have already surmised about the extent of [the victim's] wound."

People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 (1983) Defendant was convicted, at a jury trial, of murder and armed violence. The evidence showed that defendant fired shots into a parking lot from a passing automobile, killing a person named Quinn. Over objection, the State was allowed to introduce evidence of a subsequent shooting incident, in which defendant shot from an automobile into another vehicle.

The evidence "convincingly established" that defendant shot the victim, and the principal issue was whether defendant had the mental state required for murder. Standing alone, the Quinn shooting "might have some ambiguity about it, [but] the two incidents, taken together, increase the certainty that the defendant deliberately acted" with the intent required for murder. The two incidents were sufficiently similar to be admitted. In both instances, defendant fired a handgun out of an automobile at night on the same street. In addition, both attacks were apparently unprovoked.

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) When evidence of a defendant's involvement in another crime is not offered to establish a common design or plan, but instead to prove the absence of an innocent frame of mind or the presence of criminal intent, a high degree of similarity between the two offenses is not necessary. Instead, "mere general areas of similarity will suffice."

In this case, evidence of defendant's commission of another crime with the same two companions as in the case on trial, where general similarities between the offenses were present, was admissible to dispel defendant's claim that he was innocently involved in the crime at trial and to show his criminal intent.

People v. Heard, 187 Ill.2d 36, 718 N.E.2d 58 (1999) In a murder case, evidence of defendant's violent acts toward the decedent before her death was admissible to show defendant's motive and intent to harm the decedent and her new boyfriend. The evidence revealed defendant's "continuing hostility and animosity" toward the couple; in addition, defendant's theft of the complainant's clothes showed that "defendant's motive for the murders was his anger over the break-up of his relationship."

People v. Illgen, 145 Ill.2d 353, 583 N.E.2d 515 (1991) Where defendant was tried for first degree murder arising out of the shooting death of his wife, evidence of prior incidents in which defendant had abused the

decedent was properly admitted to show intent and motive. Such evidence tended to negate the likelihood that the shooting was accidental and showed that defendant and the decedent had an antagonistic relationship.

The testimony was not inadmissible on the ground that the prior assaults were too remote; admissibility is not controlled solely by passage of time, and the evidence showed a pattern of abuse by defendant from the start of the marriage to within three years before the offense. In addition, within months before the shooting, defendant voiced a belief that a man could kill his wife and escape criminal responsibility.

The prior assaults were sufficiently similar to the fatal assault to be admissible. There were a "number of general similarities;" both the shooting and the prior assaults occurred with little or no provocation, defendant had once previously threatened to shoot his wife, and defendant disclaimed responsibility.

People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994) Defendant, a baseball coach, was convicted of aggravated criminal sexual assault. The State contended that on several occasions defendant blindfolded one of his 10-year-old players, tied the youth's hands behind his back, and committed sexual offenses. The defense claimed that defendant merely placed the player's arms behind his back while helping him do various neck and shoulder exercises. The court admitted evidence of other crimes on the issue of defendant's intent. Even where defendant presents an innocent construction of his conduct, crimes against other children are admissible if relevant for any proper purpose, so long as their probative value outweighs their prejudicial effect.

People v. Wells, 184 Ill.App.3d 925, 540 N.E.2d 1070 (1st Dist. 1989) At defendant's trial for delivery of cocaine on July 18, evidence of another delivery of cocaine by defendant on August 1 was relevant to establish defendant's knowledge and criminal intent in regard to the offense on trial. See also, **People v. Clark**, 173 Ill.App.3d 443, 526 N.E.2d 356 (2d Dist. 1988).

People v. Blommaert, 184 Ill.App.3d 1065, 541 N.E.2d 144 (3d Dist. 1989) At defendant's trial for the murder of her baby, the State was properly allowed to introduce testimony regarding defendant's previous abusive actions toward the baby to prove intent and lack of accident or mistake.

People v. Connolly, 186 Ill.App.3d 429, 542 N.E.2d 517 (4th Dist. 1989) At a trial for burglary, evidence showing that defendant had committed two burglaries three years earlier was not relevant to intent, knowledge or presence. "Other crimes evidence is admissible only to prove intent, knowledge, or presence if it is closely related to the crime charged in point of time, place and circumstance."

People v. Denny, 241 Ill.App.3d 345, 608 N.E.2d 1313 (4th Dist. 1993) At defendant's trial for home invasion and aggravated criminal sexual assault, evidence that defendant had, several months before the incident at issue, threatened the complainant with a knife was not admissible on the issue of intent, because defendant's intent to be in the home and to engage in sexual intercourse was not disputed.

People v. Bailey, 88 Ill.App.3d 416, 410 N.E.2d 545 (3d Dist. 1980) Defendant was convicted of aiding a fugitive for driving a man named Bannister away from an armed robbery scene, knowing that Bannister had committed the offense and intending to prevent his apprehension. Over objection, the State was allowed to introduce evidence of the activities of defendant and Bannister after leaving the scene, for the purpose of proving defendant's knowledge and intent. This evidence included an attempt to locate a certain person to assault and picking up another person for the purpose of robbing her.

Evidence of the subsequent activities was improperly admitted. The relevant "knowledge" element was defendant's knowledge that Bannister had committed the armed robbery. "Since the State had the defendant's statement that Bannister had mentioned robbing the store as soon as he returned to the defendant's

car, the subsequent criminal activities evidence was irrelevant on the knowledge element."

Although the subsequent activities may have been probative of defendant's intent to prevent Bannister's apprehension, this purpose could have been achieved without mentioning the criminal behavior. Under Illinois law, "otherwise admissible evidence must be purged of references to other crimes if it is at all possible to do so without doing violence to the probative value of the evidence."

People v. Woltz, 228 Ill.App.3d 670, 592 N.E.2d 1182 (5th Dist. 1992) Defendant was charged with aggravated criminal sexual assault for alleged committing an act of sexual penetration against V.J. At trial, the court admitted evidence that defendant had also committed a sexual assault against J.S., and instructed the jury that evidence that defendant had "raped" J.S. was admitted to show absence of mistake and "design or plan."

The evidence was not admissible to show absence of mistake. The only act which defendant claimed had been accidental was touching the complainant's breast, while the charge involved penetration of the vagina. In addition, it is improper to admit acts of sexual misconduct with other children to show intent, guilty knowledge or lack of accident or mistake, because those factors are shown by the acts themselves.

People v. Bobo, 278 Ill.App.3d 130, 662 N.E.2d 623 (5th Dist. 1996) Defendant, a high school teacher, was charged with aggravated criminal sexual abuse for allegedly fondling one of the female students in his class. To show defendant's "intent and/or motive and/or knowledge," the trial court admitted evidence that defendant had allegedly fondled other female students at other times. This evidence was improperly admitted.

The State failed to establish how such evidence showed motive, intent, or knowledge. Defendant denied that the charged incident ever occurred; he did not claim it was an accident. The other crimes evidence served only to demonstrate a propensity to sexually assault or harass female students.

Cumulative Digest Case Summaries **§19-24(b)(3)**

People v. Chapman, 2012 IL 111896 (No. 111896, 3/22/12)

1. Generally, evidence of other crimes is admissible for purposes other than to show propensity to commit crime. Thus, other crimes evidence is admissible to show motive, intent, identity, lack of mistake, and *modus operandi*, provided that the prejudicial impact of the evidence does not substantially outweigh the probative value. The trial court's ruling on the admissibility of other crimes evidence will not be disturbed absent a clear abuse of discretion.

2. 725 ILCS 5/115-20 provides that:

> [e]vidence of a prior conviction of a defendant for domestic battery, aggravated battery committed against a family or household member . . . stalking, aggravated stalking, or violation of an order of protection is admissible in a later criminal prosecution *for any of these types of offenses* when the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant. (Emphasis added).

Section 115-20 abrogates the common law rule against propensity evidence, provided that the evidence is relevant and its probative value is not substantially outweighed by the risk of undue prejudice. **People v. Dabbs**, 239 Ill. 2d 277, 940 N.E.2d 1088 (2010).

3. Defendant argued that at his trial for the first degree murder of his girlfriend, the State should not have been allowed to introduce evidence that defendant had a prior conviction for domestic battery against the decedent. Defendant argued that §115-20 does not authorize admission of the prior conviction in a first degree murder trial, because the phrase "later criminal prosecution for any of these types of offenses" authorizes other crimes evidence only in subsequent prosecutions for the five offenses specified in the

statute. Defendant argued that because first degree murder is not specifically listed, §115-20 does not authorize the use of propensity evidence in first degree murder prosecutions.

The court rejected the defendant's argument, finding that the phrase "any of these types of offenses" was intended to include prosecutions for all offenses which share the same general characteristics as the specified offenses. Because murder of a household member can be of the same "kind, class or group" as the offenses enumerated in §115-20, and the charge alleged that defendant murdered his girlfriend in the couple's residence, the charge involved the functional equivalent of domestic battery or aggravated battery committed against a family or household member. Thus, §115-20 authorizes admission of the prior conviction so long as the probative value is not outweighed by the prejudicial effect.

4. The court concluded that evidence of defendant's prior domestic battery conviction was more probative than prejudicial where the prior offense was committed against the same victim, occurred less than 18 months before the alleged murder, and was relevant to the State's theory of the case because it showed defendant's intent and inclination to harm the decedent.

Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Harding, 401 Ill.App.3d 482, 929 N.E.2d 597 (1st Dist. 2010)

1. Evidence of crimes other than the offense with which the defendant is charged may not be admitted to show general criminal propensity, but may be admitted if relevant for other purposes, including intent. Other crimes evidence should be admitted only if sufficiently relevant concerning a proper issue to avoid the risk that the jury will consider it merely as showing propensity.

One factor in determining relevancy is whether the uncharged crimes are sufficiently similar to the charged crime to be probative of a contested issue. Only "general similarity" between the charged and prior offenses is required when other crimes evidence is admitted on the issue of intent.

The prosecution's statement of its purpose for introducing other crimes evidence does not remove the need for the trial court to make an independent determination of relevance.

2. Where the defendant was charged with child abduction for attempting to lure children to his car by offering them rides, evidence of prior convictions for attempted aggravated criminal sexual assault and attempted criminal sexual assault was insufficiently similar to the charged crime to justify admission on the issue of intent. The prior crimes involved forcible attacks on adult women who were followed on foot as they left bars, and offered no insight into defendant's intentions when he offered rides to elementary school girls in broad daylight. Instead, the prior offenses merely showed a propensity to commit sexual crimes.

The court rejected the State's arguments that the crimes were sufficiently similar to be admissible because all of the victims were females who were strangers to the defendant; "[w]e are aware of no authority permitting the admission of prior crimes on the basis of such broad generalities."

Defendant's convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Johnson, 2014 IL App (2d) 121004 (No. 2-12-1004, mod. op. 1/23/15)

At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The Appellate Court agreed with defendant that the other crimes evidence was inadmissable for the asserted purposes, but found that it was properly admitted as propensity evidence.

1. Generally, evidence of other crimes is inadmissible to show propensity to commit a crime, but is admissible if relevant for any other purpose such as *modus operandi*, intent, motive, identity, or absence of mistake. Subsequent bad acts may be used as other crimes evidence.

725 ILCS 5/115-7.3(b) creates an exception to the general rule in certain sex offense prosecutions. Under §115-7.3(b), in a prosecution for one of the specified offenses the State may introduce evidence that defendant committed another of the specified offenses. Such evidence is admissible for any relevant purpose, including defendant's propensity to commit sex crimes.

Before evidence may be admitted under §115-7.3(b), the trial court must weigh the probative value of the evidence against the undue prejudice it might cause. The admissibility of the evidence rests within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion.

2. Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

3. The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

Defendant's convictions for first degree murder and aggravated criminal sexual assault were affirmed.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

People v. McGee, 2015 IL App (1st) 122000 (No. 1-12-2000, 1/23/15)

Defendant was convicted of stalking a CTA employee based on two incidents where he approached her, banged on the windows of her kiosk, and verbally threatened her. The State, over defendant's objection, was also allowed to introduce evidence of a physical altercation between defendant and the CTA employee's husband which occurred two hours after the second incident, when defendant returned to the train station. During that altercation, defendant stabbed the husband with a box cutter. The police later recovered a box cutter from defendant's backpack.

The court held that the admission of altercation between defendant and the husband was improper other crimes evidence and reversible error. The court rejected the State's argument that evidence was admissible as a continuing narrative of the charged offense and to show defendant's intent to harm the CTA employee.

1. Other-crimes evidence is admissible if it is part of a continuing narrative of the events giving rise to the charged offense or is intertwined with the offense. When facts about the uncharged criminal conduct are part of a continuing narrative of the charged criminal conduct, they do not constitute separate, distinct, and unconnected crimes.

Here, defendant's altercation with the husband was a distinct event that was not part of a continuing narrative. It occurred two hours after his last contact with the CTA employee and did not involve any contact with her. Instead, when defendant returned to the station, the husband approached him and the two began fighting. The incident was thus inadmissible as a continuing narrative.

2. The incident was also inadmissible to establish defendant's intent to harm the CTA employee since it showed that he arrived at the station with the box cutter. Even though evidence of the box cutter may

have been admissible, the State could have done this by simply showing that the box cutter was found in defendant's backpack at the station. It had no need to introduce evidence of the altercation to prove the existence of the box cutter.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

People v. Sundling, 2012 IL App (2d) 070455-B (No. 2-07-0455, 1/31/12)

1. In **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2011), the Supreme Court held that the defense has an adequate opportunity to cross-examine, and the Confrontation Clause is therefore satisfied, where the witness testifies on direct examination in sufficient detail to establish each element of the charged offenses. Here, the Confrontation Clause was satisfied where the victim testified and was subject to cross-examination, although the witness had gaps in his memory, because those gaps did not reach the point that the witness provided insufficient detail to permit cross-examination. The eight-year-old witness, who was four years old at the time of the alleged sexual abuse, testified that he remembered meeting the defendant and remembered wrestling with him, but could not remember where the defendant touched him or whether defendant said anything.

Because the witness testified and willingly responded to all questions asked on direct examination, and was available for cross-examination had defense counsel sought to question him, the fact that he had trouble remembering some aspects of the incident did not make him unavailable for cross-examination. The court distinguished **People v. Learn**, 396 Ill.App.3d 891, 919 N.E.2d 1042 (2nd Dist. 2009), in which the witness "shut down emotionally and was unable to answer questions," because in this case the witness answered all the questions he was asked and provided enough detail to permit cross-examination.

2. Generally, other crimes evidence is inadmissible to demonstrate the defendant's propensity to commit the charged crime. Evidence regarding other crimes is admissible, however, if offered to prove intent, *modus operandi*, identity, motive, absence of mistake, or some relevant fact other than propensity. Before admitting evidence of other crimes, the trial court must weigh probative value against prejudicial effect. Other crimes evidence may be excluded if the prejudicial effect substantially outweighs the probative value.

In addition, 725 ILCS 5/115-7.3(a)(1) permits the admission of some other crimes evidence in prosecutions for certain sex offenses. However, §115-7.3(a)(1) also requires a balancing of probative value and prejudicial effect.

To be admissible, other crimes evidence must have some threshold similarity to the crime charged. As factual similarities increase, the probative value of the evidence also increases. Where the evidence is not offered to show *modus operandi*, mere general areas of similarities are sufficient to support admissibility.

Defendant was charged with aggravated criminal sexual abuse against two children. The court concluded that the trial judge erred by admitting three prior convictions for sex offenses against children.

The court held that it was error to admit a 1984 Cook County conviction for indecent liberties and a 1997 Michigan conviction for attempted criminal sexual conduct with a person under the age of 13, because the only evidence consisted of certified copies and a docketing statement for the Cook County case and a copy of the charge and sentencing order in the Michigan case. Because the supporting evidence was insufficient to permit the trial court to determine that there were similarities between the prior offenses and the instant charges, the evidence should have been excluded.

Similarly, the trial court erred by admitting a 1997 Indiana conviction for child molestation. Although the State introduced a probable cause affidavit from the Indiana case, the affidavit should have been excluded for two reasons. First, the affidavit lacked sufficient indicia of reliability concerning the conduct underlying the conviction because it related to the original charges, not to a subsequent guilty plea which defendant entered after an Appellate Court in Indiana overturned the original conviction.

Second, the affidavit was inadmissible hearsay because it was an out-of-court statement offered to prove the truth of the matters asserted. The court found that the affidavit could not qualify for the business record exception to the hearsay rule; the business record exception does not apply to documents which are

prepared in anticipation of litigation, and a probable cause affidavit is clearly created for purposes of litigation.

However, the court concluded that the erroneous admission of the other crimes evidence was not plain error. The defendant did not claim that the error was so serious that it affected the fairness of the trial and challenged the integrity of the process, and the court concluded that the evidence was not closely balanced.

Defendant's convictions for aggravated criminal sexual abuse were affirmed.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Young, 2013 IL App (2d) 120167 (No. 2-12-0167, 9/24/13)

Where defendant was charged with unlawful possession of less than 15 grams of cocaine, and evidence of defendant's previous drug use and drug purchases was admitted on the issues of knowledge and intent, it was plain error to instruct the jury that it could consider the prior drug crimes in determining "defendant's knowledge and possession." Because the defendant was charged with possession of a controlled substance, allowing the previous drug offenses to be considered on the issue of possession erroneously implied that the other drug crimes could be used to show a propensity to commit drug offenses. The court stressed that the trial court should have ensured that the instructions limited the jury's use of the evidence to properly admitted purposes.

However, the court concluded that the error was harmless where the evidence was not closely balanced and there was no serious risk that the jurors convicted defendant because they did not understand the law.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

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§19-24(b)(4)
Identity; Connecting Defendant to the Crime Charged

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) Defendant was convicted of two murders at a grocery store. Defendant contended that evidence concerning a prior armed robbery was improperly admitted. The victim testified that a certain gun and camera were taken in the robbery. After the murders charged here, the gun and camera were found in defendant's possession. The gun was shown to have been used in the instant murders.

Evidence of the prior crime was properly introduced to show that the owner of the gun was not involved in the murders in this case. In addition, coupled with the fact that the gun and camera were found in defendant's possession, the evidence connected defendant to the murder weapon and explained his possession of it.

People v. Jones, 105 Ill.2d 342, 475 N.E.2d 832 (1985) Evidence of defendant's commission of a burglary two days before the murder for which he was on trial was properly admitted. A knife taken in the burglary was found at the murder scene, and other items taken in the burglary were found in defendant's possession. This evidence showed "defendant's identity and his presence at the [murder] scene." See also, People v. Diaz, 78 Ill.App.3d 277, 397 N.E.2d 148 (1st Dist. 1979) (evidence showing that a weapon used by defendant in a subsequent crime was taken during the robbery for which defendant was on trial).

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) Defendant was charged with murder and armed robbery of a parking lot attendant. The victim's body was found in a shack in the parking lot; he was handcuffed with handcuffs that had the markings "Taiwan" and "Stop" on them. Additionally, a rare 1811

coin was taken.

The State was allowed to introduce evidence that two days later, defendant and two others robbed a jewelry store. Defendant and another man went behind the counter to collect the merchandise. The police received a call and arrested the three perpetrators at the store. The 1811 coin was found on one of the perpetrators (not defendant), and two pairs of handcuffs containing the same markings as those mentioned above were found on the floor.

Defendant confessed to the jewelry store robbery. He also said that he had driven his two accomplices to the parking lot where the crimes on trial took place, but said that he remained in the car while his companions entered the shack.

Evidence of the jewelry store robbery was properly introduced because it was relevant to specifically connect the three individuals who committed it with the parking lot murder.

People v. Richardson, 123 Ill.2d 322, 528 N.E.2d 612 (1988) Following a jury trial, defendant was convicted of murder and armed robbery. The incident occurred in a food and liquor store on April 1, 1980. Two employees of the store testified that after they saw defendant walk to the liquor department, they heard a shot and the warning, "Stay down motherf——r. This is a stickup." Defendant took money out of the cash register and ran from the store. An employee who worked in the liquor department died from a gunshot wound.

The State was allowed to introduce evidence of a shooting that occurred four days later. In that incident, a man identified as defendant entered a tavern, waved a gun, announced a "stickup," jumped over the bar, and shot a bartender as he attempted to run.

Evidence of the subsequent shooting was relevant to identify defendant as the perpetrator of the crimes on trial – because there were "evidentiary links between the two crimes" – expert testimony established that the same gun was used, and eyewitnesses identified defendant as the gunman in the second shooting.

However, evidence concerning another armed robbery on May 4, 1982, was improperly admitted. A police officer testified that he received a radio call concerning a robbery in progress, along with a description of the perpetrator. He went to the scene, saw a man (identified as defendant) who matched the description, and made the arrest. Another officer testified that he obtained a photo of defendant based upon the May 4 armed robbery, and showed it, with other photos, to the witnesses to the 1980 robberies.

The 1982 armed robbery was not admissible to show how the investigation unfolded and how defendant came into custody. The State had not shown any similarity between the 1982 arrest and the 1980 murder which might render the circumstances of the former offense probative of the latter. Further, defendant's apprehension as a suspect in the 1982 armed robbery did not tend to identify him as the armed robber in 1980.

People v. Ellis, 26 Ill.2d 331, 186 N.E.2d 269 (1962) Evidence that defendant robbed the complainant a few days before the robbery on trial was properly admitted - it was relevant in regard to the complainant's ability to identify defendant. See also, **People v. Butler**, 31 Ill.App.3d 78, 334 N.E.2d 448 (2d Dist. 1975).

People v. Cole, 29 Ill.2d 501, 194 N.E.2d 269 (1963) At defendant's trial for the sale of narcotics to an undercover agent, evidence of a prior sale by defendant to the agent was admissible because it strengthened the identification of defendant as the seller in the case on trial and made the agent's account of the sale on trial (that he merely walked up to defendant and purchased heroin) more plausible by showing the relationship between the parties.

People v. Butler, 133 Ill.App.2d 299, 273 N.E.2d 37 (1st Dist. 1971) Defendant denied driving the type of car used in the crimes charged. Defendant was rebutted by a witness who stated she saw defendant in the car previously and was robbed by him at the time. It was error to mention the prior robbery since it was

unnecessary. See also, **People v. Blakely**, 8 Ill.App.3d 78, 289 N.E.2d 273 (1st Dist. 1972).

People v. Turner, 78 Ill.App.3d 82, 396 N.E.2d 1139 (1st Dist. 1979) At defendant's trial for murder and armed robbery, the trial court erred by allowing the State to introduce evidence of defendant's involvement in a subsequent kidnapping, an unrelated offense. The evidence was not relevant to identity or an attempt by defendant to conceal evidence.

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) In a prosecution for drug offenses, the State erred by introducing evidence that the arresting officers were familiar with defendant before he was arrested. By introducing evidence that an officer whose duties included "narcotics surveillance" and "gang surveillance" knew defendant before the arrest, the prosecution created the "obvious inference . . . that [defendant] had been engaged in prior illicit drug or gang activity." Because there were no issues concerning identification, there was no "relevant purpose for repeated references to a narcotics and gang surveillance officer knowing Larry Carter by name."

People v. Barbour, 106 Ill.App.3d 993, 436 N.E.2d 667 (1st Dist. 1982) At defendant's trial for rape, the State introduced evidence of two other rapes allegedly committed by defendant. The Appellate Court rejected the State's contention that the other crimes were admissible to establish defendant's identity. Since defendant admitted the sexual intercourse but claimed it was consensual, identity was not in issue.

Cumulative Digest Case Summaries **§19-24(b)(4)**

People v. Gregory, 2016 IL App (2d) 140294 (No. 2-14-0294, 3/30/16)

Other-crimes evidence is admissible to prove any material fact relevant to the case, including defendant's identity. But it is not admissible if it only shows the defendant's propensity to engage in criminal activity.

After a jury trial, defendant was convicted of threatening a public official and cyberstalking based on a number of e-mails he sent to various public officials with the Village of Oswego and the Oswego police department. These emails contained angry and profanity-laden complaints about perceived official misconduct along with thinly veiled threats against the officials and their families.

At trial, the State also introduced 10 letters defendant sent to the Oswego police department after he was arrested in this case. These letters contained large amounts of profanity and other derogatory language and generally complained that the charges against him were baseless. They also referred to other crimes and bad acts by defendant, including acts of domestic violence, traffic offenses, accusations of being a drug dealer, and a poor employment history.

The court held that such evidence was not admissible. Although portions of the letters were relevant to the issue of identity as they provided circumstantial evidence that defendant sent the emails in question, they also contained a large amount of other-crimes evidence that the State "does not even argue was relevant." Moreover, the evidence of unrelated offenses was so voluminous and inflammatory that there was a great risk the jury would find defendant guilty because of his propensity to commit crimes.

The court reversed defendant's convictions and remanded for a new trial.

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

People v. Gumila, 2012 IL App (2d) 110761 (No. 2-11-0761, 12/6/12)

The common-law rule is that evidence of crimes, wrongs, or acts by the defendant, aside from the crime for which he is being tried, is inadmissible if the prior conduct is relevant solely to establish defendant's propensity to commit an offense such as the one charged. Evidence of other crimes may be admitted for a host of purposes other than to show propensity, such as to prove intent, knowledge, and

absence of mistake or accident. Other-crime evidence that is relevant for a proper purpose is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Whether to admit other-crime evidence lies within the sound discretion of the trial court.

Evidence of Cookies and Favorites found on the hard drive of defendant's computer was admissible in his prosecution for possession of child pornography to prove that defendant knowingly and voluntarily possessed the pornography. Defendant's defense was that he did not seek out the images of child pornography found on his computer, but that those images had appeared by happenstance on his computer screen as he browsed for adult pornography. The Cookies and Favorites proved that defendant revisited sites with names and descriptions suggestive of child pornography. They tended to show that his accessing of illicit images was knowing and voluntary rather than inadvertent. Although defendant did not argue that the probative value of this evidence was outweighed by its prejudicial effect, it is manifest that the relevance of the Cookies and Favorites far surpassed any potential for unfair prejudice.

People v. Martin, 408 Ill.App.3d 44, 945 N.E.2d 1239 (1st Dist. 2011)

Other crimes evidence is inadmissible to show a defendant's propensity to commit crime, but may be admitted for other relevant purposes, including to establish the identity of the perpetrator of a crime. To establish identification, there must be some similarity between the crimes which makes it more likely that the perpetrator of the uncharged offense also committed the charged crime.

The trial court properly admitted evidence that three weeks before the charged offense, defendant shot a different man with the same weapon used in the charged offenses. Although the crimes had little else in common (the charged offenses involved an attempted robbery and the uncharged offense an argument between two groups of men outside a restaurant), the use of the same weapon within a short period of time made it more likely that the perpetrator of the first crime also committed the second.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010)

1. Evidence is relevant when it renders a matter of consequence more or less probable or tends to prove a fact in controversy.

There was no error in the admission of evidence of pornography found on defendant's computer depicting violence against women, bondage, sadism, and rape, where a significant portion depicted vaginal or anal penetration by a finger or foreign object. This evidence tended to prove defendant's identity as the perpetrator of the sexual assaults, as the perpetrator emulated the acts and scenarios depicted in the pornography, showed a particular interest in that type of activity, and said it gave him pleasure. It was irrelevant that there was no evidence that defendant viewed the pornography contemporaneously to the sexual assaults.

2. An issue regarding the admissibility of evidence is preserved for review only is there is an adequate offer of proof. A formal offer of proof is the traditional method of making an offer of proof. It consists of eliciting the testimony of the witness sought to be introduced outside the presence of the jury. An alternative method is an informal offer of proof made by counsel informing the court with particularity: (1) what the testimony will be; (2) by whom it will be presented; and (3) its purpose. An informal offer of proof is insufficient if it merely summarizes the testimony in a conclusory manner or offers unsupported speculation regarding what the testimony will be.

Any error in the exclusion of testimony of an expert was waived where counsel made no formal offer of proof after the court deemed counsel's informal offer insufficient to inform the court of the nature of the evidence sought to be introduced.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Quintero, 394 Ill.App.3d 716, 915 N.E.2d 461 (3d Dist. 2009)

1. Due to the likelihood of prejudice, evidence of other crimes is generally inadmissible. However,

such evidence may be admitted for purposes other than to show a defendant's propensity for criminal activity. Thus, other crimes evidence may be admitted to show *modus operandi*, intent, identity, motive, or absence of mistake.

In order to be admissible, other crimes evidence must have some threshold similarity to the charged crime. Where evidence is offered on the theory of *modus operandi*, which refers to a pattern of criminal behavior so distinctive that separate crimes are recognized as the work of the same person, a high degree of factual similarity between the crimes is required. In other words, the crimes must have distinctive features that are not common to most offenses of the same type.

2. At defendant's trial for murder, the trial judge erred by admitting, on the issue of identification, evidence of a second murder which had been committed some 20 months earlier. Because there was nothing about the earlier offense which connected defendant to the charged offense, the evidence was not probative on identification.

The court found that the evidence was admissible, if at all, only to show *modus operandi* – that the offenses were so similar as to mark them as the handiwork of a single perpetrator. The court found there were insufficient similarities between the offenses to justify admission of the evidence to show *modus operandi*; the State's theory of the crime was similar to a scene from the movie "The Godfather," and was not a distinctive method of committing crimes which could be traced to a single criminal. The court stated that the differences between the two offenses "outweigh the unremarkable similarities. . . such that there was no demonstrated pattern of criminal behavior so distinctive that the separate crimes could be recognized as the handiwork of the defendant."

3. The improper admission of other crimes evidence may be harmless if the defendant is not prejudiced or denied a fair trial. The State has the burden of persuasion, and to establish harmlessness must show beyond a reasonable doubt that the result would have been the same without the error.

Here, the erroneous admission of other crimes evidence could not be deemed harmless. The evidence of guilt was not overwhelming, and the outcome of the trial depended largely on the credibility of a witness whose believability was suspect.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Fletcher Hamill, Ottawa.)

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§19-24(b)(5)
Motive

People v. Heard, 187 Ill.2d 36, 718 N.E.2d 58 (1999) In a murder case, evidence of defendant's violent acts toward the decedent before her death was admissible to show defendant's motive and intent to harm the decedent and her new boyfriend. The evidence revealed defendant's "continuing hostility and animosity" toward the couple; in addition, defendant's theft of the complainant's clothes showed that "defendant's motive for the murders was his anger over the break-up of his relationship."

People v. Devin, 93 Ill.2d 326, 444 N.E.2d 102 (1982) At defendant's trial for the murder of a jail inmate, another inmate testified that defendant had committed the murder. He also testified that defendant said he planned to inform authorities that the victim was murdered by two other inmates, who were notorious in the county. As a reward for this information, defendant believed that the State would reduce his sentence on armed robbery charges pending against him.

The testimony was proper to show defendant's motive. While reference to "pending charges" is

preferable to the specific reference to armed robbery, the reference to armed robbery was not so prejudicial as to require reversal.

People v. Witherspoon, 27 Ill.2d 483, 190 N.E.2d 281 (1963) At defendant's trial for the murder of a police officer, the State properly introduced warrants showing that defendant was charged with crimes in Michigan. This evidence was relevant to show a motive for killing the officer, who was attempting to arrest him. See also, **People v. Olson**, 96 Ill.App.3d 193, 420 N.E.2d 1161 (2d Dist. 1981). Compare, **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987) (mere existence of arrest warrant is not relevant unless defendant knew of it).

People v. Hendricks, 137 Ill.2d 31, 560 N.E.2d 611 (1990) Following a jury trial, defendant was convicted of the murders of his wife and children. The evidence against defendant was entirely circumstantial.

The State was allowed to introduce evidence of defendant's alleged increasingly aggressive sexual involvement with women he employed to model back braces he sold. The purpose of this evidence was to establish a motive for the murders (i.e., his increasing sexual conduct allegedly created a conflict with his religious beliefs, divorce was not a viable option, and defendant would have been ostracized from his church had his sexual conduct become known).

The Supreme Court discussed the testimony of the models in the order in which they came in contact with defendant, as compared to the order in which their testimony was presented by the State, and concluded that no escalation of sexual aggression was shown. "Evidence may not be manipulated to support a theory. When the models' testimony is considered in its proper order, it presents no more than a haphazard series of encounters, isolated instances of what could be labeled by some as sexual attraction or clumsy attempts with adolescent urges. . . . [W]e are not prepared to find that the prejudicial impact of the testimony is outweighed by its probative value."

Evidence of uncharged misconduct "undermines the presumption of innocence," the State failed to prove any escalation of sexual aggression by defendant, the record "suggests that the prosecution's purpose in presenting the testimony about the models was aimed at inflaming the jury's passions against the defendant," and the prosecutor utilized this evidence in closing argument "to portray the defendant as having an evil disposition and to indicate that the models were victims" rather than for the limited purpose of motive. Thus, the models' testimony should have been stricken.

Without the models' testimony or proof of any escalating sexual aggression, the testimony about defendant's religious beliefs and background was irrelevant and highly prejudicial.

People v. Lucas, 151 Ill.2d 461, 603 N.E.2d 460 (1992) In a murder prosecution in which the State claimed that members of a prison gang had killed a prison superintendent in revenge for the death of a fellow gang member, the trial judge erred by admitting evidence of threats and evidence that a correctional officer had been attacked by other members of the gang. There was no evidence that defendant was involved in either the threats or the attack, and the threats were too remote in time to justify admission where they ceased about two weeks before the superintendent's death. However, the errors were found to be harmless. See also, **People v. Smith**, 141 Ill.2d 40, 565 N.E.2d 900 (1990) (plain error to admit evidence of defendant's gang membership to show motive; alleged motive on the part of gang member to retaliate against the decedent was never linked to defendant, who was not shown to be a gang member or to be acting on behalf of a gang).

People v. Illgen, 145 Ill.2d 353, 583 N.E.2d 515 (1991) Where defendant was tried for first degree murder arising out of the shooting death of his wife, evidence of prior incidents in which defendant had abused the decedent was properly admitted to show intent and motive. Such evidence tended to negate the likelihood that the shooting was accidental and showed that defendant and the decedent had an antagonistic relationship.

The testimony was not inadmissible on the ground that the prior assaults were too remote;

admissibility is not controlled solely by passage of time, and the evidence showed a pattern of abuse by defendant from the start of the marriage to within three years before the offense.

People v. Hansen, 313 Ill.App.3d 491, 729 N.E.2d 934 (1st Dist. 2000) Evidence of defendant's pedophilia was not admissible at a murder trial to prove motive and intent, because most of the evidence pertained to incidents that occurred in the 20-year-period after the decedents' murders. "The defendant could hardly be said to have been motivated to kill the victims in 1955 to prevent the discovery of acts of pedophilia that he committed in the 1960s and 1970s." Furthermore, although an officer testified that defendant admitted picking up and have sex with young male hitchhikers "from the 1950s through 1974," such "vague testimony" was insufficient to establish a motive for killings in 1955.

People v. Knight, 309 Ill.App.3d 224, 722 N.E.2d 331 (2d Dist. 1999) Any connection between domestic battery and a threat made six weeks later was "too tenuous to establish motive." Although the threat indicated that defendant did not want the complainant to sleep with his friends and the offense in question concerned an alleged beating and rape after the complainant mentioned oral sex with a former boyfriend, "there was no evidence that the former boyfriend was one of defendant's friends." The mere fact that defendant may have had a "jealous nature was not specific enough to establish motive" for the offense in question.

People v. Mac Rae, 47 Ill.App.3d 302, 361 N.E.2d 685 (1st Dist. 1977) At defendant's trial for attempt murder, the State properly introduced evidence that defendant had previously forged his wife's name on certain documents. This evidence showed a motive for the attempt murder since the victim had threatened to expose the situation to defendant's wife.

People v. Reimnitz, 72 Ill.App.3d 761, 391 N.E.2d 380 (1st Dist. 1979) At defendant's trial for the murder of his wife, the State's use of evidence that defendant engaged in a homosexual act 7½ months after the murder was improper. The purpose of this evidence (to show a homosexual preference and a motive for the murder) was "far outweighed by its inflammatory effect upon the jury."

People v. Richmond, 201 Ill.App.3d 130, 559 N.E.2d 302 (4th Dist. 1990) At defendant's trial for first degree murder for the beating death of a woman in November 1988, the State was allowed to introduce evidence that the victim had obtained an order of protection against defendant in May 1988, and that defendant had beaten the victim in the summer of 1988 while he was trying to get money from her. This evidence was properly admitted to show motive and defendant's dislike for the victim.

People v. Maounis, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) In a prosecution for theft, evidence of drug addiction is relevant to motive if the State establishes that defendant was addicted to a drug, used it in such quantities that maintenance of his habit was expensive, and lacked sufficient income from legal sources to sustain his habit. The State's evidence failed to satisfy this foundation when it did not show that defendant was addicted (but only that he had used alcohol and crack cocaine), or that he lacked sufficient funds to pay for any drug use (it was undisputed that on the day of the offense defendant had at least $1,047).

Cumulative Digest Case Summaries **§19-24(b)(5)**

People v. Lovejoy, 235 Ill.2d 97, 919 N.E.2d 843 (2009)

1. The decision to qualify an expert rests in the sound discretion of the trial, whose decision will be reversed only where it was so arbitrary, fanciful or unreasonable that no reasonable person would have taken the same view. A person is permitted to testify as an expert where his or her experience and qualifications afford knowledge that is not common to the average layperson and which will assist the jury in evaluating

the evidence and reaching a conclusion. An expert is not required to meet any precise requirements regarding experience, education, scientific study, or training.

The trial court did not abuse its discretion by accepting a forensic scientist as an expert in the field of fabric pattern impressions. Although the witness had participated in only two weeks of training in this area some ten years prior to trial and had not been qualified as an expert in this field before the instant trial, he had extensive experience comparing other, analogous types of impressions and possessed knowledge of the process by which impressions are left on objects. Furthermore, such knowledge was not common to the average layperson and was helpful to the jury.

2. Other crimes evidence is admissible if relevant for any purpose other than to show the defendant's propensity to commit crimes. Other crimes evidence can be admissible to show motive to commit the crime charged, so long as the probative value of the evidence is not outweighed by the prejudicial effect.

Where the defendant was charged with the first degree murder of his stepdaughter, the trial court properly admitted, as evidence of motive, the stepdaughter's allegations that the defendant had sexually assaulted her. The court noted that the trial court weighed the probative value and prejudicial effect of such evidence, limited the testimony that was admitted, and gave a limiting instruction.

Admission of such evidence did not violate the right to confrontation under **Crawford v. Washington**, which holds that testimonial hearsay is inadmissible unless the witness is unavailable for trial and there was a prior opportunity for cross-examination. The statements fell outside the **Crawford** rule because they were admitted not to prove the truth of the matter asserted – that the defendant had assaulted the decedent – but to prove a possible motive for the murder.

3. Nor was **Crawford** violated where a medical examiner was allowed to testify concerning the results of toxicology testing done by an outside laboratory, where the examiner did not know the identity of the person who performed the testing or whether the equipment was in proper operating condition.

Under Illinois law, experts may both consider medical and psychological records commonly relied upon by members of their profession and testify about the contents of those records at trial. Because the medical examiner testified that it was common practice to rely on toxicological reports prepared by an outside laboratory when drawing conclusions related to the cause of death, and testified that he was trained to interpret such test results, those results were admissible. The court also noted that the statements were not admitted for the truth of the matter asserted – that the decedent had specified levels of substances in her blood – but to explain the expert's opinion concerning cause of death.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

People v. Jackson, 399 Ill.App.3d 314, 926 N.E.2d 786 (1st Dist. 2010)

1. Evidence of uncharged crimes may not be admitted to establish propensity to commit criminal acts. Such evidence may be admissible, however, for legitimate purposes such as proof of motive. Unprosecuted drug use is admissible to establish a motive for the charged offense only if the prosecution demonstrates that the defendant was addicted to narcotics and lacked the financial resources to sustain his habit.

Here, the State failed to present sufficient preliminary evidence to introduce defendant's drug use as a motive to commit murder. There was no evidence that defendant's drug use was habitual rather than recreational, and the only evidence concerning defendant's financial condition was that he had just cashed an unemployment check.

Because the State failed to provide a sufficient foundation, defendant's drug use was improperly admitted to establish a motive for murder. The court also noted that at trial, the prosecutor argued that defendant's drug use should be considered only as reflecting his poor character, and not as evidence of motive.

2. Although defendant objected on hearsay grounds to the admission of his statements about his drug use, at trial he did not argue that he was prejudiced because the statements revealed the commission of other crimes. The court concluded, however, that the plain error rule applied because the evidence was closely

balanced and because the error was of sufficient magnitude to deny a fair trial.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Kari Firebaugh, Chicago.)

People v. Weston, 2011 IL App (1st) 092432 (No. 1-09-2432, 8/12/11)

Evidence that the defendant was a member of a gang or was involved in gang-related activity is admissible to provide a motive for an otherwise inexplicable act. Because street gangs are regarded with considerable disfavor, and there may be strong prejudice against street gangs, particularly in metropolitan areas, trial courts should exercise great care in exercising discretion to admit gang-related testimony. Gang evidence is only admissible when the prosecution can demonstrate a clear connection between the crimes and the gang evidence.

Two sisters were shot in the course of a search of their apartment by defendant and his brother, who were looking for weapons belonging to defendant's cousin. No evidence connected the weapons to any gang, only to defendant's cousin. There was testimony that in the course of the search defendant expressed concern about his cousin going to prison for life if the police recovered the weapons. The familial relationship between defendant and his cousin provided the clear explanation for defendant's actions, not his gang membership. The gang evidence was unnecessary to provide a motive for an otherwise inexplicable act, and should have been excluded. As the gang evidence was irrelevant, its probative value could never outweigh its prejudicial impact.

The court affirmed defendant's convictions after finding the error harmless.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

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§19-24(b)(6)
Time and Place Proximity

People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 (1980) At defendant's trial for murder, the State introduced evidence showing that shortly after the offense, defendant committed an arson a few blocks away. The State contended that the evidence was admissible to establish defendant's presence near the murder scene at the critical time.

"Generally, time and place proximity, without more, is an insufficient basis for permitting other crimes evidence." The State could have established the time and place proximity without mentioning the arson — "the same witness could testify to time and place proximity without mentioning a distinct crime" and without hindering the prosecution in any "legitimate way."

People v. Fuerback, 66 Ill.App.2d 452, 214 N.E.2d 330 (1st Dist. 1966) At defendant's trial for an armed robbery that occurred at 10:50 a.m., defendant and his mother testified that he was in her apartment at the time of the crime and did not leave until noon. In rebuttal, the State called a witness who testified that defendant robbed her grocery store at 11:40 a.m.

Evidence of the other robbery was improper. The rebuttal witness could have testified that defendant was in her store without mentioning the robbery.

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§19-24(b)(7)
Consciousness of Guilt

People v. Baptist, 76 Ill.2d 19, 389 N.E.2d 1200 (1979) Evidence showing that defendant attempted to kill

an eyewitness is admissible to show a consciousness of guilt.

People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 (1980) At defendant's trial for murder, evidence showing that a short time after the murder defendant committed an arson a few blocks away was not relevant to show a consciousness of guilt (in that defendant attempted to destroy evidence of the murder (a gun) by way of the arson). There was no evidence to support the theory – the State's own witness testified that the arson was intended to punish the person who resided at the scene of the arson and not to conceal evidence.

People v. Gambony, 402 Ill. 74, 83 N.E.2d 321 (1948) A defendant's attempt to bribe or intimidate a witness is admissible to show consciousness of guilt. See also, **People v. Goodman**, 55 Ill.App.3d 294, 371 N.E.2d 168 (4th Dist. 1977).

People v. Knight, 309 Ill.App.3d 224, 722 N.E.2d 331 (2d Dist. 1999) The trial court erred by admitting a statement defendant allegedly made six weeks after a domestic battery, in which he said that he would break the complainant's legs if she slept with another of his friends. The statement did not show "consciousness of guilt," because defendant's threat did not relate to the offense being prosecuted or to any other criminal acts which defendant had committed in the past.

Cumulative Digest Case Summaries **§19-24(b)(7)**

People v. Abernathy, 402 Ill.App.3d 736, 931 N.E.2d 345, 2010 WL 2673073 (4th Dist. 2010)

1. Evidence of other crimes is admissible if relevant for any reason other than to show propensity to commit crime. Such evidence may be admitted to show motive, intent, identity, absence of mistake, or *modus operandi*. Evidence of other crimes may also be admitted as part of a continuing narrative of events and to show consciousness of guilt.

Even where other crimes evidence is introduced for a permissible reason, it should be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. Although the trial court did not explicitly state that it balanced prejudice and probative value before deciding to admit the other crimes evidence, it was clear that the judge performed the required balancing test because it limited the State to introducing the evidence most closely related to the charged offense.

2. Other crimes evidence may be admitted if it is part of a "continuing narrative" of the events giving rise to the offense. Thus, evidence may be admitted if it is intertwined with the offense charged, even if an uncharged offense is disclosed.

Where defendant was charged with an aggravated domestic battery in his residence, evidence that a fire was set at the same location a few minutes later was part of a continuing narrative of the circumstances surrounding the battery, rather than evidence of a separate and distinct crime. The court stressed that the battery and fire occurred at the same location, the fire destroyed some of the evidence of the battery, the fire was started within minutes after the battery, and two of the officers assigned to investigate the battery began their inquiry at the scene of the fire. Under these circumstances, the continuing narrative theory applied.

3. Under the "consciousness of guilt" theory for admitting other crimes evidence, evidence that the defendant attempted to conceal his involvement in a crime, either by destroying evidence or attempting to eliminate a witness, is admissible even if an uncharged crime is disclosed. Here, the trial court properly admitted evidence that defendant committed arson in order to conceal evidence that he had committed domestic aggravated battery.

4. The better practice is for the trial court to instruct the jury of the limited purpose of other crimes evidence both at the time the evidence is admitted and at the close of the case. However, reversal was not required where the trial court gave only an instruction at the close of trial.

(Defendant was represented by Assistant Defender Stuart Shiffman, Springfield.)

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§19-24(b)(8)
Circumstances of Arrest; Narrative of Crime

People v. Lewis, 165 Ill.2d 305, 651 N.E.2d 72 (1995) Evidence of other crimes is not admissible merely to show how an investigation unfolded; it must also be relevant to specifically connect defendant with the crimes for which he is being tried. See also, **People v. Overton**, 281 Ill.App.3d 209, 666 N.E.2d 753 (1st Dist. 1996) (other crime evidence inadmissible because it did not connect defendant to the offense); **People v. Brown**, 275 Ill.App.3d 1105, 657 N.E.2d 642 (1st Dist. 1995).

People v. Jackson, 232 Ill.2d 246, 903 N.E.2d 388 (2009) Evidence which suggests that defendant has engaged in prior criminal acts should not be admitted unless it is relevant. The steps taken to investigate a crime may be relevant when necessary and important to a full explanation of the State's case, including where such evidence is necessary to explain a lapse of time between an eyewitness's identification of the assailant and an arrest. Even where such evidence discloses other crimes, it is presented for a purpose other than to show defendant's propensity to commit crime. However, evidence of the steps taken in an investigation is not relevant unless it specifically connects defendant with the crimes for which he is being tried.

The State did not introduce other crimes evidence where a State's witness testified that he entered two unknown DNA samples from the crime scene into a State DNA database, and received information that the samples matched defendant's DNA. First, the evidence was relevant to explain the five-year-lapse between the initial recovery of blood samples and defendant's arrest. In the absence of some explanation of the delay, the jury would have been left to speculate about the authorities' ability to identify defendant nearly six years after the offense.

Second, the fact that a defendant's DNA is included in a DNA database does not necessarily suggest that he is a prior offender. The witness did not claim that the database was composed of samples from convicted offenders; in fact, the database contained samples from several additional sources.

People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 (1980) At defendant's trial for murder, testimony showing that a short time after the murder defendant committed an arson a few blocks away was not admissible as part of a continuing narrative of the crime. The arson was "a distinct crime undertaken for different reasons at a different place at a separate time."

People v. Richardson, 123 Ill.2d 322, 528 N.E.2d 612 (1988) At defendant's trial for a murder and armed robbery that occurred on April 1, 1980, a police officer testified about another crime and his arrest of defendant on May 4, 1982. The officer testified that on May 4, 1982, he received a radio call of a robbery in progress and a description of the perpetrator. He went to the scene, saw defendant (who matched the description), and made an arrest. A photo of defendant was taken and shown to the witnesses of the 1980 crimes.

Testimony pertaining to the 1982 crime was error because it was not admissible to show the course of the investigation or circumstances of defendant's arrest. There was no 'threshold similarity' between the 1982 arrest and the 1980 murder rendering the circumstances of one probative of the other. Further, defendant's apprehension on the 1982 armed robbery did not tend to identify him as the 1980 armed robber. Finally, the other crimes evidence "was not relevant as part of a 'continuing narrative' of the original crime, since it clearly related to a separate, distinct, and disconnected crime."

People v. Nieves, 193 Ill.2d 513, 739 N.E.2d 1277 (2000) The trial judge erred by permitting the prosecutor

to read into the record portions of a pretrial statement indicating that when defendant surrendered to New York law enforcement authorities, he discussed crimes that had occurred in both Chicago and New York. Defendant's New York crimes were not relevant to explain the manner in which he was placed in custody by Chicago police.

Other crimes evidence may be admissible to show "steps in the investigation of the crime and events leading to it," only if the evidence specifically connects defendant with the crimes for which he is being tried. Defendant's criminal activities in New York had no relevance to whether he committed a murder in Illinois, and should not have been admitted.

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) Defendant was charged with the murder and armed robbery of a parking lot attendant. The victim's body was found in a shack in the parking lot and was handcuffed with handcuffs which had the markings "Taiwan" and "Stop." In addition, a rare 1811 coin was taken.

The State was allowed to introduce evidence that two days later defendant and two others robbed a jewelry store. The 1811 coin was found on one of the perpetrators (not defendant), and two pairs of handcuffs containing the same markings as mentioned above were found on the floor

Defendant confessed to the jewelry store robbery. He also said that he had driven his two accomplices to the parking lot (where the crimes on trial took place), but remained in the car while they entered the shack.

Evidence of the jewelry store robbery was relevant to show the circumstances of defendant's arrest. "It would be difficult to explain or describe circumstances surrounding the defendant's arrest without introducing a substantial amount of the evidence concerning the jewelry robbery."

People v. Spiezio, 105 Ill.App.3d 769, 434 N.E.2d 837 (2d Dist. 1982) At defendants' trial for burglary a police officer was allowed to testify, over objection, that defendants were arrested for another, unrelated crime (theft of a motor vehicle). Evidence of the collateral crime was improper because it was not relevant to any issue in the trial — there was no showing that the stolen vehicle was used in the burglary or that its proceeds were found in the vehicle.

People v. Pittman, 126 Ill.App.3d 586, 467 N.E.2d 918 (1st Dist. 1984) The officer who arrested defendant testified that he ran defendant's name through the National Crime Information Center and learned that defendant was wanted on five charges, including armed robbery. This testimony was not properly admissible as part of a continuous narrative of the arrest. Testimony that defendant was wanted for armed robbery may have been admissible, but testimony about five other charges was "gratuitous and overbroad."

People v. Johnson, 104 Ill.App.3d 572, 432 N.E.2d 1232 (1st Dist. 1982) The State was properly allowed to admit evidence of other crimes to establish the reason for defendant's arrest. See also, **People v. Davis**, 93 Ill.App.3d 187, 416 N.E.2d 1179 (1st Dist. 1981).

People v. Hill, 278 Ill.App.3d 871, 663 N.E.2d 503 (5th Dist. 1996) Defendant was convicted, in a jury trial, of unlawful delivery of a controlled substance. At trial, the State introduced a tape-recording made by a police informant who was "wired for sound" as he walked in an area frequented by defendant. As the informant walked, he talked to the monitoring officers, to defendant's brothers, and "[o]n occasion . . . to himself."

On appeal, defendant argued that the trial court erred by admitting recorded conversations between the informant and the monitoring officers, defendant's brothers, and a third person. Defendant also argued that the informant's "gratuitous commentary to himself" should have been excluded. In response, the State argued that the challenged evidence was part of the res geste of the criminal offense.

There is no res geste exception to the hearsay rule. Various courts and legal scholars have "criticized

the notion of res geste for its imprecision;" the exception fails "to contribute to an understanding of the problem and inhibit[s] any meaningful analysis." In addition, continued use of the res geste exception "will continue to obscure rational analysis and . . . demean established evidentiary rules designed to promote the admission of reliable evidence." See also, **People v. Giles**, 261 Ill.App.3d 833, 635 N.E.2d 969 (4th Dist. 1994) (repudiating the res geste exception).

Cumulative Digest Case Summaries **§19-24(b)(8)**

People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 (2010)

Other-crime evidence may be admitted as part of a continuing narrative if it is part of the circumstances attending the entire transaction and does not involve separate, distinct, and disconnected crimes. The continuing-narrative exception is inapplicable even where offenses occur in close proximity to each other, if the offenses are distinct and undertaken for different reasons at a different place and at a separate time.

Defendant's statement admitting to the commission of other burglaries and describing the technique he used was not admissible under the continuing-narrative exception to the use of other-crime evidence. But this evidence was properly admitted for a purpose other than to prove defendant's propensity to commit burglary. Defendant's statement supported his theory of defense that he committed the burglary but left before any murder, by showing that he had developed a technique to avoid detection and contact with residents of the homes he burglarized.

(Defendant was represented by Assistant Defender Allen Andrews, Supreme Court Unit.)

People v. Abernathy, 402 Ill.App.3d 736, 931 N.E.2d 345, 2010 WL 2673073 (4th Dist. 2010)

1. Evidence of other crimes is admissible if relevant for any reason other than to show propensity to commit crime. Such evidence may be admitted to show motive, intent, identity, absence of mistake, or *modus operandi*. Evidence of other crimes may also be admitted as part of a continuing narrative of events and to show consciousness of guilt.

Even where other crimes evidence is introduced for a permissible reason, it should be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. Although the trial court did not explicitly state that it balanced prejudice and probative value before deciding to admit the other crimes evidence, it was clear that the judge performed the required balancing test because it limited the State to introducing the evidence most closely related to the charged offense.

2. Other crimes evidence may be admitted if it is part of a "continuing narrative" of the events giving rise to the offense. Thus, evidence may be admitted if it is intertwined with the offense charged, even if an uncharged offense is disclosed.

Where defendant was charged with an aggravated domestic battery in his residence, evidence that a fire was set at the same location a few minutes later was part of a continuing narrative of the circumstances surrounding the battery, rather than evidence of a separate and distinct crime. The court stressed that the battery and fire occurred at the same location, the fire destroyed some of the evidence of the battery, the fire was started within minutes after the battery, and two of the officers assigned to investigate the battery began their inquiry at the scene of the fire. Under these circumstances, the continuing narrative theory applied.

3. Under the "consciousness of guilt" theory for admitting other crimes evidence, evidence that the defendant attempted to conceal his involvement in a crime, either by destroying evidence or attempting to eliminate a witness, is admissible even if an uncharged crime is disclosed. Here, the trial court properly admitted evidence that defendant committed arson in order to conceal evidence that he had committed domestic aggravated battery.

4. The better practice is for the trial court to instruct the jury of the limited purpose of other crimes evidence both at the time the evidence is admitted and at the close of the case. However, reversal was not

required where the trial court gave only an instruction at the close of trial.

(Defendant was represented by Assistant Defender Stuart Shiffman, Springfield.)

People v. Hale, 2012 IL App (1st) 103537 (No. 1-10-3537, 9/18/12)

1. Evidence of other crimes is admissible if it is part of the continuing narrative of the event giving rise to the offense, is intertwined with the event charged, or explains an aspect of the crime charged that would otherwise be implausible. Evidence of other crimes may be admissible where it sets the stage for the charged offense and explains circumstances about the charged offense that might appear improbable. Other-crime evidence may not be admitted under the continuing-narrative exception, even when the crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at a different place at a separate time. A trial court's ruling on the admissibility of other-crime evidence is reviewed for an abuse of discretion.

2. Defendant made a statement to the police admitting his involvement in two shootings. According to the statement, defendant and his companions were driving around armed with guns with the intent to retaliate against a person named Mario. When they exited their car to look for Mario, they were fired upon, and fired back in self-defense. Defendant believed that someone had been shot during that exchange of gunfire, and in fact an innocent bystander was struck by bullets. Several minutes later and several blocks from the first shooting, defendant and his companions fired at a car they believed to contain Mario.

The trial court denied the State's motion *in limine* to admit evidence of the first shooting at defendant's trial for the second shooting under the continuing-narrative exception, finding it more prejudicial than probative. The court noted that it would reconsider its ruling if the defense attacked the integrity of defendant's statement in any way.

3. The Appellate Court held that the trial court abused its discretion in excluding the other-crime evidence. The evidence of the first shooting was offered to prove the ongoing motive of defendant and his companions to locate and shoot Mario. Even though they did not initiate the gunfire in the earlier shooting, they had exited their car with the intent to locate and shoot Mario. Therefore, the two shootings were not separate and distinct. The evidence of the earlier shooting proved defendant's intent and a common criminal design supporting defendant's accountability for the later shooting.

The other-crime evidence was also admissible to corroborate defendant's confession as the police were not aware of his participation in the first shooting at the time he made the admission. Although the trial court had ruled that it would allow admission of the other-crime evidence if the defendant challenged the statement, the State was entitled to establish the accuracy and reliability of the statement in its case- in-chief. The trier of fact must determine the weight and reliability of the statement regardless of whether defendant challenges its reliability.

The Appellate Court further held that any danger that the case would become a mini-trial on the first shooting would be avoided by holding the State to its proffer that it only intended to offer the testimony of the victim of the earlier shooting that she heard gunshots and was shot at a particular location, but was unable to identify the perpetrator. The probative value of this evidence substantially outweighed its risk of unfair prejudice.

Cunningham, J., dissented. The abuse-of-discretion standard is the most deferential standard of review. An abuse of discretion occurs only when no reasonable person would agree with the trial court's decision. The majority simply substituted its judgment for that of the trial court. There was no legitimate reason to admit the evidence of the earlier shooting. Taking defendant's statement at face value, the exclusion of evidence of the first shooting created no risk of jury confusion. The only commonality between the two shootings was the search for Mario. The trial court's judgment that the probative value of the evidence of the first shooting was outweighed by its prejudicial effect of creating the impression of a crime spree was not an abuse of discretion.

People v. Jacobs, 2016 IL App (1st) 133881 (No. 1-13-3881, 9/29/16)

Defendant was charged with possession of a stolen motor vehicle. At trial, the son of the owners of the vehicle testified that jewelry was taken from his parents' house at the same time the vehicle was stolen. The son testified that when he went to a pawn shop to see if he could find his mother's jewelry, he saw defendant drive the stolen car away from the store.

Before trial, the trial court granted a motion in limine excluding the evidence that jewelry had been taken from the home. However, the trial court overruled defense objections when the prosecutor mentioned the jewelry in opening argument. The trial judge then stated that the evidence was admissible to show that the car had been stolen.

The Appellate Court held that the evidence was improperly admitted as other crimes evidence, and was especially prejudicial where the trial court refused to allow defendant to present evidence that another person had been arrested for burglarizing the house.

1. Other-crimes evidence is inadmissible if used merely to show defendant's propensity to commit crimes. Evidence of other crimes may be admitted for other purposes, such as proving motive, opportunity, intent, preparation, planning, knowledge, identity, or absence of mistake or accident. In addition, under the continuing-narrative exception, defendant's other bad acts are admissible when those acts are part of a continuing narrative which concerns the circumstances of the entire transaction and are not separate and distinct crimes. The continuing-narrative exception will not apply, even where crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at different places and times.

The Appellate Court concluded that even if the continuing narrative exception applied, the probative value of the evidence that jewelry was stolen was substantially outweighed by the prejudicial effect. The court noted that the State could have established that the son saw defendant driving the stolen vehicle without stating that the car had been at a pawn shop and creating an inference that defendant had been involved with the burglary and theft of the jewelry. The evidence was prejudicial to defendant not only because it created an unmistakable inference that he was involved in a crime for which he was not on trial, but also because it directly impacted his defense that he had been allowed to drive the car by an acquaintance and did not know it had been stolen.

2. In addition, defendant was improperly precluded from introducing evidence that another person had been arrested for the burglary of the home. First, the trial judge erred by finding that the excluded evidence was hearsay where it referred only to the fact of an arrest, and not to any out-of-court assertion. Second, the concerns underlying the admission of other-crimes evidence are not present where the uncharged crime was committed by someone other than the defendant. Exclusion of the evidence here was critical because the fact that another person was arrested for the burglary could have dispelled much of the prejudice created by the admission of evidence of the burglary and theft of the jewelry.

3. The evidentiary errors were not harmless. The improperly admitted evidence created an inference that defendant had committed a burglary of the home and therefore likely stole the car which he was charged with possessing, directly contradicting his claim that he did not know the vehicle was stolen. In addition, the trial court failed to give a limiting instruction concerning the other crimes evidence. Finally, the risk of prejudice was increased because defendant was impeached with a prior conviction for residential burglary, the offense to which he was improperly linked by the other crimes evidence.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

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§19-24(b)(9)
Details of Other Crimes

People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 (1983) "The trial court should carefully limit evidence of another crime to evidence that is relevant to the issue on which the other crime is admitted." In this case,

conducting a "mini-trial" as to the other crime was unnecessary but not prejudicial. See also, **People v. Tiller**, 94 Ill.2d 303, 447 N.E.2d 174 (1982); **People v. McKibbins**, 96 Ill.2d 176, 449 N.E.2d 821 (1983).

People v. Richardson, 123 Ill.2d 322, 528 N.E.2d 612 (1988) When evidence of another crime is admitted on the question of identity, "it should be confined to such details as show the opportunity for identification and not the details of the crime."

People v. Robinson, 167 Ill.2d 53, 656 N.E.2d 1090 (1995) Although the trial court is required to carefully limit evidence of other crimes to that which is relevant to the purpose for which it was admitted, defense counsel failed to object to the extraneous testimony thereby waiving the issue. Furthermore, the plain error doctrine did not apply because the State presented "persuasive identification testimony."

People v. Brown, 319 Ill.App.3d 89, 745 N.E.2d 173 (4th Dist. 2001) Even where other crimes evidence is admissible, the trial court must carefully limit the evidence to that which is relevant to the case. Cumulative evidence of uncharged conduct may prejudice defendant by "overpersuading" the jury that defendant is a bad person, and may lead to a conviction for reasons other than defendant's guilt of the crime charged.

In this case, the admission of excessive other crimes evidence "switched the focus of the trial to the prior incident." Four of the State's 12 witnesses testified only about the prior incident, and two other witnesses testified about the prior incident in addition to the charged crime. Thus, half of the State's witnesses testified about the uncharged conduct. In addition, much of the testimony about the prior crime was repetitive.

People v. Kimbrough, 138 Ill.App.3d 481, 485 N.E.2d 1292 (1st Dist. 1985) The evidence concerning the other crime was detailed only to the extent necessary to show defendant's modus operandi and that the other crime was actually committed. See also, **People v. Maness**, 184 Ill.App.3d 149, 539 N.E.2d 1368 (4th Dist. 1989).

People v. Butler, 31 Ill.App.3d 78, 334 N.E.2d 448 (2d Dist. 1975) The complaining witness testified not only concerning the armed robbery incident on trial, but also about his identification of defendant during another robbery 12 days earlier. He also gave a detailed description of the prior incident.

When evidence of a prior offense is admissible on the question of identity, it should be "confined to such details as show the opportunity for identification and not the details of the crime." Here, the emphasis on the prior offense was prejudicial and was not cured by a limiting instruction or by evidence that defendant had been acquitted of the prior offense.

People v. Thigpen, 306 Ill.App.3d 29, 713 N.E.2d 633 (1st Dist. 1999) Although the other crimes evidence had some relevance to the existence of a common plan or scheme to eliminate competition in selling drugs and might have been relevant to the issue of identity, the probative value of the evidence was outweighed by its prejudicial effect where the trial judge admitted extensive details about the uncharged crime. Many of the details "could only serve to portray the defendant as callous and remorseless." In addition, the other crimes were more serious than the offenses for which defendant was being tried.

The trial judge was criticized for admitting a photograph of the corpses of the victims of the other crimes and for sending the photograph to the jury room during deliberations. The photograph was "the clearest example" of the way in which unnecessary detail concerning the other crimes was admitted. Trial judges often refuse to allow juries to see photographs of the victim of the crime charged. "To send back a photo of the victims of another crime laid at the defendant's feet is extraordinary."

People v. Olson, 96 Ill.App.3d 193, 420 N.E.2d 1161 (2d Dist. 1981) At defendant's trial for the attempt murder of a police officer, attempting to elude a police officer, and other offenses, the State was allowed to introduce evidence that defendant was on parole and work release at the time and that he had committed a burglary earlier the same day.

Introduction of "some evidence" of other offenses to show motive (i.e., why defendant responded the way he did upon the encounter with a police officer) was proper. However, too much evidence of other crimes was presented. Five witnesses described the burglary incident and two witnesses testified that defendant was on parole and work release.

People v. Diaz, 78 Ill.App.3d 277, 397 N.E.2d 148 (1st Dist. 1979) At defendant's trial for a tavern armed robbery the State was allowed, over objection, to introduce lengthy testimony concerning defendant's commission of a subsequent offense (the attempt armed robbery of a pregnant woman).

That testimony was improper. The principal relevance of the subsequent offense was in showing the circumstances of defendant's arrest and that the weapon used was stolen during the tavern robbery. If the subsequent-offense testimony had been limited to the armed robbery attempt, the prejudice would not have clearly outweighed its probative value. However, the alleged victim was permitted to give lengthy testimony about that offense, including detailed testimony of threats against her and her unborn child and therefore the prejudicial effect outweighed the probative value of that evidence.

People v. Nunley, 271 Ill.App.3d 427, 648 N.E.2d 1015 (1st Dist. 1995) Defendant was charged with the murder and armed robbery of a drug dealer. At trial, the State introduced testimony that defendant had confessed to the offenses some 16 months after they happened, while he was in custody on unrelated charges of stabbing his mother and killing her dog.

Two police officers and an assistant State's Attorney testified that defendant said he attacked his mother and the dog because they were possessed by Satan. Defendant said he felt better because he had confessed, and one of the officers asked whether defendant had committed any other crimes. Defendant then confessed to the murder and armed robbery at issue here.

The trial judge erred by admitting evidence of the unrelated crimes against defendant's mother and her dog. Although some evidence of these offenses would have been admissible to show that defendant's confession was voluntary, the "detail and repetitive manner" with which the evidence was presented "greatly exceeded" its relevance to voluntariness and "subjected defendant to a mini-trial over conduct far more grotesque than that for which he was on trial."

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§19-24(c)
Evidence Suggesting Other Criminal Conduct

People v. Berlin, 75 Ill.2d 266, 388 N.E.2d 412 (1979) It was not improper for the State, on cross-examination of defendant, to inquire into his true name (Sanders) and ask if that name was different from the name (Berlin) defendant gave to the police and under which he was charged. Such questioning was relevant "to clarify defendant's true identity."

Such questioning was did not necessarily imply prior criminal activity. The jury "could easily have supposed any number of innocent reasons for defendant's having adopted a different name [and] it is merely speculation to conclude that a jury will automatically associate an assumed name with a criminal background." See also, **People v. Canacho**, 71 Ill.App.3d 943, 389 N.E.2d 1213 (1st Dist. 1979).

People v. Stover, 89 Ill.2d 189, 432 N.E.2d 262 (1982) The prosecutor erred by eliciting testimony from a police officer that he was previously acquainted with defendant, since it suggested prior criminality on the

part of defendant. This testimony was not probative of the issue of defendant's knowledge that the officer was in fact a police officer, an essential element of the offense of resisting, because the police officer testified at length as to his official attire on the day of the arrest. Thus, defendant's knowledge of the officer's status was already shown.

People v. Bryant, 113 Ill.2d 497, 499 N.E.2d 413 (1986) A police officer who arrived at the scene of the crime testified that he saw defendant running away and called him by name. The record did not show how the officer knew defendant, and defendant contended that the testimony improperly suggested a prior criminal record. "Although the prosecutor did not argue that the officer's prior acquaintance with the defendant was evidence of a criminal history, that implication may be conveyed by testimony of this nature, and for that reason it is better avoided, unless somehow relevant. It did not appear to have any relevance here."

People v. Lampkin, 98 Ill.2d 418, 457 N.E.2d 50 (1983) It was error for a police officer to testify that defendant had been arrested previously. "[I]t is fundamental that mere proof of an individual's arrest cannot be used against that individual in a criminal case since the evidence of an arrest would prejudice the defendant in the eyes of the jurors. . . . Where such irrelevant material is contained in an otherwise competent statement or confession, it must be deleted before the statement or confession is read to the jury, unless to do so would seriously impair its evidentiary value."

People v. Owens, 102 Ill.2d 145, 464 N.E.2d 252 (1984) During his examination of a police officer, the prosecutor on three occasions referred to "the matter at hand." Defendant alleged that these references improperly suggested that other criminal charges were pending against him. The comments were not flagrant and "any error was harmless beyond a reasonable doubt."

People v. Wilson, 116 Ill.2d 29, 506 N.E.2d 571 (1987) At defendant's trial for the murder of two police officers, the State introduced evidence of an outstanding warrant for defendant at the time of the incident. This evidence was not relevant to show that defendant had a motive for the killings (i.e., to avoid arrest), where the State did not produce any evidence to show that defendant knew that the arrest warrant existed or that the officers were arresting him pursuant to the warrant. "The existence of the arrest warrant does not by itself show that the defendant was trying to avoid apprehension. Unless the defendant knew about the warrant or knew that the officers were attempting to arrest him, the existence of the warrant does not establish anything about the defendant's state of mind."

People v. Nelson, 193 Ill.2d 216, 737 N.E.2d 632 (2000) Where identification is a material issue, testimony relating to the use of mug shots may be introduced, however, such evidence must not be used to suggest that defendant has committed unrelated criminal acts. Here, the jury was informed that mug shots had been taken on three different occasions that were far enough apart for defendant's appearance to change, and that the most recent photograph was taken near the time of the offenses that were being prosecuted. This was "precisely" the type of evidence that should have been excluded, and the error was not harmless.

People v. Arman, 131 Ill.2d 115, 545 N.E.2d 658 (1989) It was improper for a police officer to mention that a photo of defendant which was identified by a witness came from the police department identification file:

> "There is no dispute that when identification is a material issue at trial, testimony relating the use of mug shots in an investigation may be introduced to show how a defendant was initially linked to the commission of an offense. . . . The admissibility of such evidence is not without limits, however. Mug shot evidence tending to inform the jury of a defendant's commission of other, unrelated criminal acts should not be admitted. . . .

> In this case, [the officer's] reference to the photograph's having come from the Chicago Police Department's identification files informed the jury that the person depicted had been previously arrested, and the testimony was, therefore, evidence of other crimes that should not have been admitted."

People v. Burns, 171 Ill.App.3d 178, 524 N.E.2d 1164 (1st Dist. 1988) It was improper for the State to bring out that a police officer had known defendant by the name of "Jabbo." Although it is proper to question a defendant regarding his use of assumed names "if proof of the assumed names is shown to be material," it is "highly prejudicial and improper" to adduce such evidence "solely to raise the inference that the defendant had used assumed names in order to evade apprehension by law enforcement officers for prior criminal offenses."

People v. Brown, 146 Ill.App.3d 101, 496 N.E.2d 1020 (1st Dist. 1986) It is well-settled that evidence of an alias can be admitted only if it is relevant to some fact at issue. Here, the State introduced defendant's driver's license, issued under his alias, and argued that it was relevant to prove that defendant had blue eyes (a witness had testified that the robber had blue eyes). Use of the license for that purpose was "unjustifiable" – defendant was present in court for the jury to see and the "State could have asked that the record reflect their observations regarding defendant's eye color."

People v. Strawder, 25 Ill.App.3d 961, 325 N.E.2d 10 (2d Dist. 1975) A police officer testified that he had known defendant for about five years and had known him by four different names. Defendant did not object to the testimony, but moved for a mistrial at the conclusion of the State's case. "It would appear . . . that the State did not attempt to bring in evidence of his criminal record, but merely that the police officer had known defendant for five years under different names. This information might lead one to suspect the prior behavior of the individual, but it does not allege or even raise questions about a prior criminal record."

People v. Pumphrey, 51 Ill.App.3d 94, 366 N.E.2d 433 (1st Dist. 1977) Cross-examination of defendant and his wife concerning their prior use of assumed names was improper, because their use of assumed names had nothing to do with the issues in the case.

People v. Harbold, 124 Ill.App.3d 363, 464 N.E.2d 734 (1st Dist. 1984) The prosecutor erred in eliciting testimony from a police officer that certain guns (unrelated to the charge on trial) had been found in defendant's home.

People v. Barnes, 182 Ill.App.3d 75, 537 N.E.2d 949 (1st Dist. 1989) At defendant's trial for unlawful use of firearms by a felon, three police officers testified that defendant was in possession of $4,000 when he was arrested. This fact was also mentioned by the prosecutor in opening statement and in closing argument.

Although the amount of cash recovered from defendant was not relevant for proving the crime charged, "the jury was bombarded with this irrelevant evidence, which took on the appearance of being a central issue to be considered by the jury in its assessment of defendant's credibility and which could only have suggested to the jury that the cash was obtained through some illegal means." This error, along with others, required a new trial.

People v. Watson, 55 Ill.App.3d 564, 371 N.E.2d 113 (1st Dist. 1977) At defendant's armed robbery trial it was reversible error for prosecutor to tell the jury, in his opening statement, that defendant had been arrested on an unrelated armed robbery charge, and to elicit testimony from a police officer that defendant had been arrested for another "incident."

People v. Goodwin, 69 Ill.App.3d 347, 387 N.E.2d 433 (3d Dist. 1979) On direct examination at defendant's

jury trial, a police officer was asked what defendant did upon his arrest, and the officer responded, "he asked me to let him go, he did not want to go back to prison again." The remark was an improper reference to prior criminal conduct.

People v. Wade, 51 Ill.App.3d 721, 366 N.E.2d 528 (5th Dist. 1977) It was reversible error for the prosecutor to bring out, during examination of two police officers, that they had been investigating defendant for involvement in five other crimes.

People v. Spiezio, 105 Ill.App.3d 769, 434 N.E.2d 837 (2d Dist. 1982) References by police officer to the fact that defendant had been under police surveillance was improper.

People v. Hawkins, 4 Ill.App.3d 471, 281 N.E.2d 72 (3d Dist. 1972) Use of "mug shots" of defendant was reversible error since they suggested prior crimes.

People v. Davis, 173 Ill.App.3d 300, 527 N.E.2d 552 (1st Dist. 1988) A mugshot book from which a witness identified defendant's photo was properly sent to the jury. The book was necessary to show the jury the photo from which defendant was first identified and to show the accuracy and fairness of the identification. Also, the jury requested the book. The possible prejudice was outweighed by the probative value. See also, **People v. Neely**, 184 Ill.App.3d 1097, 540 N.E.2d 931 (3d Dist. 1989).

People v. Wheeler, 71 Ill.App.3d 91, 388 N.E.2d 1284 (2d Dist. 1979) Discussion of the use of mug shots. See also, **People v. Cruz**, 71 Ill.App.3d 76, 388 N.E.2d 1330 (2d Dist. 1979).
People v. Hudson, 7 Ill.App.3d 333, 287 N.E.2d 297 (3d Dist. 1972) Testimony that defendant's fingerprints were on file at the Bureau of Identification was error since it implied prior crimes.

People v. Mendiola, 171 Ill.App.3d 936, 526 N.E.2d 172 (1st Dist. 1988) At his trial for murder, defendant presented an alibi defense. Before defendant's sister (Victoria) took the stand, the prosecutor indicated that he would cross-examine her about alibi testimony she had given for defendant in another case. The defense objected on the ground that such testimony would inform the jury that defendant had an arrest record. The prosecutor argued that the testimony would prove the bias of Victoria. The trial judge ruled that Victoria could be cross-examined about previously testifying on defendant's behalf, but the prosecutor could not refer to her prior testimony as alibi testimony.

During the cross-examination of Victoria about her prior testimony, the prosecutor brought out, over objection, that she was not an eyewitness in that case and was not there to be a character witness.

The fact Victoria had previously testified for defendant "does not necessarily" establish a bias or a motive to fabricate on defendant's behalf. "The probative value of such testimony is greatly outweighed by the prejudicial effect of suggestion to the jury that defendant was previously charged with some criminal offense." Also, the "prosecutor completely ignored the trial court's admonishment . . . not to inform the jury that Victoria Mendiola had testified for defendant as an alibi witness."

People v. Taylor, 244 Ill.App.3d 806, 612 N.E.2d 943 (4th Dist. 1993) In a jury trial, defendant was convicted of public indecency. In opening argument, the trial judge sustained defense objections to the prosecutor's statement that the investigating officer suspected defendant once he heard the description of the offense. However, the trial court overruled objections to remarks that the description gave the officer "a better idea as to who the defendant was."

At trial, the officer testified that when he showed a photo lineup to the eyewitness, he covered the bottom part of the pictures to conceal the fact that he was using booking photographs.

The jury was improperly informed that defendant had been previously arrested. It was completely unnecessary for the officer to disclose that he was using booking photographs, as he could have merely said

that he obtained the photographs from the police station.

People v. McCorkle, 239 Ill.App.3d 1014, 607 N.E.2d 296 (3d Dist. 1993) Defendant was charged with the aggravated criminal sexual abuse of his daughter's 16-year-old babysitter. Defendant's former wife testified that defendant often went to the restaurant where the complainant worked. The State's Attorney then elicited that the ex-wife began dating defendant when she was 16 and defendant was 36. In closing argument, the prosecutor rhetorically asked about defendant's pursuing "jail bait" and commented that he had done so before when he dated his ex-wife.

Plain error occurred both in the elicitation of the evidence and in the prosecutor's argument. The evidence was used solely to imply a propensity to commit sexual crimes with young women, and thus violated the rule against admission of "other crimes" evidence. Because the evidence was close, the conviction was reversed and the cause remanded for a new trial.

People v. Mason, 274 Ill.App.3d 715, 653 N.E.2d 1371 (1st Dist. 1995) In a prosecution for murder of a gang member, the State erred by introducing evidence that defendant was a "regent" in the Gangster Disciples. According to the testimony, a "regent" is a gang member responsible for selling drugs, protecting drug territories and hiding weapons. Although the witnesses did not claim that defendant had committed any specific crimes, testimony that he had responsibility for conducting the gang's criminal activity was analogous to "other crimes" evidence and had "the same tendency to inflame the juror's [sic] passions."

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) In a prosecution for drug offenses, the State erred by introducing evidence that the arresting officers were familiar with defendant before he was arrested. By introducing evidence that an officer whose duties included "narcotics surveillance" and "gang surveillance" knew defendant before the arrest, the prosecution created the "obvious inference . . . that [defendant] had been engaged in prior illicit drug or gang activity." Because there were no issues concerning identification, there was no "relevant purpose for repeated references to a narcotics and gang surveillance officer knowing Larry Carter by name."

People v. Agee, 307 Ill.App.3d 902, 719 N.E.2d 251 (1st Dist. 1999) Evidence that the arresting officer was assigned to "a special operations unit concentrating on narcotics and gang weapons activity" and was familiar with the area in which the arrest occurred because it was a "high narcotic activity area" was irrelevant to defendant's alleged commission of unlawful use of a weapon, and implied to the jury that defendant had engaged in uncharged narcotics offenses. Under Illinois law other crimes evidence offered to provide a narrative of events leading to an arrest is admissible only if there "is some relevant purpose to the evidence, connecting defendant to the offense" for which he is being tried.

Cumulative Digest Case Summaries **§19-24(c)**

People v. Jacobs, 2016 IL App (1st) 133881 (No. 1-13-3881, 9/29/16)

Defendant was charged with possession of a stolen motor vehicle. At trial, the son of the owners of the vehicle testified that jewelry was taken from his parents' house at the same time the vehicle was stolen. The son testified that when he went to a pawn shop to see if he could find his mother's jewelry, he saw defendant drive the stolen car away from the store.

Before trial, the trial court granted a motion in limine excluding the evidence that jewelry had been taken from the home. However, the trial court overruled defense objections when the prosecutor mentioned the jewelry in opening argument. The trial judge then stated that the evidence was admissible to show that the car had been stolen.

The Appellate Court held that the evidence was improperly admitted as other crimes evidence, and

was especially prejudicial where the trial court refused to allow defendant to present evidence that another person had been arrested for burglarizing the house.

1. Other-crimes evidence is inadmissible if used merely to show defendant's propensity to commit crimes. Evidence of other crimes may be admitted for other purposes, such as proving motive, opportunity, intent, preparation, planning, knowledge, identity, or absence of mistake or accident. In addition, under the continuing-narrative exception, defendant's other bad acts are admissible when those acts are part of a continuing narrative which concerns the circumstances of the entire transaction and are not separate and distinct crimes. The continuing-narrative exception will not apply, even where crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at different places and times.

The Appellate Court concluded that even if the continuing narrative exception applied, the probative value of the evidence that jewelry was stolen was substantially outweighed by the prejudicial effect. The court noted that the State could have established that the son saw defendant driving the stolen vehicle without stating that the car had been at a pawn shop and creating an inference that defendant had been involved with the burglary and theft of the jewelry. The evidence was prejudicial to defendant not only because it created an unmistakable inference that he was involved in a crime for which he was not on trial, but also because it directly impacted his defense that he had been allowed to drive the car by an acquaintance and did not know it had been stolen.

2. In addition, defendant was improperly precluded from introducing evidence that another person had been arrested for the burglary of the home. First, the trial judge erred by finding that the excluded evidence was hearsay where it referred only to the fact of an arrest, and not to any out-of-court assertion. Second, the concerns underlying the admission of other-crimes evidence are not present where the uncharged crime was committed by someone other than the defendant. Exclusion of the evidence here was critical because the fact that another person was arrested for the burglary could have dispelled much of the prejudice created by the admission of evidence of the burglary and theft of the jewelry.

3. The evidentiary errors were not harmless. The improperly admitted evidence created an inference that defendant had committed a burglary of the home and therefore likely stole the car which he was charged with possessing, directly contradicting his claim that he did not know the vehicle was stolen. In addition, the trial court failed to give a limiting instruction concerning the other crimes evidence. Finally, the risk of prejudice was increased because defendant was impeached with a prior conviction for residential burglary, the offense to which he was improperly linked by the other crimes evidence.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Maldonado, 402 Ill.App.3d 411, 930 N.E.2d 1104 (1st Dist. 2010)

1. A witness's isolated reference to having obtained the defendant's DNA profile or fingerprint record from a database does not constitute reversible error if the reference is either: (1) necessary to explain the course of the investigation, or (2) ambiguous concerning whether the evidence resulted from prior criminal activity. A reference is "isolated" if there is neither direct evidence nor argument at trial concerning the defendant's prior criminal record.

2. The court declined to reverse the conviction where a State fingerprint examiner testified that she obtained defendant's fingerprint card from the "Bureau of Identification in Joliet." First, the remark was isolated because there was no evidence or argument concerning defendant's prior offenses. Second, the remark was ambiguous because jurors are aware that fingerprints may result from incidents other than an arrest, including obtaining government employment. Finally, defense counsel did not request a limiting instruction, but instead chose to clarify on cross-examination that the fingerprint card may have been created as a result of defendant's arrest on this charge, rather than from some unrelated arrest. Under these circumstances, there was no likelihood of prejudice.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Roman, 2013 IL App (1st) 110882 (No. 1-11-0882, 11/6/13)

1. Evidence that defendant was a gang member or involved in gang-related activities is admissible to show a common purpose or design, or to provide a motive for an otherwise inexplicable act. However, due to the possibility of strong prejudice against street gangs, gang-related evidence is admissible only if there is adequate proof that membership or activity in the gang is related to the crime charged. The trial court must take great care in admitting gang-related testimony.

2. The trial court erred at a trial for first degree murder by admitting testimony from eyewitnesses that defendant was a member of the Latin Kings. The Court rejected the State's argument that such evidence strengthened eyewitness identifications of the defendant as one of the perpetrators. Although two of the eyewitnesses stated that they knew defendant was a gang member, none of the eyewitnesses based their identifications of defendant on that fact. Instead, the witnesses stated that they recognized the perpetrators of the offense because they had seen them in the neighborhood for several years. Thus, gang membership was not related to the identifications.

Similarly, the trial court improperly admitted photographs of defendant's tattoos and testimony from a police officer that the tattoos showed that defendant was a member of the Latin Kings. Although the judge also admitted this evidence to corroborate eyewitnesses' identifications, none of the witnesses mentioned the tattoos or suggested that the tattoos were an aid in identifying defendant as one of the perpetrators. Thus, the evidence was not relevant to the identifications and had the effect of inflaming the jury.

Furthermore, the gang evidence was not admissible to support the State's theory that the murder was gang related. The State argued that the perpetrators killed the victim to avenge a perceived slight to the Latin Kings a few weeks earlier, when workers at the factory where the offense occurred gave shelter to a man who was being beaten. The court stressed that the State failed to present any evidence to show that the instant offense was intended as retaliation for a perceived slight. In addition, there was no evidence that either this incident or the prior one was gang related, as there was no testimony that the perpetrators flashed gang signs, yelled gang slogans, or otherwise indicated that they were members of a gang.

3. The court concluded that the error was not harmless beyond a reasonable doubt, noting that there was no physical evidence tying defendant to the offense and that the admission of gang evidence always carries a strong risk of prejudice.

4. Finally, the trial judge erred by denying defense counsel's request to remove a "Gang Unit" sticker from the State's courtroom cart, especially since the State had no objection. Given the strong risk of prejudice that is inherent whenever a jury is exposed to gang-related evidence, the presence of the sticker on the cart had the potential to negatively impact the defense. The court stated, "Whether the case involves gang affiliation or not, fairness dictates that the cart be identified with a sticker that does not transmit a potentially prejudicial message, especially when an innocuous alternative is so easy."

(Defendant was represented by Assistant Defendant, Kristen Mueller, Chicago.)

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§19-25
Photographs

People v. Donaldson, 24 Ill.2d 315, 181 N.E.2d 131 (1962) In order for a photograph to be admitted into evidence it must be identified by a witness as a portrayal of certain facts and verified by such witness, based upon personal knowledge, as a correct representation of those facts at the time relevant to the issues. The witness need not be the photographer and need not know the time or circumstances of the taking of the photograph, but he must have personal knowledge of the scene or object in question and must testify that it is correctly portrayed by the photograph. See also, **People v. Cheek**, 93 Ill.2d 82, 442 N.E.2d 877 (1982); **People v. Holman**, 103 Ill.2d 133, 469 N.E.2d 119 (1984) (a police officer was properly allowed to testify

that the man depicted in a certain photo was defendant where the officer had an opportunity to observe defendant before trial and in the courtroom). But see, **People v. Beverly**, 63 Ill.App.3d 186, 379 N.E.2d 753 (1st Dist. 1978) (photo purportedly depicting defendant was improperly admitted into evidence because no one testified that the person depicted was defendant).

People v. King, 29 Ill.2d 150, 193 N.E.2d 790 (1963) Before a photograph is admitted into evidence, the opposing party is entitled to cross-examine the witness who provided the foundation for it.

People v. Henenberg, 55 Ill.2d 5, 302 N.E.2d 27 (1973) Photographs of the deceased were not necessarily cumulative merely because there was oral testimony concerning the same issues. See also, **People v. Gerecke**, 45 Ill.App.3d 510, 359 N.E.2d 1178 (4th Dist. 1977).

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) The trial court did not abuse its discretion in allowing the State to introduce color photos of the murder victim at the crime scene and at the morgue:

> "If photographs are relevant to prove facts at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probativeness is outweighed. . . . Among the valid reasons for admitting photographs of a decedent is to prove the nature and extent of injuries and the force needed to inflict them; the position, condition, and location of the body; the manner and cause of death; to corroborate a defendant's confession; and to aid in understanding the testimony of a pathologist or other witness. And while such photographs may be somewhat cumulative of the testimony of a witness, such as a police officer who described the condition and location of the body, they may also aid jurors in understanding this testimony."

See also, **People v. Heard**, 187 Ill.2d 36, 718 N.E.2d 58 (1999); **People v. Redd**, 135 Ill.2d 252, 553 N.E.2d 316 (1990); **People v. Kitchen**, 159 Ill.2d 1, 636 N.E.2d 433 (1994); **People v. Newbury**, 53 Ill.2d 228, 290 N.E.2d 592 (1972).

People v. Fierer, 124 Ill.2d 176, 529 N.E.2d 972 (1988) Photos of the murder victim, taken in the autopsy room, were properly admitted at trial where the photos were taken after the body was cleaned of blood and before any autopsy procedure had begun, the photos did not show any autopsy incisions and permitted a clear view of the victim's wounds, and, though the cause of death was not disputed, issues of self-defense and defendant's mental state were vigorously contested. See also, **People v. Heard**, 187 Ill.2d 36, 718 N.E.2d 58 (1999) (autopsy photos were properly admitted where the prosecution used them to question the medical examiner, the examiner used the photographs to explain her findings of the victims' injuries and causes of death, and the photos were relevant to the manner of the victims' deaths and the State's theory that defendant had acted out of revenge); **People v. Lindgren**, 79 Ill.2d 129, 402 N.E.2d 238 (1980) (photos of the deceased at the crime scene were properly admitted because they were probative of the cause of death and amount of force used and tended to corroborate the testimony of the pathologist and other witnesses); **People v. Henenberg**, 55 Ill.2d 5, 302 N.E.2d 27 (1973) (photos of the decomposed body of the deceased were properly admitted where the photos showed the condition of the body as it was found and corroborated testimony as to the cause of death and the identity of the victim); **People v. Foster**, 76 Ill.2d 365, 392 N.E.2d 6 (1979) (color photos of decedent's decaying and dismembered body were properly admitted because they were probative of the time and manner of the homicidal death and the circumstances of concealment of the death); **People v. Walcher**, 42 Ill.2d 159, 246 N.E.2d 256 (1969) (photos of the deceased were properly admitted at a bench trial because they were helpful in showing the location of the bullet entrance wounds, illustrated the testimony of the pathologist, and were used on cross-examination of defendant to impugn his version of the shooting); **People v. Kubat**, 94 Ill.2d 437, 447 N.E.2d 247 (1983) (enlarged color photos of

the murder victim were properly admitted because they were relevant to show the nature, extent, and location of the wounds). But see, **People v. Garlick**, 46 Ill.App.3d 216, 360 N.E.2d 1121 (5th Dist. 1977) (the State's use of a gruesome color photograph of the deceased's massive head wound was "needlessly prejudicial"; in view of defendant's admission of the offense and his defense of insanity, the photograph was not probative of any material issue and "could serve no purpose other than to inflame and prejudice the jury in the grossest manner").

People v. Lefler, 38 Ill.2d 216, 230 N.E.2d 827 (1967) Photographs showing autopic incisions, and those which are made gruesome by autopsy procedure, are not admissible.

People v. Holt, 7 Ill.App.3d 646, 288 N.E.2d 245 (3d Dist. 1972) There is no distinction, for admissibility, between color photos and black and white photos.

People v. Hebel, 174 Ill.App.3d 1, 527 N.E.2d 1367 (5th Dist. 1988) Photographs may be used as substantive evidence and not merely to corroborate, illustrate, or impeach oral testimony.

People v. Rolon, 71 Ill.App.3d 746, 390 N.E.2d 107 (1st Dist. 1979) Generally, photos of the crime scene should be excluded when they would confuse or mislead the jury. When the conditions in a photo differ from the conditions that existed at the time of the incident, the photo is inadmissible unless the changes can be explained so that the jury will not be confused or misled. See also, **People v. Williams**, 71 Ill.App.3d 547, 390 N.E.2d 32 (1st Dist. 1979) (photo of crime scene was properly excluded because it was taken two years after the incident, at a different time of day, and there was no showing that the conditions depicted were the same as at the time of the incident.

People v. Hawthorne, 60 Ill.App.3d 776, 377 N.E.2d 335 (2d Dist. 1978) A mug shot of defendant was properly admitted into evidence where its purpose was to show how he was first identified by a witness, and not for the purpose of showing an arrest for another offense.

People v. Smith, 321 Ill.App.3d 669, 749 N.E.2d 986 (1st Dist. 2001) 1. A videotape containing both sound and video components is admissible where the proponent satisfies the foundation requirements for both a motion picture and a sound recording. A sufficient foundation to admit a motion picture occurs where a witness with personal knowledge of the filmed object testifies that the film is an accurate portrayal of what it purports to show. A sufficient foundation to admit a sound recording occurs where a party to the conversation testifies to the accuracy of the recording and there is no claim that changes or deletions have occurred. Where no party to the conversation testifies concerning the accuracy of the recording, a sufficient foundation is established by evidence of the: (1) capability of the device for recording, (2) competency of the operator, (3) proper operation of the device, (4) preservation of the recording with no changes, additions or deletions, and (5) identification of the persons whose speech is recorded.

2. The State laid a sufficient foundation to introduce a motion picture - a detective testified that he was familiar with defendant and the principal, who were depicted in the tape, from seeing them in the neighborhood. However, there was no foundation to admit the audio portion of the videotape; no party to the conversation testified, and there was no evidence concerning the device's capability to record or proper operation, the competency of the operator, or that the recording had been preserved without changes.

People v. Taylor, 2011 IL 110067 (No. 110067, 10/6/11)

1. Photographs and videotapes may be introduced as substantive evidence if a proper foundation is

laid. Such evidence is frequently admitted under the "silent witness" theory, which provides that no witness need testify concerning the accuracy of an image depicted in the photograph or videotape so long as the accuracy of the process that produced the evidence is established by an adequate foundation.

As a matter of first impression, the court found that the Appellate Court appropriately considered several factors in determining whether there had been a proper foundation for the admission of a VHS tape under the "silent witness" theory, including: (1) the device's capability for recording and general reliability; (2) the competency of the operator; (3) the proper operation of the device; (4) a chain of custody showing the manner in which the recording was preserved; (5) an identification of the persons, locale or objects depicted; and (6) an explanation of any copying or duplication process. The court stressed, however, that no list of factors is exclusive, and each case must be evaluated under all of the circumstances. The dispositive issue in determining whether a proper foundation was established is whether the process that produced the recording was shown to be accurate and reliable.

2. Here, the Appellate Court erred by finding that the State failed to establish a sufficient foundation to admit a VHS tape which had been made from the hard drive of a surveillance camera. The court found that although the system might not have worked perfectly, the mere fact that a recording existed showed that it did work to some extent. The fact that portions of the recording were incomplete did not bar its evidentiary use so long as the defects were not so substantial as to render the entire recording untrustworthy.

Because the officer who set up the surveillance camera testified that he determined that it was working properly, and the videotape made from the surveillance video allowed the defendant to be identified, there was sufficient evidence to show that the system was working properly.

3. The court rejected the Appellate Court's finding that the VHS tape was inadmissible because the State failed to give an explanation of the process by which the data from the hard drive of the surveillance system was copied to the VHS cartridge. The court noted that a police report stated that the officer "made a copy of the video surveillance on the hard drive, specifically the segment where [defendant] was in [the complainant's office], onto a VHS tape." Where a court is addressing preliminary questions, including the admissibility of evidence, it need not follow the usual rules of evidence and may consider hearsay or other evidence which would be inadmissible if offered to a jury. Thus, the Appellate Court erred by refusing to consider the report on the ground that it was not "evidence."

The court also concluded that the report provided a sufficient explanation of the copying process to establish that the process was reliable. The court did not indicate whether the police report had been admitted at trial or was merely contained in the common law record.

4. For similar reasons, the court found that the Appellate Court erred by finding that the State failed to show a sufficient chain of custody to make the VHS tape admissible. The same police report stated that the officer made the VHS tape and then locked the tape in his desk "to be later locked in an evidence locker." In addition, a strict proof of chain of custody is not necessary if there are other factors demonstrating the authenticity of the recording. Finally, gaps in the chain of custody go to the weight of the evidence rather than its admissibility.

5. The Appellate Court also erred by finding that the VHS tape was inadmissible because the State failed to preserve the original recording on the hard drive of the surveillance system. The Supreme Court concluded that the "original" of data stored in a computer or similar device is a printout or other output that is "readable by sight, shown to reflect the data accurately." Thus, the VHS tape, which was created by copying data stored on the hard drive of the surveillance system, constituted an "original." The State was not required to bring the surveillance system into court to show the video that was recorded on the hard drive.

6. Finally, the Appellate Court erred by finding that the State failed to establish that there had been no alterations, deletions or changes during the process of copying the data from the surveillance system to the VHS cartridge. In many cases, alteration of the image may be necessary to prevent the introduction of irrelevant, unimportant, prejudicial, or privileged information. As a general rule, editing renders evidence inadmissible only if it affects the reliability or trustworthiness of the recording. Otherwise, editing goes only to the weight of the evidence.

Thus, a videotape is inadmissible only if the editing shows that the recording was tampered with or

fabricated. Here, there was no such showing, as the officer who made the tape testified that the recording on the VHS tape was the same as the one he watched on the original surveillance system.

The court concluded that the totality of the evidence showed that the State laid a proper foundation for the admission of the VHS tape. Thus, the court did not abuse its discretion by admitting the tape.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Thompson, 2016 IL 118667 (No. 118667, 1/22/16)

1. Under Illinois Rule of Evidence 701, lay opinion identification testimony is admissible if the testimony is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. When the identification is being made from a video recording or a photograph, both of which the jury is able to view for itself, the court held that such testimony is helpful where there is some basis for concluding that the witness is more likely to correctly identify the defendant than the jury.

It is not necessary to show that the witness has had sustained contact or intimate familiarity with, or special knowledge of the defendant. Instead, the witness must only have had contact with the defendant beyond what the jury has had to achieve a level of familiarity that would make the opinion helpful.

Courts should use a totality of circumstances approach in deciding whether such testimony is admissible, and should consider the following factors in making that decision: (1) the witness's general familiarity with the defendant; (2) the witness's familiarity with the defendant at the time the recording was made; (3) whether the witness observed the defendant dressed in a manner similar to the person depicted in the recording; (4) whether the defendant was disguised in the recording or changed his appearance between the time of recording and trial; and (5) the clarity of the recording and extent to which the person is depicted.

The absence of any of the above factors does not render the testimony inadmissible. And the extent of a witness's opportunity to observe the defendant goes to the weight, not admissibility, of the evidence.

2. Additional rules apply when lay opinion identification testimony is presented by law enforcement officers. Here, there is an added concern that evidence of the officer's relationship with defendant may end up revealing defendant's prior criminal history. The court therefore adopted certain precautionary procedures when officers provide opinion identification testimony.

When the State seeks to introduce such evidence, the circuit court should permit the defendant to examine the officer outside the presence of the jury so he may explore the officer's level of familiarity as well as any bias or prejudice. When the officer testifies, he may identify himself as a member of law enforcement, but to establish familiarity he should only testify about how long he knew defendant and how frequently he saw him.

Additionally, the court should instruct the jury before the testimony and in the final charge that it need not give any weight to such testimony and that it should not draw any adverse inference from the witness's status as a law enforcement officer.

3. Here the State introduced lay opinion identification testimony from four witnesses, three of whom were law enforcement officers. The Supreme Court held that the testimony of the three officers was not properly admitted, but the testimony of the civilian witness was proper.

(a) Deputy Sheriff Sandusky interrogated defendant after he was arrested and viewed a video and still image of a man stealing anhydrous ammonia from storage tanks. Sandusky testified that defendant was the person in the images. The court held that Sandusky gained a familiarity with defendant during his interrogation, an interaction that was "in a more natural setting" than the jury would have had from its limited exposure to defendant in the courtroom. Sandusky was thus more likely to correctly identify defendant than the jury. But the trial court failed to employ the precautionary measures required for law enforcement witnesses and thus Sandusky's testimony was improper.

(b) Officer Jackson also identified defendant from the video and still image. But there was no evidence about how long he knew defendant or how often and under what circumstances he had seen him. There was thus no evidence demonstrating any basis for concluding that Jackson was more likely to correctly

identify defendant than the jury. And the trial court failed to employ any precautionary measures prior to his testimony. Accordingly, Jackson's testimony was improper.

(c) Officer Huff was able to identify defendant from the video and still image based on his "previous dealings" with defendant. The court held that Huff had "a perspective of defendant that the jury did not have" and thus was more likely to correctly identify him. But his testimony was inadmissible because the court did not employ any precautionary procedures before admitting his testimony.

(d) Jessica Joslin identified defendant from the still image. She had never met or spoken to defendant, but she once saw him sleeping on the front porch of a mutual friend's house when she was "strung out on methamphetamine." The court held that
"although close" there was a sufficient basis to conclude that she was more likely to correctly identify defendant than the jury. And because Joslin was not a law enforcement officer, the trial court did not have to employ any precautionary procedures. Joslin's testimony was thus admissible.

4. Although the court found that the testimony of the three officers was inadmissible, it held that the error was harmless. Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Crenshaw, 2011 IL App (4th) 090908 (No. 4-09-0908, 8/10/11)

A partially inaudible sound recording is admissible, and any gaps in the recording are relevant only to the weight of the evidence, unless the inaudible portions are so substantial as to render the recording untrustworthy as a whole.

The circuit court did not abuse its discretion in admitting a cell phone recording of an alleged sexual assault that was not of good quality, but which the court had found was "more audible than not." The court relied on the partially audible recording only to determine that the complainant was in distress and that someone was whispering to her. The testimony of the complainant and her mother, and not the recording, supplied the evidence that the defendant was the person whispering in the recording. The court also considered the mother's reaction after listening to the recording – she immediately packed up her family and left the home they shared with defendant.

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Decaluwe, 405 Ill.App.3d 256, 938 N.E.2d 181 (1st Dist. 2010)

Evidence is relevant if it has the tendency to make the existence of a fact that is important to the determination of an action more or less probable than it would be without the evidence. Evidence may be rejected on the grounds of relevancy if the evidence is remote, uncertain or speculative. Admissibility may also depend on whether the probative value of the evidence outweighs its prejudicial effect. In this context, "prejudice" means an undue tendency to suggest a decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt or horror.

The defendant was charged with armed violence, aggravated kidnaping and attempt aggravated criminal sexual assault, in that he demanded that the 14-year-old complainant take nude photographs of him. Five-year-old photographs of the defendant's naked torso taken by defendant's wife and of defendant wearing shorts were not relevant and only invited speculation about the character of the defendant, especially given the nature of the charges. (Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

People v. Dennis, 2011 IL App (5th) 090346 (No. 5-09-0346, 8/31/11)

There are two ways in which a foundation to admit a visual recording may be provided. A traditional foundation occurs where a witness can authenticate the content of the recording by testifying that the recording accurately represents what he or she personally saw or heard when the event portrayed by the recording occurred. When a foundation is provided in this way, additional authentication such as a chain of custody is unnecessary.

Alternatively, the court can admit a recording as substantive evidence based on a foundation which establishes the recording's authenticity by other means. Under the "silent witness" theory, a recording may be admitted without the testimony of an eyewitness to the event if there is sufficient proof that the process which produced the recording was reliable. Under this method, the proponent of the evidence must show the capability of the device for recording, the competency of the operator, the proper operation of the device, the preservation of the recording without changes, additions or deletions, and the identification of the persons, locale or objects depicted sufficiently to make a clear showing that the recording is relevant. This method of showing foundation implicitly includes preservation of a chain of custody and an explanation of any copying which shows that during the process there were no changes, additions, or deletions.

Without fully explaining its holding, the court concluded that the State provided a sufficient foundation, under the "silent witness" theory, to admit a surveillance tape and three still photographs created from the tape. After an armed robbery was reported, a crime scene investigator went to the scene. He then asked the owner of the security company which had installed the security system to come to the store. The investigator and the security company owner watched the videotape at the store. At the request of the investigator, the security company owner burned two copies of the tape on CD's. The investigator took one of the CD's to his office and labeled it to show the date and the name of the person who had created it.

The court noted the failure of the defense to claim that the recording was not authentic or accurate, and held that in the absence of actual evidence of tampering the State is required to show only a probability that no tampering, substitution, or contamination occurred.

Defendant's conviction for armed robbery was affirmed.

(Defendant was represented by Panel Attorney Pamela Lacey, Benton.)

People v. Flores, 406 Ill.App.3d 566, 941 N.E.2d 375 (2d Dist. 2010)

1. Videotape and photographic evidence may be admitted at trial for one of two purposes. First, a tape or photograph may be admitted as demonstrative evidence, to illustrate a witness's testimony. A foundation for the demonstrative use of a videotape is established by the testimony of a witness with personal knowledge of the photographed object that at the time relevant to the issue, the videotape is a fair and accurate representation of the object. When a tape is used as demonstrative evidence, the fact that it has been edited goes to weight rather than admissibility.

Where a videotape is admitted as substantive evidence, by contrast, an adequate foundation requires a showing that the original videotape has been preserved without change, addition or deletion. If a copy of the tape is introduced, there must be an explanation of the copying process which satisfies the court that there were no changes, additions or deletions in the exhibit that was admitted at trial. Due to the ease with which digital images can be manipulated with modern editing software, the State may be required to show a chain of custody which shows that the image has not been altered.

2. At defendant's trial for driving with a suspended or revoked license, a witness testified that a video which he took was an accurate portrayal of the defendant's actions at the time of the offense. However, the witness also admitted that the exhibit was a copy of the original tape and that he had erased images which concerned personal matters unrelated to the offense. Because the exhibit was not the original tape but an edited copy, and because the witness "seemed to go out of his way to obscure the process by which he produced" the exhibit and made "reconstructing the process . . . a matter of guesswork," the exhibit was admissible only as demonstrative evidence. Because the trial court abused its discretion by relying on the tape as subjective evidence, the conviction for driving with a revoked or suspended license was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Sangster, 2014 IL App (1st) 113457 (No. 1-11-3457, 3/31/14)

A sound recording is admissible if a proper foundation is laid establishing the authenticity and reliability of the recording. Under the silent witness theory, a recording may be admitted without testimony

from a witness who personally knows what the recording portrays, if there is proof of the reliability of the process that produced the recording.

Defendant argued that the State failed to lay a proper foundation for the introduction of a phone call he made from Cook County jail since there was no testimony about the capability of the devices used for recording the call, the competency of the operators, or the proper preservation of the recordings. The court rejected this argument, holding that the ability of defendant to make the call provided sufficient evidence that the system worked properly.

An employee of the jail testified at the admissibility hearing that when an inmate enters the jail he is registered into the jail's telephone system. Before an inmate can place a call, he must give his personal identification number (PIN) and state his name. The system has a voice recognition capability, so his voice must match his previously recorded voice before the system will activate. If the system does not recognize the voice associated with the PIN, the inmate cannot place a phone call. Inmate calls are recorded "as a mater of course.

The court held that with these procedures in place, the ability of defendant to make the call provides sufficient evidence that the system was working properly, and hence shows that the process that produced the recording was reliable. The court noted that defendant never made a colorable claim that the recording was not authentic or accurate. Where a defendant fails to present evidence of tampering or substitution, the State only needs to establish a probability that those things did not occur. Any deficiencies go the weight, not the admissibility, of the evidence.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. Sykes, 2012 IL App (4th) 111110 (No. 4-11-1110, 7/31/12)

1. Under the silent-witness theory, a videotape may be introduced as substantive evidence so long as a proper foundation is laid. It is not necessary for a witness to testify to the accuracy of the images depicted in the video so long as the accuracy of the process used to produce the evidence is established. This is because the evidence is received as a so-called silent witness and thus speaks for itself.

2. When a lay witness provides opinion testimony, the witness's testimony in the form of opinions or inferences is limited to those which are: (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or otherwise specialized knowledge.

Lay opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the trial of fact, but it should be excluded when it consists of inferences and conclusions that can be drawn by the trier of fact.

3.Whether it is proper for a witness to narrate the contents of a video of which he has no personal knowledge is a legal issue involving no exercise of discretion, fact finding, or evaluation of credibility. Therefore, the issue is subject to *de novo* review.

4. A surveillance video that was of very poor quality and was difficult to watch was admitted as substantive evidence and thus spoke for itself. A witness who had no personal knowledge of the events at issue testified that the video depicted defendant removing money from a cash register. This testimony invaded the province of the jury because the witness was in no better position than the jury to determine what the video depicted.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Thompson, 2014 IL App (5th) 120079 (No. 5-12-0079, 4/25/14)

1. A witness who did not personally observe the events in question may identify, as lay opinion testimony, a defendant depicted in a video or photograph so long as the witness was better able than the jury to make an identification. To determine whether such evidence is admissible courts must find that: (1) the witness was familiar with defendant prior to the offense; and (2) the testimony will aid the jury in resolving the issue of identification without invading the duties of the trier of fact. Testimony will properly aid the jury

and not invade its duties where a defendant's appearance has changed between the time of recording and the date of trial, and/or the video or photograph is unclear and the testimony will help describe or interpret the unclear depiction.

Here, four witnesses identified defendant as the person depicted in the surveillance video and still photograph derived from the video. Each witness was familiar with defendant prior to the offense. But there was no evidence defendant had changed his appearance prior to trial, and none of the witnesses had a better perspective than the jury to interpret the evidence.

Although the still photograph was blurry, none of the witnesses who identified defendant described any particular features or aspects of defendant that would have aided the jury in interpreting the unclear depiction. The jury was able to compare both the video (which presented a clear depiction) and the distilled image against defendant, who was present in court, and there is no basis for concluding that the witnesses could make a more informed assessment of who was depicted in the surveillance evidence. The introduction of this identification testimony was thus improper.

2. The identification testimony was also improper as police procedure evidence. The consequential steps in a police investigation are generally relevant to explain the State's case to a jury. The State must be allowed to explain why a previously unidentified defendant became a suspect. But here none of the identification testimony explained how defendant became a suspect since he had already been identified before any of the police witnesses viewed the surveillance video. The identification testimony thus did not assist the jury in understanding the steps of the investigation or how defendant became a suspect.

3. Even if this identification testimony had been admissible, the cumulative impact of calling four witnesses to each offer their opinion of who was depicted in the surveillance video would have run the risk of improperly supplanting the function of the jury. Even when admissible, trial judges should limit the amount of such evidence. Here, the four identifications "painted multiple layers of prejudice on the images presented to the jury."

Given the singular role of surveillance evidence, a conviction obtained following the introduction of cumulative identification testimony cannot be trusted. The cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Lawrence O'Neill, Mount Vernon.)

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§19-26
Privileged Communications

§19-26(a)
Marital Privilege

People v. Hall, 194 Ill.2d 305, 743 N.E.2d 521 (2000) Under 725 ILCS 125/6, a husband or wife may testify for or against each other in a criminal case, but may not testify as to "any communication or admission made by either of them to the other or as to any conversation between them during marriage." The privilege applies only to communications and admissions, and not to a spouse's conduct. The holder of the privilege waives it by failing to object at the time of the testimony in question. In addition, because the purpose of the privilege is to promote family harmony rather than to assure the reliability of evidence, admission of testimony in violation of the privilege does not call into question the fundamental fairness of the proceedings.

People v. Sanders, 99 Ill.2d 262, 457 N.E.2d 1241 (1983) The court held that the martial privilege was not violated by the defendant's wife, who testified about a conversation she had with the defendant in the presence of their children, one of whom was 13 years of age. Although this issue was one of the first

impression in Illinois, the "great weight of authority [in other states] is that the presence of children of the spouses destroys confidentiality unless they are too young to understand what is being said." Under Illinois law, a conversation between husband and wife is not privileged if it appears that it was not intended to be confidential; thus, conversations in the presence of third parties are not privileged. Here, the record does not indicate that the 13-year-old son "was not old enough or sufficiently bright to understand the conversation at which he was present, particularly inasmuch as the wife's testimony indicates that some of it was directed to him. In these circumstances, the son's presence rendered the conversation ineligible for the protection of the statutory privilege."

People v. Foskey, 136 Ill.2d 66, 554 N.E.2d 192 (1990) The evidence showed that defendant's wife became a police informer after she was arrested for possession of heroin. Based upon information she provided to the police, defendant was arrested and heroin seized from his residence.

Before trial, the State filed an *in limine* motion to preclude the defendant from introducing certain letters the wife had written to defendant and certain conversations between the couple. In these communications the wife stated she had fabricated the story against defendant to avoid going to jail on the drug charges pending against her. The trial judge found that the above matters came within the marital privilege and excluded the evidence at trial.

The Supreme Court balanced the defendant's right to confront witnesses against the claim of marital privilege, and held that the defendant's right to confrontation should prevail in this case. First, the content of the letters and conversations "had the clear potential for devastating the credibility" of the wife's testimony. The Court also noted that the "marital privilege was intended to foster marital harmony." Here, this intent would not be served, since the wife had already cooperated with the police and acted against her husband's interests. "Barring the defendant from cross-examining his wife about these communications certainly could not further a legislative policy of preserving and promoting marital harmony."

Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1894) Only communications made during a valid marriage are privileged.

People v. Rogers, 348 Ill. 322, 180 N.E. 856 (1932) The privilege as to communications made during existence of a marriage is not terminated by death or divorce. See also, **People v. Dubanowski**, 75 Ill.App.3d 809, 394 N.E.2d 605 (1st Dist. 1979) (confidential communications made during a separation are privileged); **People v. Borchelt**, 46 Ill.App.3d 286, 360 N.E.2d 1187 (5th Dist. 1977) (statements before marriage to future wife were not privileged).

People v. McNanna, 94 Ill.App.3d 314, 236 N.E.2d 767 (3d Dist. 1968) Statements made by defendant to his wife in a public tavern, when they were seated at a table with defendant's sister, were not privileged because they were not confidential communications. See also, **People v. Torres**, 18 Ill.App.3d 921, 310 N.E.2d 780 (1st Dist. 1974) (statements made in a factory in presence of co-workers).

People v. Gardner, 105 Ill.App.3d 103, 433 N.E.2d 1318 (5th Dist. 1982) A letter written by the defendant to his wife was a privileged communication which remained protected despite the wife's disclosure of the letter's content to a third party.

People v. Saunders, 288 Ill.App.3d 523, 680 N.E.2d 790 (4th Dist. 1997) The Court rejected the State's request to adopt a rule that the spousal privilege does not apply to conversations occurring during the course of a joint criminal enterprise. Although such a rule has been adopted in federal cases and by some other states, the plain language of 725 ILCS 5/115-6 does not permit it in Illinois. However, the Court held that the statutory privilege did not apply in this case because defendant's wife acted as his agent. (See §115-6). Because it appeared that the spouse was "merely acting for the benefit of the defendant" and not participating

in the offense for her own benefit it "would seem" that the wife was acting as defendant's agent and that the statutory exception would apply.

People v. Rettig, 88 Ill.App.3d 888, 410 N.E.2d 1099 (3d Dist. 1980) The marital privilege does not prohibit one spouse from testifying about the noncommunicative conduct of the other spouse. See also, **People v. Krankel**, 105 Ill.App.3d 988, 434 N.E.2d 1162 (3d Dist. 1982).

People v. Burton, 102 Ill.App.3d 148, 429 N.E.2d 543 (4th Dist. 1981) At defendant's trial defendant's wife could testify about defendant's admission that he had sexual intercourse with his stepdaughters. An exception to the marital privilege exists "where the interests of their children are directly involved." See also, **People v. Eveans**, 277 Ill.App.3d 36, 660 N.E.2d 240 (4th Dist. 1996) (child interest exception applies to the interests of any children in parent's custody or control; exception applied where parent was charged with murdering the child).

People v. Mullinax, 67 Ill.App.3d 936, 384 N.E.2d 1372 (4th Dist. 1979) When one spouse is charged with a crime against the other spouse, the marital privilege cannot be claimed in regard to communications that are relevant to that charge. Thus, a defendant charged with the attempt murder of his wife could not properly claim that threats to her were privileged communications.

Cumulative Digest Case Summaries **§19-26(a)**

People v. Trzeciak, 2013 IL 114491 (No. 114491, mod. op. 2/21/14)

1. One spouse may testify against another spouse in a criminal case. However, a spouse may not "testify as to any communication or admission made by either [spouse] to the other or as to any conversation between them during marriage, except in cases in which either is charged with an offense against the person or property of the other." (725 ILCS 5/115-16). The purpose of this marital communications privilege, derived from common law, is to promote marital harmony and stability, and thus aid in the preservation of the marriage.

The privilege applies only to communications that are intended to be confidential. There is a presumption that privately made communications between spouses are intended to be confidential, unless it appears from the nature or circumstances that confidentiality was not intended. Nonverbal conduct is privileged only where it is clearly intended as a substitute for an oral communication, *i.e.*, it was intended to convey a message.

Based on case law from foreign jurisdictions, the court concluded that a communication between spouses can be considered "confidential" only where it is a private exchange that would not have been made but for absolute confidence in, and induced by, the marital relationship. If what is said or done by either spouse has no relation to their mutual trust and confidence as husband and wife, the reason for secrecy ceases. In such cases, the privilege is inapplicable.

Whether a particular communication was made in reliance on the marital relationship depends on the nature and form of the communication and the circumstances immediately surrounding its making. The confidentiality of a communication is a preliminary question of fact to be decided by the trial court.

2. Testimony that defendant beat his wife, tied her up, tossed her in his truck, and drove to the house of the deceased was not barred by the marital privilege because that nonverbal conduct was not intended to convey a message.

Furthermore, defendant's threat to kill his wife and the deceased was not barred by the privilege because it was not a confidential communication. The court concluded that the threat was not made in reliance on the confidences of the marriage and had no correlation to the mutual trust between defendant and his wife as spouses. It is also evident that defendant intended for his wife to communicate the threat to the

deceased, and that it was the type of communication that defendant's wife might have communicated to her family or the police.

3. In a specially concurring opinion, Justices Theis and Karmeier agreed that the threat did not constitute a confidential communication where it was made with the intent that it be repeated to a third party. However, the concurring justices objected to the creation of a new exception to the privilege for communications that were not motivated by the spouse's reliance on the intimacy, special trust, and affection of the marital relationship. The concurring opinion noted that such an exception is not included in the statutory language of §115-16 and would require courts to consider the "health or status of a marital relationship at the time a communication occurred.

4. In a dissent from the denial of rehearing, Justices Theis, Kilbride, and Karmeier criticized the majority for creating an exception to the Illinois martial privilege on the basis of foreign authority while ignoring significant foreign case law holding that application the marital privilege does not rest on a judicial determination of the health or worthiness of the marriage at the time the communication was made.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

People v. Trzeciak, 2012 IL App (1st) 100259 (No. 1-10-0259, 5/9/12)

725 ILCS 5/115-16 prohibits testimony by a husband or wife "as to any communication or admission made by either of them to the other or as to any conversation between them during marriage" with limited exceptions involving offenses against each other, spouse abandonment, or offenses against children.

The circuit court ruled that the testimony of defendant's wife that defendant beat her and threatened to kill both her and the murder victim was admissible, notwithstanding the statutory marital privilege, because "the marriage was in shambles," so there was no marital harmony to protect. Also, defendant did not intend for the threats to remain confidential, as he wanted his wife to convey them to the victim to dissuade him from helping her escape from the defendant.

The Appellate Court found that it was "undisputed that communications had between [defendant's wife] and defendant were during their marriage and were made privately." Although their marriage was not harmonious, the legislature did not see fit to require that marital harmony be present to preserve the privilege, even though it is keenly aware of the problem of domestic violence.

The Appellate Court held that the circuit court erred in not excluding the evidence of the abuse and defendant's threats against his wife and the victim. The court noted that the defendant's acts as well as his statements qualified as communications for purposes of the marital privilege, but did not otherwise explain how defendant's acts of abuse were communications.

The admission of evidence in violation of the marital privilege deprives defendant of a fair trial where it contributes to the guilty verdict. There was evidence that days before the victim's murder, he argued with another man over being dispossessed of his vehicle. The murder weapon and the victim's prescription were found in another man's home. Absent the wife's testimony regarding defendant's statements of jealousy of her relationship with the victim, along with his threats against her and the victim, there is limited evidence to support defendant's conviction. Therefore, the wife's testimony furnishing defendant's motive for killing the victim contributed to the guilty verdict.

Murphy, J., dissented. Defendant's words and actions demonstrated defendant's desire that they be communicated to the victim and not remain confidential. Moreover, the very reason for creation of the privilege did not exist here; there was no marital harmony to protect.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

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§19-26(b)

Attorney-Client Privilege

U.S. v. Zolin, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) The attorney-client privilege is aimed at encouraging full and frank communication between attorneys and their clients and to allow clients to make full disclosure to their attorneys of past wrongdoings. However, the privilege ceases to operate at the point where the client's desired advice refers to future wrongdoing — the "seal of secrecy does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." In camera review may be used to determine whether allegedly privileged communications come within the "crime-fraud exception." Before a court engages in an in camera review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that such review may yield evidence that establishes the exception. See also, Rule 1.6 of the Illinois Rules of Professional Conduct.

People v. Adams, 51 Ill.2d 46, 280 N.E.2d 205 (1972) An attorney-client privilege exists where legal advice of any kind is sought from a professional legal advisor in his or her capacity as such, and the communications relate to the purpose and are made in confidence by the client. Such communication is permanently protected from disclosure by the client or by the legal advisor, except where the protection is waived. See also, **People v. Williams**, 97 Ill.2d 252, 454 N.E.2d 220 (1983).

Turner v. Black, 19 Ill.2d 296, 166 N.E.2d 588 (1960) The attorney-client privilege may be waived by the client if the client testifies about the privileged matter. See also, **Newton v. Meissner**, 76 Ill.App.3d 479, 394 N.E.2d 1241 (1st Dist. 1979).

People v. Williams, 97 Ill.2d 252, 454 N.E.2d 220 (1983) The attorney-client privilege does not extend to the identity of the client "unless he would be prejudiced in some substantial way." Also, the attorney-client privilege does not usually extend to law students. Where the law student was authorized under Rule 711 to appear in court for limited purposes, however, the Court assumed that the privilege would apply.

People v. Knippenberg, 66 Ill.2d 276, 362 N.E.2d 681 (1977) Defendant's statements to a defense investigator came within the protection of the attorney-client privilege. Impeachment of the defendant with statements obtained from the investigator without the knowledge of defendant or his counsel was "prejudicial error of an intolerable character and violated the defendant's constitutional assurance of the effective assistance of counsel." Because this constitutional violation may have contributed to the conviction, the error is not harmless.

People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208 (1968) Statements given by a defense witness to a defense attorney are not privileged.

People v. Knuckles, 165 Ill.2d 125, 650 N.E.2d 974 (1995) Defendant was charged with murder in 1984, and was evaluated by Dr. Kyle Rossiter, a psychiatrist retained under a court order obtained by the public defender. Dr. Rossiter took notes of statements defendant made, but did not prepare a written report. After Dr. Rossiter's examination, defense counsel notified the State that the defense did not intend to introduce any evidence of physical or mental examinations or scientific tests. A short time later defendant pleaded guilty and received a 33-year-sentence.

Years later, the defendant was allowed to withdraw her plea. New defense counsel was appointed and several experts were retained to evaluate defendant's mental state at the time of the offense. Counsel notified the State that the defense would raise insanity and self-defense and disclosed the names, reports and test results of five experts it intended to call at trial. However, the defense did not intend to call Dr. Rossiter, and did not list him as a witness. The State then served two subpoenas on Dr. Rossiter, seeking to obtain written reports of his 1984 interviews.

The Supreme Court concluded that the attorney-client privilege applies to communications between a defendant and a defense expert retained for trial preparation. An expert retained for purposes of trial preparation occupies the same relationship to defense counsel as does an investigator or clerk, to whom the attorney-client privilege clearly applies. Compelling a non-testifying psychiatrist retained by the defense to reveal communications from a defendant might implicate the constitutional right to the effective assistance of counsel.

People v. Wagener, 196 Ill.2d 269, 752 N.E.2d 430 (2001) **People v. Knuckles**, 165 Ill.2d 125, 650 N.E.2d 974 (1995), which extended the attorney-client privilege to communications between a defendant and a defense psychiatric expert, expressly distinguished between testifying and non-testifying experts. Under Knuckles, communications between a defendant and a psychiatric expert are protected by the attorney-client privilege "only so long as 'the psychiatrist will not testify and the psychiatrist's notes and opinions will not be used in the formulation of the other defense experts' trial testimony." The attorney-client privilege is waived "with respect to the testimony and reports of those experts who are identified by the defense as witnesses who will be called to testify on behalf of the defendant at trial, or whose notes and reports are used by other defense experts who testify." Because defense counsel disclosed to testifying defense experts a statement defendant made to his attorney, the attorney-client privilege was waived. Therefore, the State did not err by using the statement in cross-examining a defense witness. See also, **People v. Sutton**, 316 Ill.App.3d 874, 739 N.E.2d 543 (1st Dist. 2000) (statements made to a psychiatric expert during a fitness and sanity examination are protected by the attorney-client privilege, at least where the defendant does not call the expert as a witness or raise an insanity defense).

People v. Barber, 116 Ill.App.3d 767, 452 N.E.2d 725 (3d Dist. 1983) Defendant's statements to another inmate, who was assisting him in preparing civil litigation, were not privileged. The other inmate was not a "professional legal advisor" and defendant was not his "client."

Sokol v. Mortimer, 81 Ill.App.2d 55, 225 N.E.2d 496 (1st Dist. 1967) An attorney may disclose the confidential communications of a client where disclosure is necessary to protect the attorney's own rights or to defend himself against an accusation of wrongful conduct.

Cumulative Digest Case Summaries **§19-26(b)**

People v. Radojcic, 2013 IL 114197 (Nos. 114197, 114214, 11/21/13)

1. The attorney-client privilege protects confidential communications between an attorney and a client. The purpose of the privilege is to encourage full and frank communication, without fear that confidential information will be disseminated to others. The privilege embodies the principle that sound legal advice is dependent on full and frank communication.

The attorney-client privilege is applicable where three conditions are satisfied. First, legal advice of some sort must be sought from a professional legal adviser in his or her capacity as such. Second, the communication must relate to that purpose. Third, the communication must be made in confidence by the client.

The client has the right to raise the privilege and the right to waive it. The attorney-client privilege protects both the client's communications to the attorney and the attorney's advice to the client.

2. Like all evidentiary privileges, the attorney-client privilege is inconsistent with the search for truth because it prevents the disclosure of evidence that would be relevant and admissible. Thus, the privilege must be "strictly confined within its narrowest possible limits."

The "crime-fraud exception" is one exception to the attorney-client privilege, and is triggered when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity. The

crime-fraud exception focuses on the intent of the client, and not on the legitimacy of the services provided by the attorney. In other words, even where counsel is completely innocent of wrongdoing, "it cannot be the attorney's business to further any criminal object."

Where the crime-fraud exception applies, the attorney-client privilege is inapplicable. However, only conversations that relate to the crime or fraud may be disclosed.

3. In order for the crime-fraud exception to apply, the proponent of the exception must present evidence which presents a reasonable basis to suspect that the communications in question were in furtherance of a crime or fraud. However, "the best and often only evidence of . . . the exception . . . is the allegedly privileged communication itself," which cannot be disclosed without violating the privilege. To resolve this dilemma, the trial court may conduct *in camera* review of the communications in order to determine whether the crime-fraud exception applies.

To justify *in camera review,* the proponent of the exception must present a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review "may reveal evidence to establish the claim that the crime-fraud exception applies." The evidentiary showing required for an *in camera* hearing is less than the showing ultimately needed to establish the application of the crime-fraud exception itself. Furthermore, *in camera* review is not required in every case, as the trial court has discretion whether such review is necessary.

Ideally, the *in camera* review should be conducted by a judge other than the judge who is presiding over the matter at which the communications would be introduced. Furthermore, any *in camera* questioning of counsel must be narrowly tailored so that confidential information is not needlessly disclosed.

4. The State made a sufficient showing of the crime-fraud exception to reverse the trial court's finding that the exception did not apply. The State presented transcripts of grand jury testimony concerning a scheme through which "carefully structured real estate transactions became the vehicles through which [defendant] was able to defraud numerous lenders, as well as the Department of Housing and Urban Development, all the while keeping his name off any documentation."

In addition, the transcripts provided a reasonable basis to conclude that defendant's communications with counsel were in furtherance of the scheme. Even if the communications between defendant and counsel did not directly concern the fraudulent mortgage applications, the criminal scheme was furthered by communications relating to the real estate transactions which were an essential part of that scheme.

The court acknowledged that the transcripts did not reflect any direct conversations between defendant and counsel, but held that the crime-fraud exception may apply to communications between an attorney and a third party on behalf of the client, so long as those indirect communications furthered a fraudulent scheme.

(Defendant was represented by Emily Wood of Chicago.)

People v. McRae, 2011 IL App (2d) 090798 (No. 2-09-0798, 10/24/11)

Inmates have no legitimate expectation of privacy under the Fourth Amendment in the contents of their jail cells, but they do not knowingly waive the attorney-client privilege with respect to documents retained in their cells simply because there is no reasonable expectation of privacy in those documents under the Fourth Amendment. Inmates retain their Sixth Amendment right to effective assistance of counsel, which includes the ability to communicate privately with their attorneys without interference. Communications made in confidence by defendants to their attorneys are protected from disclosure by the attorney-client privilege. When that privilege is violated, the constitutionality of the conviction depends on whether the violation produced, directly or indirectly, any of the evidence offered at trial.

A letter written by defendant to his attorney was confiscated from his jail cell and turned over to the prosecution. It was not contested that the letter was written to counsel for the purpose of legal advice in anticipation of trial and was intended to be kept confidential. Defendant pleaded guilty after being advised by his attorney that the contents of the letter could be used against him at trial. At a hearing on defendant's motion to vacate his plea, the trial court ruled that defendant's constitutional rights were not violated by

confiscation of the letter because the letter was not kept in an envelope marked "legal mail." While this circumstance was possibly relevant to whether the letter was a privileged communication, it did not, in and of itself, amount to a waiver of the attorney-client privilege. After concluding that defendant's plea was void on other grounds, the court directed that on remand an appropriate inquiry be made into all of the circumstances of the seizure of the letter and whether the defendant treated the letter in such a careless manner as to negate his intent to keep it confidential.

(Defendant was represented by Panel Attorney Thomas Brandstrader, Chicago.)

People v. Radojcic, 2012 IL App (1st) 102698 (No. 1-10-2698, 5/2/12)

1. Illinois courts review *de novo* decisions concerning the admissibility of evidence when a party claims the attorney-client privilege.

2. As a general rule, a client has the right to prevent the disclosure in judicial proceedings of communications between the attorney and the client. The client loses the privilege if he seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity. To defeat the privilege, the party seeking disclosure must show that a prudent person has a reasonable basis to suspect the perpetration or attempted perpetration of a crime or a fraud, and that the communications were in furtherance thereof.

3. The court may hear evidence *in camera* to determine whether the privilege applies where only the communications themselves show that the privilege does not apply. But before hearing evidence *in camera*, the judge should require the party seeking disclosure to show facts that would support a reasonable belief that an *in camera* review of the materials may reveal evidence to establish the crime-fraud exception.

4. The trial judge found that the evidence apart from the communications with the attorney did not show that a prudent person would have a reasonable basis to suspect that the communications furthered the attempt to perpetrate crimes or fraud. But the court failed to perform the next step of determining whether the prosecution presented sufficient evidence to support a reasonable belief that the communications themselves could show that defendant lost the privilege by using communications with his attorney to further his attempts to perpetrate crimes or fraud.

5. The defense argued that the grand jury testimony of witness Patterson did not provide any reason to suspect that the communications between defendant and his attorney furthered attempts to commit crimes or fraud because either defendant communicated with the attorney through Patterson, or Patterson acted on her own when she told the attorney what to do.

If Patterson acted on her own, only she has the attorney-client privilege, and she waived her privilege by testifying before the grand jury about her discussions with the attorney.

If Patterson merely acted as a conduit for defendant's communications with the attorney, she either acted as defendant's agent, or not as defendant's agent.

If she did not act as defendant's agent, the communications are not privileged as a defendant's voluntary disclosure of information in the presence of a third party who is not the agent of defendant or his attorney is not privileged.

If Patterson acted as defendant's agent, the communications are protected by the privilege, but the crime-fraud exception applies. The communications with the attorney delineated instructions for preparation of documents needed to receive fraudulent loans, even if the attorney did not know about the falsified loan applications and even if he did not himself commit any crime or fraud.

The court reversed the order striking the attorney's name from the State's list of witnesses and remanded for trial.

(Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

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§19-26(c)

Physician and Therapist Privileges

Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) The Supreme Court held that federal law should recognize a psychotherapist's privilege. Federal Rule of Evidence 501 provides that unless otherwise provided, privileges "shall be governed by the principles of common law" as interpreted by federal courts "in light of reason and experience." The Court concluded that a psychotherapist-patient privilege promotes "sufficiently important interests" that outweigh society's interest in admitting probative evidence. Like spousal and attorney-client relationships, which are protected by privilege, the psychotherapist-patient relationship requires confidence and trust. Indeed, the "mere possibility" that statements made to a therapist might be disclosed is likely to "impede the development of the confidential relationship necessary for successful treatment." Such a privilege serves a public interest by "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." The Court held that the federal psychotherapist privilege applies to communications made to licensed social workers, as well as to those made to psychiatrists and psychologists. In modern society, a significant amount of mental health treatment is provided by social workers, especially where the patient is of cannot afford high fees. In addition, the "vast majority" of states extend the psychotherapist privilege to licensed social workers. (Note: Illinois law recognizes a physician-patient privilege (735 ILCS 5/8-802), a privilege for statements made to rape crisis personnel (735 ILCS 5/8-802.1), a privilege for statements made to persons counseling victims of violent crimes (735 ILCS 5/8-802.2) and a therapist-patient privilege (740 ILCS 110/1 et seq.)).

People v. Florendo, 95 Ill.2d 155, 447 N.E.2d 282 (1983) The Court held that the disclosure of patient identities does not violate the statutory physician-patient privilege, which limits privileged information to that which is necessary to enable the physician to render professional services. A patient's identity is not required for treatment. Defendant had contended that since his medical center rendered abortion-related services, the disclosure of patient names would inevitably associate them with the treatment received. The Court balanced a patient's confidentiality interest with the public interest in maintaining the grand jury's power to conduct investigations - and held that "the balance should be struck in favor of the public."

People v. English, 31 Ill.2d 301, 201 N.E.2d 455 (1964) The psychiatrist-patient privilege does not apply where a defendant is examined by a court-appointed physician. See also, **People v. Primmer**, 111 Ill.App.3d 1046, 444 N.E.2d 829 (4th Dist. 1983).

People v. Foggy, 121 Ill.2d 337, 521 N.E.2d 86 (1988) The Court upheld the validity of the statutory privilege for communications made by sexual assault victims to rape crisis counselors. Defendant was not denied due process or the right to confront witnesses by the trial judge's refusal to conduct an in camera inspection of the victim's counseling records; defendant's request was "merely general" and was not supported by any allegations that material useful to the defense at trial was likely to be found in the records. "[B]ecause of the strong policy of confidentiality expressed in [Ch. 110, §8-802.1] and the absence of any indication by the defendant that the victim's communications with the counselor would provide a source of impeachment, we do not believe that the privilege was required to be breached in this case."

People v. Wilson, 164 Ill.2d 436, 647 N.E.2d 910 (1994) Defendant was convicted of three murders and one count of armed robbery, and was sentenced to death. The Court held that the trial court acted properly by refusing to suppress statements defendant made to a mental health counselor. Although Ch. 91½, §801 et. al. requires that communications made to a therapist must be kept confidential, a "homicide exception" permits disclosures relating "directly to the fact or immediate circumstances of the homicide." Defendant's oral statements referred "directly to the facts" of the triple homicide because defendant told the counselor that he knew who was responsible for the murders. In addition, a journal entry made during treatment, which said that defendant "use[d] to be . . . a stick up man," could be "interpreted" as referring to the triple homicide

since defendant was under investigation for murder and armed robbery and the "journal entry explained his reasons for committing armed robberies."

People v. Sutton, 316 Ill.App.3d 874, 739 N.E.2d 543 (1st Dist. 2000) The general physician-patient privilege is created by 735 ILCS 5/8-802, which provides that no physician or surgeon:

> "shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except . . . in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide."

In addition to the general privilege of §8-802, 725 ILCS 5/104-14 provides a specific privilege for statements made during fitness and sanity examinations; such statements may not be admitted unless the defendant raises the defense of insanity or drugged or intoxicated condition. The Appellate Court held that the "homicide exception" of 735 ILCS 5/8-802(1)does not apply to statements made during a fitness or sanity examination if the defendant does not raise insanity or drugged or intoxicated condition as a defense.

Therefore, the plain language of §104-14 precluded impeachment of defendant's testimony with statements made during a fitness examination. **People v. Kashney**, 111 Ill.2d 454, 490 N.E.2d 688 (1986), which held that a defendant waives the protection of §104-14(a) by calling a court-appointed psychiatrist to testify in his behalf, was inapplicable where the defense did not call the psychiatrist to testify or introduce the substance of the statements, which came into evidence only through the State's cross-examination.

People v. Gemeny, 313 Ill.App.3d 902, 731 N.E.2d 844 (2d Dist. 2000) Tapes of phone messages defendant left for a mental health counselor who was scheduled to testify against defendant were protected under 740 ILCS 110/10(a), which provides a privilege for communications between a therapist and a recipient of mental health services. The court concluded that because the calls were made to set up counseling sessions, the messages fell within the statute. The purpose of the privilege - to encourage complete candor between the patient and the therapist - is served by protecting all confidential statements, including calls made outside a formal treatment session.

People v. Dace, 114 Ill.App.3d 908, 449 N.E.2d 1031 (3d Dist. 1983) (aff'd 104 Ill.2d 96, 470 N.E.2d 993 (1984)) Despite the statutory privilege in Ch. 91½, §801 et seq., the mental history of a witness is relevant to his credibility and is a permissible area of impeachment. Thus, if either the witness or the therapist invokes the statutory privilege, the trial court should conduct an in camera hearing to determine what information is relevant to the witness's credibility. See also, **People v. Phipps**, 98 Ill.App.3d 413, 424 N.E.2d 727 (4th Dist. 1981).

People v. Herbert, 108 Ill.App.3d 143, 438 N.E.2d 1255 (1st Dist. 1982) The physician-patient privilege did not protect medical records of a physician subpoenaed by a grand jury, where the patients had signed forms entitled "Authorization for Release of Medical Information."

People v. Dean, 126 Ill.App.3d 631, 467 N.E.2d 353 (5th Dist. 1984) A doctor's disclosure of the medication prescribed for a patient does not violate the physician-patient privilege.

People v. Sagstetter, 177 Ill.App.3d 982, 532 N.E.2d 1029 (2d Dist. 1988) Defendant entered a negotiated guilty plea to aggravated criminal sexual abuse against his stepdaughter, in return for the State's agreement to dismiss another charge and recommend a sentence of probation. The trial judge, however imposed a sentence of four years imprisonment. At sentencing, two letters written by defendant were introduced without any defense objection. Both letters were written to a master clinician of a mental health center, at his request, during defendant's outpatient treatment. The letters described, *inter alia*, a fantasized sexual relationship with

defendant's stepdaughter. The trial judge specifically referred to the letters in imposing sentence.

The Court held that because the letters were "therapeutic tools aimed at helping defendant to address his considerable mental problems" and were written at the request of defendant's therapist, they were confidential under the Mental Health and Developmental Disabilities Confidentiality Act (Ch. 91½, §801, et. seq.) Thus, they were inadmissible at the sentencing hearing without defendant's express approval. Counsel's failure "to take the necessary step to assert the therapist - recipient privilege . . . [constituted] ineffective assistance of counsel." Since the letters were "uncorroborated and unduly prejudicial and inflammatory," the result of the sentencing hearing "would likely have been different but for counsel's 'unprofessional errors.'"

People v. Maltbia, 273 Ill.App.3d 622, 653 N.E.2d 402 (3d Dist. 1995) Defendant's car struck a tree as he was attempting to flee police officers who were following him for a speeding violation. Defendant was apprehended and handcuffed, but when he lost consciousness he was taken by ambulance to a hospital, where he "remained largely unresponsive." After a blood test disclosed that defendant had not consumed alcohol, the treating physician ordered a paramedic and a nurse to obtain a urine sample to test for the presence of drugs and possible internal injuries. When the nurse and paramedic removed defendant's clothing to obtain the sample, they found a small blue cloth bag in defendant's underwear. The nurse and paramedic opened the bag and saw what they believed to be marijuana. The bag was given to the police, and defendant was subsequently charged with several drug offenses.

735 ILCS 5/8-802 provides, in part:

"No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only . . .

(8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment."

The Appellate Court affirmed a suppression order. Because the urine sample was required to determine whether defendant was under the influence of drugs or had internal injuries, and because the treating physician testified that he changed his diagnosis after learning of the contents of the bag, the drugs were discovered as the result of a medical procedure that was necessary for diagnosis and treatment.

The exception of §8-802(8) did not apply. Although that exception allows the disclosure of privileged information "to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment," the record did not show that defendant was in the "custody" of the police during the medical examination.

People v. Nohren, 283 Ill.App.3d 753, 670 N.E.2d 1208 (4th Dist. 1996) Merely asking an emergency room nurse whether defendant's blood had been drawn did not violate 735 ILCS 5/8-802; the officer sought only to discover whether tests had been performed, and not to obtain the results of such tests.

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§19-26(d)
Other Privileged Communications

Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) Newsman may be required to disclose evidence and sources to a grand jury. See also, 735 ILCS 5/8-901 et seq. (Illinois statutory privilege for news reporters).

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) Defendant charged with sexual assault against a child was entitled to have the trial judge review, in camera, confidential Children and Youth

Services Agency records pertaining to the child for information material to the defense.

In re Special Grand Jury, 104 Ill.2d 419, 472 N.E.2d 450 (1984) A grand jury investigation involved the disclosure of confidential information contained in transcripts of a juvenile proceeding. A reporter who had written an article based on the transcripts testified that he knew who gave him the transcripts but he invoked the reporter's privilege not to disclose the person's identity. Thereafter, upon request by the grand jury, the circuit court granted an application divesting the reporter of his privilege to refuse disclosure. The reporter's privilege (Ch. 110, §§8-901 to 8-909) may be divested where "all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved."

The Court found that the public interest would be served by ascertaining who had violated the confidentiality of the Juvenile Court Act, but that all other available sources of information had not been exhausted. At least three members of the State's Attorney's Office had possession of the transcripts and were not called before the grand jury, and the transcripts had been given to the Judicial Inquiry Board. See also, **People v. Childers**, 94 Ill.App.3d 104, 418 N.E.2d 959 (3d Dist. 1981).

People v. Williams, 97 Ill.2d 252, 454 N.E.2d 220 (1983) Communications between a defendant and a probation officer are not privileged.

In re Grand Jury, 125 Ill.2d 424, 530 N.E.2d 453 (1988) The Court held that the public accountant privilege (Ch. 111, §5533) does not extend to information furnished to an accountant for the purpose of preparing a tax return. Such information is not confidential because it is anticipated that it will be disclosed to federal and State tax authorities.

People v. McNeal, 175 Ill.2d 335, 677 N.E.2d 841 (1997) 735 ILCS 5/8-803 provides that statements made to a clergyman are not subject to compelled disclosure where the statements were made "in [the clergyman's] professional character or as a spiritual advisor. . . ." The Court held that the testimony of defendant's brother was not protected by the clergyman's privilege where the statements had not been made to the brother in his capacity as a clergyman; it appeared that the brother initiated the conversations, the brother failed to assert any privilege, and the brother said he was unsure of some statements because he was "too upset" to listen.

People v. Burnidge, 178 Ill.2d 429, 687 N.E.2d 813 (1997) Where the trial judge suppressed statements by defendant that had been improperly disclosed, defendant had received "the full measure of relief . . . necessary to vindicate the [clergyman's] privilege." The Court concluded that the trial court did not err by declining to quash the prosecution.

People v. Criss, 294 Ill.App.3d 276, 689 N.E.2d 645 (4th Dist. 1998) Similar to the State's "informant privilege," there is a qualified privilege against disclosure of a "secret surveillance location." The court found that requiring the police to disclose secret surveillance locations would "seriously cripple legitimate criminal surveillance and endanger the lives of police officers and those who allow their property to be used for criminal surveillance."

To overcome the "secret surveillance location" privilege, the defendant must demonstrate a need for disclosure that goes beyond "mere speculation that the information may possibly prove useful." Whether disclosure is required is to be decided by "balancing the public interest in keeping the location secret with the defendant's interest in preparing a defense." The court stressed, however, that even where the defendant is unable to overcome the privilege he is permitted to cross-examine "the police officer's observations with respect to distance, weather and possible obstructions." See also, **People v. Knight**, 323 Ill.App.3d 1117, 753 N.E.2d 408 (1st Dist. 2001) (the court, after noting that Criss concerned a suppression hearing, held that the State at trial should be compelled to disclose the exact surveillance location if that information is

"material" to the issue of guilt).

People v. Diercks, 88 Ill.App.3d 1073, 411 N.E.2d 97 (5th Dist. 1980) The Court discussed the clergy privilege (Ch. 110, §8-803), and held that the privilege applies when the communication is made in confidence. The presence of a third party defeats the privilege. See also, **People v. Pecora**, 107 Ill.App.2d 283, 246 N.E.2d 865 (1st Dist. 1969).

Cumulative Digest Case Summaries **19-26(d)**

People v. Peterson, 2015 IL App (3d) 130157 (No. 3-13-0157, 11/12/15)

735 ILCS 5/8-803 provides:

> A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court . . . a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body . . . , nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor.

To fall under the clergy privilege, a communication must be: (1) an admission or confession, (2) made for the purpose of receiving spiritual counsel or consolation, and (3) made to a clergy member whose religion requires him to receive admissions or confessions for the purpose of providing spiritual counsel or consolation. The privilege belongs to both the individual making the statement and the clergy member.

In addition, the clergy privilege applies only to admissions or confessions which are made in confidence. The privilege does not apply to communications that are made in the presence of a third person unless that person was indispensable to the counseling activity. Furthermore, the person who made the statement may waive the privilege by communicating the same matters to third parties.

The party which seeks to invoke the clergy privilege bears the burden of showing that all of the elements have been satisfied. The trial court's determination whether the elements of the privilege have been proven will be reversed only if it is against the manifest weight of the evidence.

The court concluded that the trial court did not err by finding that the communication in question was not confidential and that the clergy privilege therefore did not apply. The clergyman testified that the conversation occurred on the patio of a Starbucks and that he asked a third person to observe, although he did not believe that the third party could hear what defendant was saying. Under these circumstances, the trial court's ruling was not contrary to the manifest weight of the evidence.

Defendant's conviction for first degree murder was affirmed.

People v. Thodos, 2015 IL App (2d) 140995 (No. 2-14-0995, 9/23/15)

1. The clergy-penitent statute provides that a clergyman or practitioner of any religious denomination accredited by the religious body to which he belongs, shall not be compelled to disclose in court a confession of admission made to him in his professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of his religion. 735 ILCS 5/8-803. Essentially, under the statute, a clergyman or accredited practitioner cannot be compelled to testify about confessions made to him while seeking spiritual guidance.

2. At defendant's trial, Robert Sutter and defendant invoked the clergy-penitent privilege claiming that Sutter could not be compelled to testify about an admission defendant made to him when he was acting as defendant's spiritual advisor. Sutter was neither a pastor at his church nor a paid member of the clergy. His formal training in spiritual counseling consisted of speaking with his pastors and being a disciple of "numerous religious people."

The church elders, who were the governing body of the church, made Sutter the leader of a small

Bible-study group, and defendant was one of his disciples. The elders also authorized Sutter to baptize defendant. Defendant eventually made a number of confidential confessions to Sutter. Afterwards, defendant would pray with Sutter and ask for forgiveness, and Sutter would rebuke defendant.

Sutter would often talk and pray with the pastor, assistant pastor, Sutter's wife, defendant's counselor, and other members of the small group about defendant's confessions. One member of the small group was a police officer. When Sutter spoke to the officer about defendant's confessions, the office never indicated that he was speaking to Sutter in his professional capacity as a police officer, and the officer never indicated that Sutter could be called to testify against defendant.

The trial court found that the clergy-penitent privilege applied. It also found that Sutter did not waive the privilege merely because he talked to others about defendant's confessions since he shared that information with the understanding that it would remain confidential.

3. On appeal, the State conceded that defendant confessed to Sutter to obtain spiritual guidance. But the State argued that Sutter (1) was not an accredited clergyman or practitioner as defined in the statute, and (2) waived the privilege by discussing the confessions with others.

The Appellate Court rejected both of the State's arguments. First, the court found that Sutter was an accredited practitioner as defined by the statute. The evidence showed that the church elders authorized Sutter to lead a small group and to baptize defendant, and thus accredited Sutter to perform certain activities. Additionally, the church was aware that Sutter, in his role as spiritual advisor, was receiving confessions from defendant since he regularly spoke to the pastor and assistant pastor about defendant's confessions. Nothing in the statute requires the person giving spiritual advice to be ordained or have completed specific religious training. Instead, a practitioner only needs the authorization of his religious organization.

Second, the court found that the privilege was not waived. Even if Sutter waived the privilege by speaking to others, the privilege belongs to both the confessor and the practitioner. There was no evidence that defendant, who also invoked the privilege, ever shared his confessions with anyone but Sutter. And when Sutter shared the information with others in the church, he did so to help defendant spiritually and with the understanding that the confessions would remain confidential.

The Appellate Court affirmed the trial court's ruling that the clergy-penitent privilege applied.

(Defendant was represented by former Assistant Defender Kathy Hamill, Elgin.)

People v. Thomas, 2014 IL App (2d) 121001 (No. 2-12-1001, 9/26/14)

Under section 8-803 of the Code of Civil Procedure, the clergy-penitent privilege only applies where disclosure is "enjoined by the rules or practices" of the relevant religious organization. 735 ILCS 5/8-803. The privilege belongs to both the confesser and the clergyman. When the clergyman does not object to testifying about the confession, the burden shifts to the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion.

At defendant's trial, the court precluded evidence that another man, N.H., confessed to a jail pastor that he had committed the offense. The trial court ruled that the confession to the pastor was barred by clergy-penitent privilege. The Appellate Court held that trial court erred in excluding this evidence. The record showed that the pastor agreed to testify, so the burden shifted to N.H. to show that the rules of the pastor's religion prohibited disclosure. The pastor, however, testified that the rules of his religion did not prohibit disclosure, and N.H. offered no evidence to the contrary. Under these circumstances, the trial court's decision to bar the pastor's testimony was erroneous.

The Appellate Court specifically rejected the State's argument that the confesser's perception of the privilege should control whether the privilege applies. Nothing in section 8-803 provides that the confesser's perception determines when the privilege applies. Instead, the rules of the pastor's religion control the outcome.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

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§19-27
Scientific Evidence

§19-27(a)
Generally

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2876, 125 L.Ed.2d 469 (1993) 1. Frye v. U.S., 293 F. 1013 (1923), which bars expert opinion based on a scientific technique unless that technique is generally accepted as reliable in the relevant scientific community, has been superseded in federal prosecutions. Instead, the Federal Rules of Evidence authorize the admission of expert testimony that is reliable and relevant.

2. A trial judge may consider many factors in deciding whether evidence is reliable. While the acceptance of a scientific technique is no longer a prerequisite to the admission of expert testimony, it is a valid consideration in determining reliability.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) Daubert applies not only to "scientific" testimony but to all expert testimony. The specific factors of reliability mentioned in Daubert (i.e., whether a theory or technique can be and has been tested and subjected to peer review and publication; whether with respect to a particular technique there is a high "known or potential rate of error"; whether there are "standards controlling the technique's operation"; and whether the theory or technique enjoys "general acceptance" within the relevant scientific community) are merely descriptive, and not a definitive checklist to determine whether expert evidence is admissible. Instead, **Daubert** requires a "flexible" inquiry that depends on the particular circumstances of the case.

The court also held that on review, the abuse of discretion standard applies to the trial court's determination to admit or exclude expert testimony under **Daubert**. See also, **U.S. v. Scheffer**, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (**Daubert** was not intended to foreclose per se exclusionary rules for certain types of expert or scientific evidence, such as polygraph evidence).

Donaldson v. CIPS, 199 Ill.2d 63, 767 N.E.2d 314 (2002) 1. In Illinois, the admissibility of expert scientific testimony is determined by the Frye test, which permits the admission of scientific evidence if the methodology or scientific principle on which it is based is sufficiently established to have gained general acceptance in the particular field in question. The "general acceptance" criteria does not concern the ultimate conclusion of an expert witness, but only the underlying methodology used to generate that conclusion. If the underlying method is reasonably relied upon by experts in the field, the factfinder may consider the opinion despite the novelty of the expert's conclusion.

Methodology need not be accepted unanimously or even by a majority of experts in order to satisfy **Frye**. However, a technique that is experimental or of dubious validity is not "generally accepted."

The **Frye** test does not make the trial judge a "gatekeeper" of all expert opinion testimony. Instead, the trial court is to apply **Frye** only if the principle, technique or test in question is "new" or "novel."

2. The court rejected the argument that Illinois follows the "**Frye**-plus-reliability" test, which had been adopted by some appellate districts. Under that test, expert testimony is admissible only if the trial court determines both that the technique or methodology in question is generally accepted and that the specific opinion at issue is reliable. Under Illinois law, once a scientific technique is generally accepted, questions concerning the underlying data and the expert's opinion go to the weight of the evidence rather than to admissibility.

People v. McKown, 226 Ill.2d 245, 875 N.E.2d 1029 (2007) 1. In Illinois, novel scientific evidence can be admitted only if it satisfies the **Frye** test. A court may determine the general acceptance of a scientific

principle by holding a Frye hearing and considering evidence, or by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject.

2. Horizontal gaze nystagmus (HGN) evidence is "scientific evidence," and is therefore subject to the **Frye** standard. HGN, which measures the degree of involuntary jerking of the eyes, is not within the common knowledge of laymen and requires expert interpretation.

In addition, HGN testing is "novel" because courts nationwide have split concerning whether it is a reliable indicator of the use of alcohol.

3. Most Illinois cases involving judicial notice of the scientific acceptance of HGN testing have relied on **State v. Superior Court (Blake),** 149 Ariz. 269, 718 P.2d 171 (1986), in which the only expert testimony at the **Frye** hearing was presented by the prosecution. Furthermore, in showing that HGN testimony was based on an accepted scientific principle, the prosecution's expert witness in **Blake** relied on the adoption of HGN by the National Highway Transportation Safety Administration and several police departments. Because the actions of NHTSA and the police departments had been based on the expert's own studies, she "in essence referred back to her own conclusions, magnifying the opportunity for error."

The court also noted that courts of other jurisdictions have differed widely concerning the admissibility and reliability of HGN testimony, precluding reliance on such decisions as a basis for finding scientific acceptance. In addition, no Illinois court has held a **Frye** hearing concerning HGN.

4. The court rejected the argument that it could find HGN testimony to be reliable based on technical writings. Many of the writings offered by the State did no more than state the accepted theory that alcohol consumption may cause HGN, without finding that HGN is a reliable indicator of alcohol impairment when used as a roadside sobriety test. The court also noted the divergence of expert opinion in the field - many writings indicate that the HGN test is "too delicate" to be administered accurately outside a laboratory, and stress that nystagmus can be caused by many factors other than the use of alcohol.

The Supreme Court retained jurisdiction and remanded the cause for a **Frye** hearing. See also, **People v. Basler**, 193 Ill.2d 545, 740 N.E.2d 1 (2000) (the purpose of a **Frye** hearing is to determine whether novel scientific evidence is generally accepted in the relevant scientific community).

In re Commitment of Simons, 213 Ill.2d 523, 821 N.E.2d 1184 (2004) 1. Under Illinois law, the admission of expert testimony is governed by **Frye**, which permits the admission of scientific evidence only if the methodology or scientific principle on which the evidence is based has gained general acceptance in the particular field to which it belongs. "General acceptance" does not mean universal acceptance or that the methodology is accepted unanimously, but only that the underlying method used to generate an expert opinion is reasonably relied upon by experts in the field.

In addition, **Frye** applies only to "new" or "novel" methodology. Methodology is considered "new" or "novel" if it is "original or striking" or does not resemble "something formerly known or used."

The trial court's decision concerning whether an expert witness is qualified to testify and will offer relevant testimony is reviewed for abuse of discretion. However, the trial court's determination whether the **Frye** standard has been satisfied is reviewed de novo. In reviewing a Frye ruling, a court of review may consider both the trial court record and "appropriate" sources from outside the record.

2. "Actuarial risk assessment," a process by which expert witnesses use various tests to predict the likelihood that a sex offender will re-offend, satisfies **Frye** and therefore is admissible in Illinois courts. The court noted a conflict in Appellate Court precedent concerning whether actuarial science is new and therefore subject to the **Frye** test, but concluded that if **Frye** applies, such an assessment of the likelihood of re-offending satisfies **Frye** because the procedure is generally accepted by professionals who assess sexually violent offenders. In the course of its holding, the court noted that no other state has deemed actuarial risk assessment to be inadmissible, and that in many states such assessments are mandated by either statute or regulation.

People v. McClanahan, 191 Ill.2d 127, 729 N.E.2d 470 (2000) The Confrontation Clause was violated by

725 ILCS 5/115-15, which provided that in drug prosecutions the State could use lab reports as *prima facie* evidence of the identity of a substance, unless within seven days of receiving the report the defense demanded live testimony.

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) The Court affirmed long-standing Illinois precedent that evidence of bloodhound trailing is insufficiently reliable to be admitted into evidence. See also, **People v. Lefler**, 294 Ill.App.3d 305, 689 N.E.2d 1209 (5th Dist. 1998) (rejecting argument that Illinois precedent prohibiting evidence of bloodhound tracking applies only to bloodhounds but not to "highly educated" German Shepards; the basis for the exclusion is that canine tracking "relies on an instinctive power incapable of human decipher," since no one "really knows, nor can they define, how or why a dog performs in any way on any specific occasion").

People v. Jordan, 103 Ill.2d 192, 469 N.E.2d 569 (1984) The trial court did not err by allowing forensic odontologists to testify to the cause of death based on the "pink tooth theory," which holds that if a decedent's teeth appear to be pink, the cause of death was strangulation. The record showed that the study of the "pink tooth phenomenon" was within the witness's field of expertise, neither of defendant's experts testified that the "pink tooth phenomenon" did not exist or was not recognized in the dental community, and the "pink tooth theory" is outside the realm of the knowledge of lay persons."

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) A State expert witness was properly allowed to testify concerning the results of a "neutron-activation analysis" he conducted on bullets recovered from the murder victim and cartridges found in defendant's home. The expert testified that based on the analysis of trace elements, he believed that the bullets recovered from the victim and cartridges found in defendant's home would commonly be found within the same box of cartridges or from another box of the same type that had been manufactured or packaged on or about the same day.

The Supreme Court held that the "neutron-activation analysis" is a "reliable forensic-science technique," and that the test results were relevant to establish as more probable that the bullets from the murder scene were from the same box as the cartridges found in defendant's home.

In re Commitment of Sandry, 367 Ill.App.3d 949, 857 N.E.2d 295 (2d Dist. 2006) 1. Illinois follows a "rather pure version" of Frye, and does not consider the reliability or validity of the theory as a threshold issue in determining whether the evidence may be admitted. Instead, reliability and validity may be raised at trial by the opposing litigant.

The appropriate standard of review for Frye issues is de novo.

2. The field of penile plethysmography has obtained sufficient acceptance in the relevant scientific field to satisfy Frye. The court found that PPG has a "logical, plausible, common-sense" basis, and that it is reasonable for experts to rely on the test. In addition, the test is widely used, indicating acceptance by a substantial number of persons who work with sex offenders.

The court also noted that the only issue in this case was whether PPG results may be utilized by an expert in forming an opinion about the likelihood of recidivism of a sex offender. Issues such as whether PPG test results could be presented directly to the trier of fact, or whether the prejudicial effect of such evidence would substantially outweigh its probative value, were not raised.

3. Defendant did not waive his Frye argument although he merely filed a motion in limine, and did not raise an objection at trial when the State attempted to introduce the report of the expert who had relied on PPG testing. Normally, a motion *in limine* is insufficient to preserve an error for review, and a party must also raise an objection when the disputed evidence is offered at trial. One reason for this general rule is that the evidence at trial may have some bearing on the admissibility of an item of evidence.

Whether evidence satisfies **Frye** does not depend on the evidentiary context in which it is introduced at trial, "at least insofar as it is offered for the same or a sufficiently similar purpose in a latter proceeding."

Under these "unique circumstances," there was no need to raise an additional objection at trial after the motion *in limine* was filed.

People v. Canulli, 341 Ill.App.3d 361, 792 N.E.2d 438 (4th Dist. 2003) At a trial for speeding, the trial judge erred by admitting evidence based on laser technology without a Frye hearing.

1. The use of Lidar laser technology to measure vehicle speed constitutes novel evidence, requiring a **Frye** hearing.

2. Whether evidence based on a novel scientific technique should be admitted depends on whether the technique has gained general acceptance in the scientific community to which it belongs. The proponent of scientific evidence can prove general acceptance in several ways, including by scientific publications, judicial decisions, practical applications and expert testimony. However, unless "the question of general acceptance has been thoroughly and thoughtfully litigated" in previous cases, "reliance on judicial practice is a hollow ritual."

3. The trial court erred by taking judicial notice of the result of a previous **Frye** hearing in the same county. Courts are not bound to follow decisions of equal or inferior courts. In addition, the hearing occurred several years previously, involved different parties, was conducted at a sentencing hearing after the defendant pleaded guilty, and involved a different laser system. The record of the hearing indicated that the defendant was unaware that a **Frye** hearing was going to be held, and therefore did not present any evidence. Under these circumstances, the issue of scientific acceptance of laser technology to measure vehicle speed had not been adequately litigated to justify taking judicial notice.

People v. Raney, 324 Ill.App.3d 703, 756 N.E.2d 338 (1st Dist. 2001) To admit an expert opinion based on testing by an electronic or mechanical device, the proponent must show that: (1) the facts in question are a type reasonably relied upon by experts in the field, and (2) the electronic or mechanical device was functioning properly at the time of the testing. Where an expert utilized gas chromatography mass spectrometer test results to determine that a substance was cocaine, but failed to testify that the machine was functioning properly at the time of the testing, the State failed to establish a sufficient foundation to render the expert's opinion admissible.

People v. Davis, 304 Ill.App.3d 427, 710 N.E.2d 1251 (2d Dist. 1999) Under **Frye**, a trial court considering the admissibility of novel scientific evidence must hold a hearing to determine whether the scientific principles on which the evidence rests have gained general acceptance in the relevant scientific community. The proponent of the evidence has the burden to prove that the Frye test has been satisfied.

Where the trial court did not specifically conduct a formal **Frye** hearing, but heard evidence outside the presence of the jury and considered the reliability of the evidence and the degree to which the scientific method is established and accepted, the equivalent of a **Frye** hearing occurred.

People v. Glisson, 359 Ill.App.3d 962, 835 N.E.2d 162 (5th Dist. 2005) As a issue of first impression, the Appellate Court held that testimony by police officers who are familiar with the odor of anhydrous ammonia is sufficient to identify a substance as anhydrous ammonia. The court noted testimony that forensic labs will not accept anhydrous ammonia for testing because it is a hazardous substance, and that the officers stated they were familiar with the odor of anhydrous ammonia through their experience as law enforcement officers.

People v. Williams, 128 Ill.App.3d 384, 470 N.E.2d 1140 (4th Dist. 1984) Trial court properly allowed dentist with 19 years experience to testify as an expert and to voice opinion that defendant could have made the bite mark on victim's arm because his teeth and dental arch matched the bite mark.

People v. McGee, 88 Ill.App.3d 447, 410 N.E.2d 641 (2d Dist. 1980) The trial judge erred by granting the State's motion *in limine* to prohibit the defense from introducing expert testimony concerning the results of

an absorption inhibition test conducted on the vaginal aspirate taken from the complaining witness shortly after the incident. The judge erred by finding that antigen testing was not generally accepted in the scientific community.

Furthermore, the judge's finding that the results of the test would be inaccurate because of the opportunity for contamination was contrary to the manifest weight of the evidence. Although a chemist who did not examine the sample voiced the opinion that contamination was "very likely" because the material had been left unrefrigerated for four months, the chemist who examined the material testified that he found no evidence of "heavy" contamination.

People v. Hendricks, 145 Ill.App.3d 71, 495 N.E.2d 85 (4th Dist. 1986) (rev'd other grounds, 137 Ill.2d 31, 560 N.E.2d 611 (1990)) The trial judge properly allowed expert testimony concerning the probable time of death based on "gastric analysis."

People v. Acri, 277 Ill.App.3d 1030, 662 N.E.2d 115 (3d Dist. 1996) Because professionals in the field of arson investigation disagreed on the reliability of an arson investigation dog's alert to the presence of accelerant where there is no corroborating laboratory evidence, there is no "general acceptance" that uncorroborated alerts are reliable. Thus, the trial court properly excluded the evidence.

People v. Rohlfs, 368 Ill.App.3d 540, 858 N.E.2d 616 (3d Dist. 2006) 1. The trial court did not abuse its discretion by admitting evidence that certain telephone numbers were displayed on caller ID devices at times relevant to the case. Under **People v. Caffey**, 205 Ill.2d 52, 792 N.E.2d 1163 (2001), caller ID evidence is admissible if the evidence shows that the caller ID device was reliable. Reliability is determined on a case-by-case basis, and is shown where testimony establishes that the same phone number always appeared for the same caller.

2. The reliability of the complainant's caller ID device was shown by testimony that: (1) whenever a friend called, the friend's phone number was displayed on the caller ID, and (2) every time the recipient received a call from a number subsequently traced to defendant's cellblock at the Tazewell County Jail, the complainant heard the same voice.

The reliability of a caller ID device located in the jail's administrative office was shown by testimony that the device was working properly when the case was being investigated, and displayed the number of the phone in defendant's cellblock when a correctional officer made a call to the administrative office from that phone. Such evidence, "while not extensive," was "marginally sufficient" to show reliability.

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Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705, ___ L.Ed.2d ___, 2011 WL 2472799 (2011) (No. 09-10876, 6/23/11)

The Sixth Amendment Confrontation Clause permits introduction of testimonial statements of witnesses absent from trial only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. **Crawford v. Washington**, 541 U.S. 36 (2004). There is no forensic-evidence exception to this rule. An analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial and therefore within the compass of the Confrontation Clause. **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009).

To admit a forensic laboratory report certifying that defendant's blood-alcohol level was above the threshold required for aggravated DWI, the State called an analyst from the laboratory who qualified as an expert witness with respect to the gas chromatograph machine used to perform the analysis as well as the laboratory's procedures. The witness had not signed the certificate and had neither participated in nor observed the test on defendant's blood sample. The certifying analyst had been placed on an unpaid leave

for an undisclosed reason, and was not called to testify. The court held that this surrogate testimony did not satisfy the Confrontation Clause.

1. The court rejected the argument that cross-examination of the certifying analyst was unnecessary because he was a "mere scrivener" and defendant's true accuser was the gas chromatograph machine. The analyst's certification reported more than a machine-generated number, and also made representations as to past events and human actions not revealed in raw, machine-produced data. Even if that were not true, the obvious reliability of a testimonial statement does not dispense with the Confrontation Clause.

2. The testimony of the surrogate analyst was not a substitute for the testimony of the certifying analyst. The surrogate could not convey what the certifying analyst knew or observed about the test or the testing process. His testimony could not expose any lapses or lies on the certifying analyst's part, or address the circumstances that led to the certifying analyst's unpaid leave. The surrogate analyst had no independent opinion regarding defendant's blood-alcohol level. The Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. In short, when the State elected to introduce the analyst's certification, the certifying analyst became the witness defendant had the right to confront.

3. The certified blood-alcohol reports were testimonial. A document created solely for an evidentiary purpose, made in aid of a police investigation ranks as testimonial. That the reports were not sworn to as in **Melendez-Diaz** was not dispositive.

Justice Sotomayor, specially concurring, emphasized that a statement is testimonial if its primary purpose is to create an out-of-court substitute for trial testimony. The formality of the certified report is also an indicator of its testimonial purpose. She identified four variants not present in the case before the court that were therefore not addressed by the opinion:

- the admissibility of a certified report where the State suggests an alternate purpose for the report other than its use as evidence;
- the admissibility of the testimony of a supervisor, reviewer, or someone else with a personal connection to the test at issue, and the degree of involvement in the testing procedure that might be required of the witness;
- the admissibility an independent opinion of an expert witness about underlying testimonial reports that were not themselves admitted into evidence, pursuant to Federal Rule of Evidence 703 (which provides that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted);
- the admissibility of only machine-generated results.

People v. McKown, 236 Ill.2d 278, 924 N.E.2d 941 (2010)

1. Illinois follows **Frye v. U.S.**, 293 F. 1013 (D.C. Cir. 1923), which provides that scientific evidence is admissible at trial only if the underlying methodology or scientific principle is sufficiently established to have gained general acceptance in the relevant scientific field. The **Frye** test applies when a "new" or "novel" scientific principle, test, or technique is cited in support of an expert's opinion.

In a previous decision in this case, the court concluded that the results of horizontal gaze nystagmus testing constitutes scientific evidence because the test requires expert interpretation by a trained police officer. (See **People v. McKown**, 226 Ill.2d 245, 875 N.E.2d 1029 (2007)). **McKown I** also held that HGN testing is "novel" for **Frye** purposes, and remanded the cause for a **Frye** hearing to determine whether HGN testing has gained general acceptance as a reliable indication of alcohol impairment.

2. After considering the results of the hearing on remand, the court concluded that when performed in conjunction with the protocol adopted by the National Highway Traffic Safety Administration, horizontal gaze nystagmus testing has gained general acceptance as a reliable indication of alcohol consumption. However, the results of HGN testing do not, in and of themselves, establish that a particular person is

impaired by the consumption of alcohol. Instead, HGN test results are just one factor which may be considered, along with other evidence, in determining impairment.

The court also noted that in a particular case, the trial court might find that HGN evidence is unduly prejudicial compared to its probative value, and may exclude the evidence on that basis.

3. In the course of its holding, the court noted that "law enforcement" is not a scientific field. Thus, **Frye** would not be satisfied by a showing that within law enforcement circles there is general acceptance of HGN results to show alcohol-induced impairment. The court found that the relevant scientific fields for HGN testing are medicine, ophthalmology, and optometry.

4. Before the results of HGN testing may be admitted, a foundation must be laid to show that the roadside HGN testing was performed by a properly-trained officer and according to NHTSA standards. A properly trained officer who performed the test in accordance with the NHTSA protocol may testify as an expert concerning the test results, and may use HGN results as part of the basis for an opinion that the defendant was both under the influence of alcohol and impaired.

5. Here, however, there was no showing in the record that the officer followed the NHTSA protocol in performing the HGN test. Therefore, the trial court erred by admitting the evidence.

The court rejected the State's argument that the issue had been waived; although defendant failed to raise the issue at trial, the State failed to argue forfeiture when the defendant raised the issue in the Appellate Court. "In effect, the State forfeited its ability to argue forfeiture by the defendant." (See also, **APPEAL**, 2-6(a)).

Defendant's conviction was reversed and the cause was remanded for a new trial.

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010)

In a prosecution for predatory criminal sexual assault, a child welfare supervisor who worked for a private social services agency testified to the characteristics of child-sexual-abuse-accommodation syndrome that are often observed in children who have been sexually abused. The Appellate Court addressed three issues related to the admissibility of that evidence.

1. **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923), requires that the methodology or scientific principle upon which an expert opinion is based be sufficiently established to have gained general acceptance in its particular field. **Frye** is the test for admissibility of scientific evidence in Illinois. A court may determine the general acceptance of a methodology or principle by holding a **Frye** hearing, or by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject. Relying exclusively on prior judicial decisions to establish general scientific acceptance can be a hollow ritual, however, if the underlying issue of scientific acceptance has not been adequately litigated. A reviewing court can conduct a **Frye** hearing as well as a trial court because under the **Frye** standard, a court does not determine the validity of a particular scientific technique, only whether there is a general consensus in the relevant scientific community regarding the reliability of the technique.

A **Frye** hearing on the admissibility of evidence of child-sexual-abuse-accommodation syndrome was not necessary. In **People v. Nelson**, 203 Ill.App.3d 1038, 561 N.E.2d 439 (5th Dist. 1990), the court considered numerous scholarly articles on the syndrome and concluded that it was generally accepted in the psychological community that children who have been sexually abused behave differently than those who have not been abused. As this is exactly the underlying basis of the syndrome, the **Nelson** decision supported the determination that evidence pertaining to the syndrome was generally accepted.

2. The adequacy of the qualifications of an expert witness is a matter within the sound discretion of the trial court. Expertise is not measured by a given level of academic qualification, but by whether the proposed expert has knowledge and experience beyond that of the average citizen that would assist the jury in evaluating the evidence. It does not matter whether the expert acquired specialized knowledge through education, training, experience, or a combination of each.

The trial court did not abuse its discretion in allowing a child welfare supervisor to testify as an expert regarding child-sexual-abuse-accommodation syndrome, even though she was not a psychologist or

expert in the field of psychology. The witness worked with staff members who worked with sexually-abused children. She had a bachelor's degree in law enforcement, a master's degree in human and family resources, and was studying for a doctorate in education. She had worked with victims and offenders as a sexual abuse therapist, and dealt with emotionally disturbed, neglected, and abused adolescents as a child care worker. She was familiar with child-sexual-abuse-accommodation syndrome through reading articles on the subject and her work with children.

3. Evidence is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Evidence is considered relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence.

Testimony regarding child-sexual-abuse-accommodation syndrome was relevant. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually-abusive relationship. The defense attacked the credibility of the child witness by introducing evidence of her delayed reporting and inconsistencies in her testimony. The syndrome evidence aided the trier of fact in weighing that evidence.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Coleman, 2014 IL App (5th) 110274 (No. 5-11-0274, 12/31/14)

1. Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle is sufficiently established to have gained general acceptance in its particular field. But **Frye** only applies to scientific evidence. If an expert's opinion is derived solely from his observations and experiences, it is not scientific evidence.

Following a **Frye** hearing, the State was allowed to introduce the testimony of an expert linguist who compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the **Frye** test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

2. The trial court properly admitted the testimony of five witnesses about hearsay statements made by the decedent, defendant's wife, that defendant wanted a divorce. This evidence was properly admissible (a) under the statutory hearsay exception for the intentional murder of a witness; (b) under the doctrine of forfeiture by wrong doing; and (c) to establish defendant's motive.

(a) Under 725 ILCS 5/115-10.6(a), a hearsay statement is admissible if it is offered against a defendant who killed the declarant to prevent her from being a witness in a criminal or civil proceeding. The statute requires a pretrial hearing to determine the admissibility of the statements.

Here the trial court properly found at the pretrial hearing that defendant murdered his wife to prevent her from being a witness at a potential dissolution proceeding. Moreover, the statutory provision applies even though defendant had not initiated divorce proceedings.

(b) The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for out-of-court statements made by an unavailable witness if the defendant intentionally prevented the witness from testifying. Here defendant intentionally prevented his wife from testifying by killing her, and thus her out-of-court statements were admissible.

(c) The deceased wife's out-of-court statements were also admissible to show defendant's motive. Her statements indicated that defendant wanted a divorce but might lose his job if he tried to obtain one. The statements thus provided a motive for killing her.

3. The trial court did not abuse its discretion in allowing an expert in document examination to compare writings spray-painted on the wall of the murder scene with defendant's known writings in documents. Although there is some difficulty in comparing writing in documents with spray-painted writing on a wall, the expert merely pointed out similarities between the writings and never identified defendant as the actual author of the wall writing. The jury, which saw photographs of the wall writing was thus free to accept or reject the expert's testimony. Defense counsel thoroughly cross-examined the expert, and presented his own expert who cast doubt on the ability to make such comparisons.

4. The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

5. The trial court properly admitted the testimony of an officer who reviewed Master Card statements and determined that spray paint was purchased using a credit card traced to defendant. Illinois Rule of Evidence 803(24) provides an exception to the hearsay rule and allows a receipt or paid bill to serve as *prima facie* evidence of the fact of a payment.

People v. Cook, 2014 IL App (1st) 113079 (No. 1-11-3079, 5/8/14)

Under the general acceptance test of **Frye v. United States**, 293 F. 1013 (D.C. 1923), scientific evidence is admissible only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in its particular field. The trial court may determine if the scientific principle or methodology meets the general acceptance test by: (1) conducting a **Frye** hearing; or (2) taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings that address the issue. The focus of the **Frye** test is on the underlying methodology that led to the opinion, not on the opinion itself.

Defendant argued that at his trial for involuntary manslaughter arising from the death of his four-month-old son, the trial court erroneously took judicial notice of the general acceptance of shaken baby syndrome (SBS) as a medical diagnosis because no **Frye** hearing has been held in Illinois to determine if an SBS diagnosis has gained general acceptance. The Appellate Court rejected this argument, holding that the State's expert testimony about SBS was not subject to the **Frye** standard because SBS it is a conclusion reached through observations and medical training and not a methodology.

The State's experts were physicians who testified that based on their observations, the injuries that caused death resulted from blunt trauma which exerted severe forces on the brain and were consistent with SBS. These opinions were based on an application of medical training to their observations. Defendant did not challenge the medical methodology relied upon to reach the experts' conclusions; instead defendant challenged the conclusions themselves.

Because the expert testimony was based on the witnesses' medical knowledge and experience and not on a theory of SBS or any other novel scientific theory, no **Frye** hearing was required.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

People v. Floyd, 2014 IL App (2d) 120507 (No. 2-12-0507, 3/28/14)

1. Under Illinois Rule of Evidence 403, relevant evidence may be excluded from trial if its prejudicial effect substantially outweighs its probative value. Here, the prejudicial effect of an expert's testimony about a retrograde extrapolation calculation outweighed its probative value and thus it should not have been admitted.

The police arrested defendant for aggravated driving under the influence at around 9:00 p.m., but did not administer a breath test until 10:30 p.m., when her blood alcohol content (BAC) was .069. The prosecution called an expert witness who testified that by conducting a retrograde extrapolation calculation,

he determined that defendant's BAC was between .082 and .095 at the time of arrest.

Retrograde extrapolation is a method for determining a person's BAC at an earlier point in time, and is possible because a person eliminates alcohol at a fixed rate. But for the calculation to be valid, the person must be in the post-absorption (elimination) phase when the test is taken, and the amount on time needed to enter that phase depends on the absorption rate, which itself varies depending on a number of factors, such as the type of food and alcohol consumed and the length of time when the drinking occurred.

The prosecution expert admitted that he did not know what defendant ate, what kind of alcohol she drank, or how long she had been drinking. He also admitted that he did not attempt to determine when defendant had entered the elimination phase, but since she had not consumed any alcohol since 7:30 p.m., he was "quite confident" she would be in the elimination phase by the time she was arrested.

The Appellate Court held that the retrograde extrapolation presented in this case, based on a single breath test and done without knowing many of the factors needed to determine whether defendant was in the elimination phase, was insufficient to provide a reliable calculation, thereby significantly diminishing its probative value. The evidence also invited the jury to determine guilt on an improper basis "due to a reaction to a supposedly high BAC rather than proof beyond a reasonable doubt." The prejudicial effect of this evidence thus substantially outweighed its probative value and it should not have been admitted.

2. The court rejected the State's argument that because Illinois follows the **Frye** test, which holds that scientific evidence is admissible if the methodology or scientific principle has gained general acceptance in its particular field, a trial court does not have discretion to exclude scientific evidence due to its prejudicial effect resulting from gaps in the evidence. The **Frye** test does not prevent a trial court from weighing the probative value of scientific evidence against its prejudicial effect. Even if a particular type of scientific evidence has gained general acceptance, its admissibility in any particular case will always depend on whether its probative value outweighs the risk of unfair prejudice.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

People v. Fountain, 2016 IL App (1st) 131474 (No. 1-13-1474, 8/23/16)

Under the **Frye** test, scientific evidence is admissible only if the methodology or scientific principle upon which an expert opinion is based has gained general acceptance in the relevant field. But the **Frye** test only applies to new or novel scientific methodologies, those that are original or striking, or do not resemble something formerly known or used.

An FBI agent testified for the State as an expert in the field of historical cell site analysis. He testified that when a cell phone is used it communicates with a cell tower. A call detail record is generated showing the time the call occurred and which cell tower was used. The agent testified about the cell towers defendant's phone used, thereby allowing him to give an opinion as to defendant's approximate location at a given time, and hence show that defendant was in the vicinity of the crimes when they occurred.

Defendant argued that a **Frye** hearing should have been held to determine whether historical cell site analysis was admissible. The court disagreed. It held that historical cell site analysis is not the product of new or novel scientific principles. All the expert did in this case was read defendant's cell phone records and transfer that information to a map to show defendant's location. Reading cell phone records and creating a map is not a scientific procedure or technique. Additionally, this type of analysis is not new or novel and has been widely accepted as reliable by numerous courts.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Jacobs, 405 Ill.App.3d 210, 939 N.E.2d 64, 2010 WL 4366876 (4th Dist. 2010)

The Sixth Amendment requires that a witness against the defendant appear at trial and be subject to cross-examination, or, if unavailable, that defendant have had a prior opportunity to cross-examine the witness. In **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527, ___ L.Ed2d ___ (2009), the Supreme Court concluded that a sworn certificate of analysis showing the results of forensic testing of seized substances were the functional equivalent of live, in-court testimony and thus inadmissible absent a showing

that the analysts were unavailable to testify and that defendant had a prior opportunity to cross-examine them. The court noted that it did not hold that "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." that 129 S.Ct. at 2532 n.1.

One of the foundational requirements for the admission of a breathalyzer-test result is that the machine used was regularly tested for accuracy. A police officer's testimony that the machine was certified as accurate based on logbook entries, offered to satisfy that foundational requirement, were not testimonial. The certifications were not compiled during the investigation of a particular crime and do not establish the criminal wrongdoing of a defendant. They did nothing more than establish that the machine was tested and working properly.

People v. Lerma, 2014 IL App (1st) 121880 (No. 1-12-1880, 9/8/14)

1. A witness may testify as an expert if his experience and qualifications give him knowledge which is not common to lay persons, and his testimony would aid the trier of fact. Expert testimony addressing matters of common knowledge is not admissible unless the subject is difficult to understand and explain. In deciding whether expert testimony is admissible, the trial court should balance the probative value of the evidence against its prejudicial effect, and it must carefully consider and scrutinize the proffered testimony in light of the facts of each case. The trial court has broad discretion in determining the admissibility of expert testimony and its decision is reviewed for an abuse of discretion.

2. Defendant attempted to have an expert testify about eyewitness identifications. The trial court denied the request on the basis that this case involved an identification by a witness who knew defendant. The court believed that under those circumstances an expert's testimony would not be helpful because "it is a fact" that people are less likely to misidentify someone they know, and it would not require an expert to explain this fact to the jury. The court also feared that the expert's testimony would be prejudicial by generating a referendum of the accuracy of eyewitness testimony generally, and possibly providing an opinion on the credibility of the eyewitness in this case.

Defendant obtained another expert who would have directly addressed the trial court's concerns. The second expert would specifically testify that under certain circumstances even identifications by acquaintances can be inaccurate. The expert also stressed that he would not issue judgements about the accuracy of any particular witness's identification or about the ultimate question of defendant's guilt. The trial court again denied defendant's request, referring to its earlier decision.

3. The Appellate Court held that the trial court by relying on its prior ruling failed to carefully consider or scrutinize the second expert's testimony, which directly contradicted the court's prior finding that it is common knowledge that an eyewitness is less likely to misidentify an acquaintance. The trial court thus failed to conduct a meaningful inquiry into the proposed testimony.

The trial court also abused its discretion by relying on its personal belief that "everybody knows" identifications by acquaintances are less likely to be inaccurate. The second expert directly contradicted this belief by concluding that it is not necessarily true that acquaintance identifications are accurate. The trial court also exercised improper judicial protectionism for the State by fearing that the expert would voice his opinion on the credibility of witnesses when the second expert specifically stated he would not do this."

Since the eyewitness identification was central to the State's case, the improper exclusion of expert testimony could have contributed to defendant's conviction and thus was reversible error. The conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

People v. Luna, 2013 IL App (1st) 072253 (No. 1-07-2253, 4/25/13)

1. The admission of expert testimony in Illinois is governed by the general-acceptance test of **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923).Under **Frye**, scientific evidence is admissible only if the methodology or scientific opinion upon which the opinion is based is sufficiently established to have gained

general acceptance in the particular field in which it belongs. "General acceptance" does not mean universal acceptance.

A court may determine the general acceptance of a scientific principle or methodology in either of two ways: (1) based on the results of a **Frye** hearing; or (2) by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject.

2. Friction ridge analysis or ACE-V is the method used to match a known print to a latent print. ACE-V signifies the steps in the process: analysis, comparison, evaluation, and verification. The trial court properly took judicial notice that ACE-V is commonly accepted within the scientific community.

Objections to the ACE-V methodology have been uniformly rejected by state and federal appellate courts. ACE-V was criticized in a 2009 report by the National Research Council of the National Academy of Sciences, but those critiques questioning underlying data and an expert's application of generally-accepted techniques go to the weight of the evidence, not its admissibility. The forum for these criticisms is a trial, not a **Frye** admissibility hearing.

The report recognizes that friction ridge analysis can be a valuable tool to identify the guilty and exclude the innocent and does not undermine the otherwise uniform body of precedent rejecting admissibility challenges to print evidence. While the report represents the views of a segment of the scientific community, it does not represent the views of the entire relevant scientific community, which includes forensic practitioners. General acceptance does not require that the methodology be accepted by unanimity, consensus, or even a majority of experts.

(Defendant was represented by Supervisor Kathleen Flynn, Chicago.)

People v. Prather, 2012 IL App (2d) 111104 (No. 2-11-1104, 10/29/12)

1. Evidence that is offered to show a person's knowledge or awareness of a circumstance and not to establish the truth of the circumstance is not hearsay.

The testimony of the complaining witness that she used a home pregnancy test and showed the positive result to the defendant was not hearsay where it was offered only to prove defendant's awareness of her pregnancy, and not that she was in fact pregnant. Because the evidence was being offered to prove only notice or knowledge, not a substantive fact, the State was not required to provide any foundation establishing that the home pregnancy test was in working order and used properly.

2. The test of **Frye v. United States**, 293 F. 1013 (1923), which governs the admissibility of scientific testimony, is codified by Illinois Rule of Evidence 702. Rule 702 states: "Where an expert witness testifies to an opinion based on a new or novel scientific principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs."

This rule only refers to expert testimony, but has also been applied to technologies used by non-experts. The **Frye** standard has two parts: general acceptance and new or novel. A court need not determine if the scientific principle has general acceptance unless it is new or novel.

A trial court's determination of whether a **Frye** hearing is necessary is reviewed *de novo*. In conducting *de novo* review, the reviewing court may consider not only the trial court record but also, where appropriate, sources outside the record, including legal and scientific articles, as well as court opinions from other jurisdictions.

No **Frye** hearing was required to establish the admissibility of evidence of a home pregnancy test because the technology of a home pregnancy test is not new or novel. The basic principle involved has been known since the 1920s and the methodologies involved were developed in the 1970s. The tests have been in wide use for over 30 years.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Robinson, 2013 IL App (1st) 102476 (No. 1-10-2476, 12/2/13)

At defendant's trial for first degree murder, a firearm examiner testified that cartridge cases found

at the scene of the offense had been fired from a weapon used in a robbery that occurred several months earlier. One of the complainants in the armed robbery identified defendant as the perpetrator of that offense.

Defendant contended that tool mark and firearm identification analysis is not generally accepted in the relevant scientific community, and that the expert testimony should therefore have been excluded under **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923). Alternatively, defendant argued that the court should have conducted a **Frye** hearing to determine whether microscopic firearm comparison is a generally accepted technique within the relevant scientific community.

1. The admission of scientific testimony in Illinois is governed by the **Frye** test. Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field to which it belongs. The **Frye** standard applies only to scientific methodology that is "new" or "novel."

General acceptance of a methodology does not require that acceptance be unanimous, by consensus, or even by a majority of experts. In addition, the **Frye** analysis focuses on the general acceptance of methodology, not the particular conclusion reached by a particular examiner or the application of the methodology in a particular case. The trial court's ruling that evidence is admissible under **Frye** is reviewed *de novo*.

2. The **Frye** standard applies only to scientific evidence. Here, the trial court denied defendant's request for a **Frye** hearing on the ground that firearm comparison is performed visually and is not a scientific process. The Appellate Court rejected this holding, noting that neither party suggested that tool mark and firearm identification materials are understandable in the absence of expert testimony. In addition, numerous courts have held that tool mark and firearm analysis involve scientific or technical evidence.

Similarly, **Frye** applies only if the scientific principle is "new" or "novel." A scientific technique is new or novel if it is original or does not resemble something already known or used. Without deciding whether tool and firearm analysis is new or novel, the court assumed for the sake of its opinion that **Frye** applies.

3. A court may determine whether a scientific principle is generally accepted either by holding a **Frye** hearing or by taking judicial notice of unequivocal and undisputed judicial decisions and technical writings. Because the trial court denied defendant's motion for a **Frye** hearing, the court considered the issue as whether general acceptance was demonstrated by judicial decisions and technical writings.

Under Illinois precedent, to decide a **Frye** question on this basis the court must examine the unanimity or division of precedent in Illinois decisions and the unanimity or division of opinion in other jurisdictions. Special emphasis is placed on whether the issue has been thoroughly litigated in the decisions which are examined. In addition, the court may consider the unanimity or division of opinion in the scientific and technical literature on the subject.

Generally, expert testimony concerning firearms has been held to be admissible in Illinois courts. The cases which the defense cited involve not the general question of whether such testimony is admissible, but the more limited question whether the subjective nature of the process allows an expert to testify that beyond a doubt a bullet was fired from a particular weapon. The court also noted that the case law from other states follows the same pattern. Furthermore, although scholarly materials cited by the defendant have raised criticisms of the methodology used here, no court has found those criticisms sufficient to conclude that the methodology is not generally accepted. The court also noted that the trial court precluded the experts from testifying that their opinions were "within a reasonable degree of scientific certainty."

The court concluded that under these circumstances, the trial judge did not err by ruling that the firearm analysis testimony was admissible. Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Melinda Palacio, Chicago.)

People v. Shanklin, 2014 IL App (1st) 120084 (No. 1-12-0084, 1/31/14)

In Illinois, the admission of expert testimony is governed by the **Frye** standard, which holds that scientific evidence is admissible only if the opinion is based on a methodology or scientific principle that

has gained general acceptance in the particular field to which it belongs. General acceptance does not mean universal acceptance. Instead, it is sufficient that the underlying method is reasonably relied upon by experts in the relevant field.

The **Frye** test only applies to novel scientific methodologies. A method is considered novel if it is "original or striking," "does not resemble something formerly known or used," or the issue of its general acceptance in the relevant community remains unsettled.

As part of his motion to suppress statements, defendant sought admission of an expert's opinion on defendant's suggestibility to confess based on the Gudjonsson Suggestibility Scale (GSS), a test designed to identify people who are less resistant to interrogation tactics. The court held a **Frye** hearing and determined that the GSS was not generally accepted in the forensic psychological community and barred the consideration of such evidence at the motion to suppress.

At the hearing, the defense experts testified that the GSS has been around since the mid-1980s and is generally accepted in the relevant field of forensic psychology. They also testified that the GSS has been widely criticized, is not known to many psychologists, and may not be currently used in forensic psychological examinations. The State's expert criticized the GSS as being inaccurate, and stated that she never uses the test because it is not clinically relevant.

On appeal, defendant argued that the trial court erred in conducting a **Frye** hearing since the GSS is not novel. The Appellate Court disagreed holding that although the GSS has been in existence for almost 30 years, the evidence at the **Frye** hearing showed that its acceptance in the field of forensic psychology has been unsettled and thus it remained a novel scientific methodology.

The court also held that based on the evidence adduced at the **Frye** hearing, which showed that the GSS has many problems and has been widely criticized, the defendant failed to show that the GSS is reasonably relied upon by forensic psychologists when examining pretrial detainees with an extensive criminal history to determine whether they understood their Miranda rights and whether their statements were voluntary.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Smith, 2015 IL App (1st) 122306 (No. 1-12-2306, modified upon denial of rehearing 11/13/15)

For breathalyzer test results to be admissible, the State must show, among other things, that the breathalyzer machine passed an accuracy test within 62 days of the breath test.

Here the State introduced a letter and report from the Illinois State Police stating that the breathalyzer machine used to test defendant's breath for alcohol had been tested for accuracy within 62 days of defendant's test. The report provided numerical results of the testing, but did not provide any interpretation of those results and did not state whether the machine had passed the accuracy tests.

The court held that the State failed to properly establish that the breathalyzer machine was certified as accurate within 62 days of defendant's test. The letter and report contained raw data but no interpretation of that data, leaving the court with no basis to discern whether the machine performed accurately. In the absence of such evidence, the breathalyzer test results (showing that defendant's alcohol concentration exceeded .08) were improperly admitted.

The court reversed defendant's conviction for driving with an alcohol concentration of .08 or more and remanded for a new trial.

(Defendant was represented by Assistant Defender Mike Gomez, Chicago.)

People v. Tyler, 2012 IL App (3d) 100970 (No. 3-10-0970, 8/23/12)

Under Illinois law, evidence of bloodhound tracking is inherently unreliable and so prejudicial that it is not to be admitted into evidence. (See **People v. Cruz**, 162 Ill. 2d 314, 643 N.E.2d 636 (1994)). Here, however, the erroneous admission of bloodhound evidence did not constitute plain error because the evidence of guilt and innocence was not closely balanced and the admission of the bloodhound evidence did not tip

the scales of justice against the defendant.

In dissent, Justice Holdridge concluded that the evidence was closely balanced and that the erroneous admission of the bloodhound evidence created an unacceptable risk that the verdict was affected. Justice Holdridge noted that there was no physical evidence showing that defendant was involved in the robbery, defendant did not confess, two co-defendants testified without implicating the defendant, and one of the co-defendants specifically denied that defendant had been involved. The dissent also noted that bloodhound tracking evidence is extremely prejudicial and that the prosecutor compounded that prejudice by eliciting extensive testimony about the dog's training and abilities. In addition, during closing arguments the prosecutor repeatedly stressed that the bloodhound tracked a scent from the scene of the robbery directly to the house where the defendant was found. Under these circumstances, Justice Holdridge would have reversed the conviction and remanded the cause for a new trial.

(Defendant was represented by Assistant Defender Robin Robertson, Chicago.)

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§19-27(b)
Finger and Shoe Prints

People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911) First case to recognize admissibility of fingerprint comparison.

People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208 (1968) Fingerprint evidence may be admitted on the testimony of an expert. Qualification of an expert rests largely within the discretion of the trial court.

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) The Supreme Court upheld the use of expert testimony concerning the "superglue" technique of developing latent fingerprints. Two expert witnesses established that the superglue technique is routinely used by the Chicago police department, that those working in the field of print examination and comparison consider the technique reliable, and that the technique is used in other jurisdictions.

People v. Hanson, 31 Ill.2d 31, 198 N.E.2d 815 (1964) An expert witness was properly allowed to testify about his examination of a shoeprint found at the crime scene and the defendant's shoe, and to voice the opinion that he could find no dissimilarities between the print and the shoe.

People v. Campbell, 146 Ill.2d 363, 586 N.E.2d 1261 (1992) The Supreme Court rejected the defendant's contention that shoeprint comparison evidence is unreliable as a matter of law, and found that such evidence was properly admitted in this case.

People v. Miller, 20 Ill.App.3d 1061, 313 N.E.2d 660 (4th Dist. 1974) An expert compared fingerprints from the crime scene with a 10-year-old fingerprint card bearing the same name as defendant. Because there was no showing that the person of the name on the card was in fact the defendant, the expert had no basis upon which to identify the prints used for the comparison. Thus, it was error to allow the expert's testimony that the prints at the scene were those of the defendant. Reversed.

People v. Eagle, 76 Ill.App.3d 427, 395 N.E.2d 155 (1st Dist. 1979) Proper foundation was laid for introduction of expert testimony that fingerprints found on can at crime scene were the same as print on defendant's fingerprint card. The State has no obligation to preserve objects from which fingerprints were lifted.

People v. Ferguson, 172 Ill.App.3d 1, 526 N.E.2d 525 (2d Dist. 1988) Although an expert may testify about a comparison of a shoeprint with the shoes suspected of making the print, he may not give identification testimony based on an analysis of the shoeprint and the "wear pattern" of defendant's shoes. The theory that "wear patterns" on shoes are unique to the individual wearer is not generally accepted within the scientific community.

Cumulative Digest Case Summaries **§19-27(b)**

People v. Luna, 2013 IL App (1st) 072253 (No. 1-07-2253, 4/25/13)

1. The admission of expert testimony in Illinois is governed by the general-acceptance test of **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923).Under **Frye**, scientific evidence is admissible only if the methodology or scientific opinion upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs. "General acceptance" does not mean universal acceptance.

A court may determine the general acceptance of a scientific principle or methodology in either of two ways: (1) based on the results of a **Frye** hearing; or (2) by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject.

2. Friction ridge analysis or ACE-V is the method used to match a known print to a latent print. ACE-V signifies the steps in the process: analysis, comparison, evaluation, and verification. The trial court properly took judicial notice that ACE-V is commonly accepted within the scientific community.

Objections to the ACE-V methodology have been uniformly rejected by state and federal appellate courts. ACE-V was criticized in a 2009 report by the National Research Council of the National Academy of Sciences, but those critiques questioning underlying data and an expert's application of generally-accepted techniques go to the weight of the evidence, not its admissibility. The forum for these criticisms is a trial, not a **Frye** admissibility hearing.

The report recognizes that friction ridge analysis can be a valuable tool to identify the guilty and exclude the innocent and does not undermine the otherwise uniform body of precedent rejecting admissibility challenges to print evidence. While the report represents the views of a segment of the scientific community, it does not represent the views of the entire relevant scientific community, which includes forensic practitioners. General acceptance does not require that the methodology be accepted by unanimity, consensus, or even a majority of experts.

(Defendant was represented by Supervisor Kathleen Flynn, Chicago.)

People v. Mitchell, 2011 IL App (1st) 083143 (No. 1-08-3143, 8/5/11)

Under **People v. Safford**, 392 Ill.App.3d 212, 910 N.E.2d 143 (1st Dist. 2009), the trial court errs by admitting testimony of a fingerprint identification where the identifying expert fails to testify concerning the process by which he or she arrived at the conclusion that a latent print matched the defendant's known sample. **Safford** concluded that as part of the foundation for admitting fingerprint evidence, the expert's explanation of the process used to make the comparison must be adequate to permit the identification to be scrutinized.

Safford did not apply where the fingerprint examiner explained the procedure by which she concluded that two latent prints matched the defendant's known prints. The examiner testified that she did a side-by-side comparison of the latent prints on the defendant's sample, looking for "ridge-type, pattern flow, and things such as this." The examiner stated that she "quickly" found thirteen points of comparison between the latent prints and defendant's known sample, and she demonstrated five specific points of comparison to the jury. The court concluded that under these circumstances, the comparison was sufficiently explained to allow the defense to challenge the identification. Thus, there was a sufficient foundation to admit the fingerprint testimony.

The court also noted that unlike **Safford,** the fingerprint evidence here did not provide direct evidence that defendant had committed the crime with which he was charged.

Defendant's conviction for first degree murder was affirmed.

People v. Negron, 2012 IL App (1st) 101194 (No. 1-10-1194, modified 1/31/13)

People v. Safford, 392 Ill. App. 3d 212, 910 N.E.2d 143 (1st Dist. 2009), held that an adequate foundation was not laid for the admission of the opinion of a expert witness regarding a fingerprint identification where the expert testified to his conclusion, but provided no testimony as to how he arrived at his conclusion, and was unable to describe what he saw in common between the latent print and the known print.

Characterizing **Safford** as an "outlier case," the Appellate Court concluded that the State had laid an adequate foundation for the testimony of its expert that defendant's print matched the latent print at issue. The expert generally explained the process of fingerprint comparison and went into detail about how he performed the comparison. Although the expert was unable to state what points of similarity he found and how many points of similarity he found, "a technical number of points of similarities is not required in order for such testimony to be admissible." The number of points of similarity affects only the weight of the evidence, not its admissibility.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Safford, 392 Ill.App.3d 212, 910 N.E.2d 143 (1st Dist. 2009)

The defendant's convictions for aggravated battery with a firearm and attempt murder were reversed, and a new trial was ordered, because a fingerprint examiner was allowed to testify to his conclusion that a print found at the scene of the crime belonged to the defendant without first offering an adequate foundation of the underlying evidentiary basis for the conclusion.

Crucial to the State's case was the testimony of Brent Cutro, a forensic scientist with 24 years of experience, who testified that a latent fingerprint belonged to the defendant. On direct examination, Cutro explained that in examining fingerprints he generally looks at three levels of detail of each print. On cross-examination, Cutro admitted that he did not note points of comparison, stating that he is among a group of experts that do not base their ultimate opinions on points of comparison. Cutro also stated that he does not make notes concerning his visual examination of prints he is comparing; he merely opines whether there is or is not a match.

1. At trial and on appeal, the defendant argued that it was improper to allow Cutro to testify only to his "conclusion," without first offering an adequate foundation of the underlying evidentiary basis for the conclusion. A majority of the Appellate Court agreed, noting that admitting expert testimony without a showing of the requisite foundation severely limits effective cross-examination and "so curtails the ability of the defendant to challenge the conclusion drawn by the expert that it leads to a suggestion of infallibility." The court emphasized that it was not overruling previous Illinois authority holding that there is no minimum number of points of similarity needed to establish a reliable fingerprint identification:

> [A]lthough the scientific community is divided as to how many points of comparison are needed to make a positive identification, the proffered expert must be subject to challenge on the analysis he undertook to arrive at his conclusion, regardless of the method he followed. Otherwise, the basis for making a positive identification between the latent and exemplar prints is not subject to scrutiny.
>
> Fingerprint evidence is extremely persuasive. A jury may be so swayed by such evidence that strong alibi witnesses have little chance of being found credible when fingerprint evidence points to the defendant being present at the scene of the crime. The persuasiveness of fingerprint evidence reinforces the need to require a proper foundation to establish its

admissibility. As our supreme court stated in the context of addressing whether facts and opinions in reports on which a psychiatrist relied in reaching his diagnosis could be disclosed to the jury:

> "Absent a full explanation of the expert's reasons, including underlying facts and opinions, the jury has no way of evaluating the expert's testimony and is therefore, faced with a 'meaningless conclusion' by the witness." **People v. Anderson**, 113 Ill.2d 1, 11, 495 N.E.2d 485 (1986).

2. Justice Wolfson, in dissent, stated that although there was "a disquieting paucity of detail to support Examiner Cutro's opinion," the lack of more substantial foundational evidence "went to the weight of Cutro's opinions, not their admissibility." Justice Wolfson added that although he had "no desire to denigrate the importance of cross-examination . . . I find no authority that supports the proposition that the lack of detail we find here is devastating enough to bar a qualified and experienced fingerprint examiner's opinions."

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

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§19-27(c)
Polygraph

U.S. v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) 1. The right to present relevant evidence is not violated by a per se ban of polygraph evidence in military justice proceedings. The ban serves the legitimate governmental interest of insuring that the trier of fact in a criminal trial considers only reliable evidence, and is not "arbitrary" or "disproportionate."

A plurality of the court found that a per se prohibition of polygraph evidence serves two additional governmental interests: (1) preserving the jury's function of making credibility determinations (i.e., preventing the trier of fact from being unduly persuaded by polygraph evidence), and (2) avoiding litigation over collateral issues such as the appropriateness of the test procedures, the qualifications of the examiner, the validity of interpretation of test results, and whether the examinee was able to use countermeasures to distort the polygraph readings.

2. The court rejected defense arguments that Rock v. Arkansas, Washington v. Texas and Chambers v. Mississippi, all of which struck down per se bans on certain types of evidence, require admission of polygraph evidence when offered by a criminal defendant. In those cases, the per se exclusions "significantly undermined fundamental elements of the accused's defense" by excluding factual evidence or testimony about the case itself. No fundamental element of the defense is undermined by exclusion of polygraph evidence - the respondent is merely barred from introducing an expert's opinion to boost his own credibility.

3. In a footnote, the court observed that Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which superseded Frye v. U.S., 293 F. 1013 (C.A.D.C. 1923) concerning the admissibility of expert testimony, was not intended to foreclose per se exclusionary rules for certain types of expert or scientific evidence.

People v Baynes, 88 Ill.2d 225, 430 N.E.2d 1070 (1981) The results of a polygraph test are not admissible in evidence, even by stipulation. The process of polygraph examinations "has not reached a level of sophistication that makes it generally more probative than prejudicial." See also, **People v. Szabo**, 94 Ill.2d

327, 447 N.E.2d 193 (1983) (not admissible at sentencing); **People v. Sanchez**, 169 Ill.2d 472, 662 N.E.2d 1199 (1996) (not admissible even under the relaxed rules of admissibility in effect at death penalty sentencing hearings); **Kaske v. Rockford**, 96 Ill.2d 298, 450 N.E.2d 314 (1983) (not admissible at administrative hearings); **People v. Ackerman**, 132 Ill.App.2d 251, 269 N.E.2d 737 (2d Dist. 1971) (not admissible at sentencing); **People v. Reese**, 90 Ill.App.3d 284, 412 N.E.2d 1179 (3d Dist. 1980) (not admissible at a juvenile transfer hearing); **People v. Thomas**, 123 Ill.App.3d 857, 463 N.E.2d 832 (1st Dist. 1984) (prosecutor may not refer to defendant's taking a polygraph test).

People v. Jefferson, 184 Ill.2d 486, 705 N.E.2d 56 (1998) 1. Under Illinois law, evidence concerning polygraph examinations and results is generally excluded from criminal trials because it is considered unreliable and likely to mislead the trier of fact. In **People v. Triplett**, 37 Ill.2d 234, 226 N.E.2d 30 (1967), however, the court suggested that polygraph evidence might be admissible to determine whether a confession is voluntary, because in that circumstance it is the mere fact of the examination, and not its result, that is relevant.

Where defendant claimed that her inculpatory statement was prompted by promises of leniency, the fact that she agreed to take a polygraph examination was admissible to explain the circumstances surrounding the defendant's inculpatory statement. "Having testified that the statement was made in response to improper inducements by the police, the defendant cannot now be heard to complain about the introduction of rebuttal evidence regarding the circumstances that actually led her to make the statement."

2. The prosecution did not violate the general rule against polygraph evidence although, before the defendant testified about her reasons for making the inculpatory statement, it presented testimony that an appointment had been made for defendant to see an unspecified "technician." Although the "technician" was in fact a polygraph examiner, the reference was vague and would not have led jurors to speculate that a polygraph examination was involved. See also **People v. Montgomery**, 302 Ill.App.3d 1, 704 N.E.2d 816 (1st Dist. 1998)(the trial court properly admitted evidence that defendant confessed after being told that in the polygraph examiner's opinion, defendant was not being completely truthful; the evidence was admitted only at the hearing on a motion to suppress the statement as involuntary).

People v. Gard, 158 Ill.2d 191, 632 N.E.2d 1026 (1994) 1. The Supreme Court extended several of its prior rulings, which prohibit evidence that a criminal defendant has taken a polygraph examination, to cases in which such examinations are taken by witnesses. Whether the defendant or witnesses are involved, polygraph evidence is inherently unreliable and susceptible to misuse by jurors, who are likely to believe it to be especially probative. Thus, admission of evidence that a witness took a polygraph is reversible error even where no defense objection is raised and even where the defense solicits the testimony.

2. The Court also held that the introduction of the polygraph evidence was plain error even though the evidence was not close. The plain error rule applies in two situations: where the evidence is closely balanced and where the error threatens the integrity and reputation of the judicial process. The admission of polygraph evidence "imping[es] upon the integrity of our judicial system" and "compromis[es] the integrity and tarnish[es] the reputation of the judicial process," and justifies reversal of the conviction despite overwhelming evidence of guilt.

People v. Melock, 149 Ill.2d 423, 599 N.E.2d 941 (1992) The defendant's due process right to present a defense, which includes the right to explain the circumstances of his confession so that the jurors may weigh its reliability, provides an exception to the general rule barring polygraph evidence where defendant claimed that he confessed because he was falsely told by the polygraph examiner that his examination, which was inconclusive, had established his guilt.

People v. Jackson, 202 Ill.2d 361, 781 N.E.2d 278 (2002) 1. The Illinois prohibition of polygraph evidence applies at bench as well as jury trials.

2. **People v. Jefferson**, 184 Ill.2d 486, 705 N.E.2d 56 (1998) recognizes a limited exception to the rule against polygraph evidence where such evidence is admitted to rebut a defendant's claim that his statement was the result of threats and false promises from the police or prosecution. The Jefferson exception does not apply, however, where the State introduces such evidence before any claim of false promises or threats are raised.

People v. McClellan, 216 Ill.App.3d 1007, 576 N.E.2d 481 (4th Dist. 1991) After the defendant testified that he changed his story during an "interview" because he decided he wanted to "clear" the situation with police, the State introduced evidence that the "interview" had actually been a polygraph examination and that the defendant changed his story in response to the examiner's statement that defendant was not telling the truth. Although the jury was instructed that the evidence was admissible only to show why the defendant had changed his story (and not to suggest the results of the polygraph), the jury could easily infer that the test showed that defendant was lying and would likely believe that such evidence was conclusive of guilt. Thus, the rule prohibiting the admission of polygraph evidence was violated.

People v. Mason, 274 Ill.App.3d 715, 653 N.E.2d 1371 (1st Dist. 1995) The State violated at least the spirit of the trial court's order excluding polygraph evidence where it introduced testimony that defendant went to the Chicago Police Crime laboratory to talk to a laboratory "technician," that another witness talked to the same "technician," that defendant then talked to the "technician" a second time, and that defendant changed his statements about the offense after the "technician" gave him the "the results of those conversations."

Although the words "polygraph" or "lie detector" were never used, the testimony "successfully signaled to the jury that the defendant had failed a polygraph examination." See also, **People v. Daniels**, 272 Ill.App.3d 325, 650 N.E.2d 224 (1st Dist. 1995) (reversible error occurred when the State presented evidence from which the jury could have inferred that defendant failed a polygraph examination; although the State did not explicitly introduce the results of defendant's polygraph, "[t]he jury would have to [have been] off on some other spinning planet" to avoid inferring that defendant had failed; defendant did not invite the polygraph evidence by questioning the detective about whether the police had coerced defendant while she was in custody).

People v. Finley, 312 Ill.App.3d 892, 728 N.E.2d 101 (4th Dist. 2000) 1. Evidence of polygraph results is generally excluded both because polygraphs are not sufficiently reliable to establish guilt or innocence and because the quasi-scientific nature of the test may cause the trier of fact to give it undue weight. It is also improper to introduce the results of a polygraph examination of a witness other than the defendant or to show that the defendant refused to take a polygraph. However, the fact that a polygraph examination was taken may be admissible, despite the general rule of exclusion, where necessary to explain the circumstances under which a defendant made a statement.

2. The trial court did not abuse its discretion by denying a mistrial after a police officer testified that defendant refused to take a polygraph. There was no showing the officer acted in bad faith, the testimony was stricken and appropriate instructions given, and the defendant was not substantially prejudiced. See also, **People v. Eaton**, 307 Ill.App.3d 397, 718 N.E.2d 1020 (1st Dist. 1999) (the State may not introduce evidence that a criminal defendant refused to take a polygraph; "[t]hat which may not be accomplished directly by evidence of polygraph test results may not be accomplished indirectly by references to whether a defendant sought, declined, or was offered a polygraph test").

People v. Rosemond, 339 Ill.App.3d 51, 790 N.E.2d 416 (1st Dist. 2003) 1. Polygraph evidence is generally inadmissible as evidence of guilt or innocence. However, where the defendant claims that his inculpatory statement was coerced, the State may present polygraph evidence to explain the circumstances surrounding the statement.

2. The defense did not make a sufficient claim of coercion to trigger the exception to the general rule

prohibiting polygraph evidence. Although defendant's father testified that during his son's interrogation a male officer asked defendant about his standing in a gang, "popped his fingers in defendant's face" when defendant denied being in a gang, and stated that he hated the Gangster Disciples, such evidence did not raise a claim of coercion sufficient to "open the door" to polygraph evidence.

The court also stressed that most of the evidence which allegedly raised a claim of coercion was presented not by the defense, but elicited by the State during cross-examination of defense witnesses. "The State is not entitled to erect a strawman of coercion and then burn it with the fire of polygraph evidence."

The court also rejected the argument that a claim of coercion was raised by a defense witness's testimony about the duration of the interrogation. The evidence showed that the interrogation was interspersed with breaks, and there was uncontested testimony concerning defendant's favorable treatment while at the police station. Under these circumstances, "there is little basis to conclude that defendant's statement resulted from the duration of his interrogation."

Cumulative Digest Case Summaries **§19-27(c)**

People v. Logan, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-3582, 6/27/11)

A post-conviction petitioner claimed that appellate counsel was ineffective for failing to argue that polygraph evidence was improperly admitted at trial. The Appellate Court found that the evidence was properly admitted, and that appellate counsel was therefore not ineffective.

1. For two reasons, evidence concerning polygraph examinations is generally excluded from evidence. First, the evidence is not sufficiently reliable to establish guilt or innocence. Second, the quasi-scientific nature of polygraph examinations may lead the trier of fact to give such evidence undue weight despite its lack of reliability.

An exception to the general rule permits the admission of polygraph evidence to provide an alternative explanation for an inculpatory statement which the declarant claims was coerced. Thus, where a witness claims that a statement was coerced by police, the State may show that the statement was made after the witness was scheduled for or took a polygraph examination.

However, the State may not introduce polygraph evidence in anticipation that a witness will claim that a statement was coerced; polygraph evidence may be used as a "shield" against a claim of police coercion, but not affirmatively as a "sword."

2. A witness initially denied that defendant was involved in the offense, but subsequently implicated defendant in a statement and in her grand jury testimony. At trial, she denied that defendant had been involved. When questioned about her prior inconsistent statements, she claimed that police had coerced the inculpatory statement and testimony by threatening to charge her with first degree murder.

The Appellate Court concluded that the trial court properly allowed the State to introduce evidence that the inculpatory statement and testimony occurred after the witness took two polygraphs and was confronted with the results. The court noted that the State did not initiate the discussion of the alleged coercion, but merely followed up after the witness alleged coercion. Furthermore, the evidence was admitted only to rebut the claim of coercion; the jury was not informed of the results of the examination, was given a limiting instruction, and was cautioned that it was not to speculate about what the polygraph showed.

People v. Matthews, 2012 IL App (1st) 102540 (No. 1-10-2540, 10/10/12)

1. As a general rule, polygraph evidence is inadmissible because polygraph test results are not sufficiently reliable to use as proof of guilt or innocence, and because jurors may give polygraph test results undue weight due to their quasi-scientific nature, despite their inherent unreliability.

An exception to this rule exists where a defendant or a witness claims that the statement he made to the police was coerced or induced by promises made by the authorities. Evidence that the defendant or witness took a polygraph exam is admissible to rebut those claims by providing an alternative explanation

for the making of the statement.

This exception does not apply where the claim of coercion or inducement is not made by the declarant of the statement, but by another witness. In that case, there is no need for a surrogate rebuttal witness in the form of polygraph evidence, because an actual rebuttal witness, the declarant, is available to testify. The jury can then perform its function of deciding which witness to believe. Introducing polygraph evidence in that circumstance does not rebut the claim of coercion or inducement, and infringes on the function of the jury by giving more credibility to the testimony of the witness who denies coercion or inducement.

The trial court abused its discretion when it admitted evidence that a prosecution witness took a polygraph exam before making a statement inculpating defendant in a murder, to rebut the testimony of a defense witness that the prosecution witness told her that her statement was coerced by police threats that she would be charged with the murder. The polygraph evidence supported the credibility of the prosecution witness and invaded the province of the jury to resolve conflicts in the evidence and to determine the weight to be given testimony.

2. As a general rule, a witness cannot be rehabilitated by the admission of statements consistent with his testimony. An exception exists where there is a claim that the witness recently fabricated the testimony or the witness has a motive to give false testimony, but only if the prior consistent statements were made before the time of the alleged fabrication or before the motive to fabricate arose.

The State introduced the written statement and grand jury testimony of its witness that were consistent with the witness's trial testimony. Although a charge was made that the witness had a motive to fabricate, the prior statements were not made before the motive to fabricate arose, and therefore should not have been admitted.

The admission of this evidence was plain error because the evidence was closely balanced. Much of the State's case relied on the testimony of this witness that the defendant admitted to killing the murder victim. While defendant's DNA was found under the victim's fingernails and her fingerprints were found on a metal tin next to a night table, this evidence was consistent with defendant's relationship with the victim. No other physical evidence connected defendant to the offense.

The Appellate Court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

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§19-27(d)
Hypnotically Enhanced Evidence

Rock v. Arkansas, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) A per se rule which excludes all hypnotically refreshed testimony "infringes impermissibly on the right of a defendant to testify in his or her own behalf."

People v. Zayas, 131 Ill.2d 284, 546 N.E.2d 513 (1989) 1. The Supreme Court discussed the problems with hypnotically-enhanced testimony and the rules adopted by other states, and concluded:

> "[B]ecause its reliability is suspect, and it is not amenable to verification due to the fact that even experts cannot agree upon its effectiveness as a memory-restorative device, a witness' hypnotically induced testimony, other than that of a defendant [see, **Rock v. Arkansas**, 483 U.S. 44 (1987)], is not admissible in Illinois courts. The fact that information elicited through hypnosis can be corroborated, moreover, does not permit a court to admit it as evidence. . . .

"[W]e think this rule will enhance rather than hinder [the truth-finding] process. The probative value of any hypnotically enhanced testimony is questionable since most scientists doubt its accuracy."

2. The Court also said, "We understand that other criminal cases in Illinois have involved the use of hypnosis. This ruling, however, will not affect those cases that have been finally determined on direct appeal." See also, **People v. Smrekar**, 193 Ill.App.3d 534, 550 N.E.2d 3 (4th Dist. 1990) (**Zayas** is not applicable to a case on post-conviction review).

People v. Wilson, 116 Ill.2d 29, 506 N.E.2d 571 (1987) A witness who undergoes hypnosis is allowed to testify as to his prehypnotic recollection. The proponent of the testimony should establish the nature and extent of the prehypnotic recall, and the parties should be permitted to present expert testimony to explain to the trier of fact the potential effects of hypnosis. "This approach, which essentially corresponds to that adopted by a number of other States . . . effectively meets the problems associated with hypnosis and its potential influences on a witness' testimony regarding his prehypnotic recollection."

People v. Sutton, 233 Ill.2d 89, 908 N.E.2d 50 (2009) 1. Under **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987) and **People v. Zayas**, 131 Ill.2d 284, 546 N.E.2d 513 (1989), hypnotically induced testimony of a witness other than the defendant is inadmissible. However, testimony about a previously hypnotized witness's pre-hypnotic recollection is admissible if the proponent of the evidence establishes that the testimony is based solely on the independent, pre-hypnotic recall.

2. Although Wilson and **Zayas** contemplate an evidentiary hearing at which the proponent of such testimony attempts to show that it is based on pre-hypnotic recall, an evidentiary hearing was unnecessary on remand where the extent of the witness's pre-hypnotic testimony was undisputed and the record clearly showed that the testimony was influenced by hypnosis. Furthermore, expert testimony was not necessary to resolve the issue of the admissibility of the witness's post-hypnotic identification of the defendant, because it was clear from the record that the identification was possible only through hypnosis.

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§19-27(e)
Ballistics & Firearms

People v. Fisher, 340 Ill. 216, 172 N.E. 743 (1930) Although an expert witness may testify concerning ballistics testing, such testimony by a witness other than an expert is improper.

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) A State expert witness was properly allowed to testify concerning the results of a "neutron-activation analysis" he conducted on bullets recovered from the murder victim and cartridges found in defendant's home. The expert testified that based on the analysis of trace elements, he believed that the bullets recovered from the victim and cartridges found in defendant's home would commonly be found within the same box of cartridges or from another box of the same type that had been manufactured or packaged on or about the same day.

The Supreme Court held that the "neutron-activation analysis" is a "reliable forensic-science technique," and that the test results were relevant to establish as more probable that the bullets from the murder scene were from the same box as the cartridges found in defendant's home.

People v. Singletary, 73 Ill.App.3d 239, 391 N.E.2d 440 (1st Dist. 1979) Expert who examined gun and fatal bullet was properly allowed to testify that the bullet might have been fired from that gun. This testimony was not objectionable on the ground that it was conjecture and speculation.

People v. Navarro, 2015 IL App (1st) 131550 (No. 1-13-1550, 9/8/15)

1. The Integrated Ballistic Identification System (IBIS) is a nationwide computerized database that compares ballistic signatures on fired bullets and cartridge casings. Under 725 ILCS 5/116-3(a)(1), a defendant may request IBIS testing on evidence secured for trial that was not subject to IBIS testing. To present a *prima facie* case for IBIS testing, the defendant must show that identity was the issue at trial and the evidence has been subjected to a proper chain of custody. 725 ILCS 5/116-3(b).

The court should permit testing if it "employs a scientific method generally accepted within the relevant scientific community," and "the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate" him. 725 ILCS 5/116-3(c). Evidence is materially relevant to a claim of actual innocence if it tends to significantly advance that claim.

2. At trial, three eyewitnesses testified that they saw defendant fire three shots in the direction of the victim. An officer testified that he chased defendant and saw him holding a gun. During the chase, the officer briefly lost sight of defendant before he arrested him. When he was arrested, defendant did not possess a gun. Other officers recovered a loaded gun from a yard near where defendant had been running. Three spent shells recovered from the scene were connected through ballistics evidence to the recovered gun.

Defendant argued at trial that he had been mistakenly identified. He was convicted of first degree murder and eventually filed a *pro se* motion for ballistics testing. The trial court denied his request and defendant appealed, alleging that an IBIS search could show that the gun linked to him was not the murder weapon and therefore produce material evidence of his actual innocence.

3. The Appellate Court affirmed the denial of defendant's motion, holding that an IBIS search could not produce evidence that would materially advance a claim of actual innocence. At trial, the State produced overwhelming evidence of defendant's guilt, including three eyewitnesses who saw defendant fire the fatal shots, and an officer who saw defendant run from the scene with a gun. None of this testimony hinged on the ballistics evidence the State presented at trial linking the recovered gun to the shooting. Accordingly, the results of any IBIS testimony would be irrelevant.

(Defendant was represented by Assistant Defender Mike Orenstein, Chicago.)

People v. Robinson, 2013 IL App (1st) 102476 (No. 1-10-2476, 12/2/13)

At defendant's trial for first degree murder, a firearm examiner testified that cartridge cases found at the scene of the offense had been fired from a weapon used in a robbery that occurred several months earlier. One of the complainants in the armed robbery identified defendant as the perpetrator of that offense.

Defendant contended that tool mark and firearm identification analysis is not generally accepted in the relevant scientific community, and that the expert testimony should therefore have been excluded under **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923). Alternatively, defendant argued that the court should have conducted a **Frye** hearing to determine whether microscopic firearm comparison is a generally accepted technique within the relevant scientific community.

1. The admission of scientific testimony in Illinois is governed by the **Frye** test. Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field to which it belongs. The **Frye** standard applies only to scientific methodology that is "new" or "novel."

General acceptance of a methodology does not require that acceptance be unanimous, by consensus, or even by a majority of experts. In addition, the **Frye** analysis focuses on the general acceptance of methodology, not the particular conclusion reached by a particular examiner or the application of the methodology in a particular case. The trial court's ruling that evidence is admissible under **Frye** is reviewed *de novo*.

2. The **Frye** standard applies only to scientific evidence. Here, the trial court denied defendant's

request for a **Frye** hearing on the ground that firearm comparison is performed visually and is not a scientific process. The Appellate Court rejected this holding, noting that neither party suggested that tool mark and firearm identification materials are understandable in the absence of expert testimony. In addition, numerous courts have held that tool mark and firearm analysis involve scientific or technical evidence.

Similarly, **Frye** applies only if the scientific principle is "new" or "novel." A scientific technique is new or novel if it is original or does not resemble something already known or used. Without deciding whether tool and firearm analysis is new or novel, the court assumed for the sake of its opinion that **Frye** applies.

3. A court may determine whether a scientific principle is generally accepted either by holding a **Frye** hearing or by taking judicial notice of unequivocal and undisputed judicial decisions and technical writings. Because the trial court denied defendant's motion for a **Frye** hearing, the court considered the issue as whether general acceptance was demonstrated by judicial decisions and technical writings.

Under Illinois precedent, to decide a **Frye** question on this basis the court must examine the unanimity or division of precedent in Illinois decisions and the unanimity or division of opinion in other jurisdictions. Special emphasis is placed on whether the issue has been thoroughly litigated in the decisions which are examined. In addition, the court may consider the unanimity or division of opinion in the scientific and technical literature on the subject.

Generally, expert testimony concerning firearms has been held to be admissible in Illinois courts. The cases which the defense cited involve not the general question of whether such testimony is admissible, but the more limited question whether the subjective nature of the process allows an expert to testify that beyond a doubt a bullet was fired from a particular weapon. The court also noted that the case law from other states follows the same pattern. Furthermore, although scholarly materials cited by the defendant have raised criticisms of the methodology used here, no court has found those criticisms sufficient to conclude that the methodology is not generally accepted. The court also noted that the trial court precluded the experts from testifying that their opinions were "within a reasonable degree of scientific certainty."

The court concluded that under these circumstances, the trial judge did not err by ruling that the firearm analysis testimony was admissible. Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Melinda Palacio, Chicago.)

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§19-27(f)
Handwriting

People v. Smith, 318 Ill. 114, 149 N.E. 3 (1925) Letters written by defendant were properly admitted for comparison to determine if he had also written an anonymous letter. Comparison must be made by person who is qualified as an expert.

People v. Harter, 4 Ill.App.3d 772, 282 N.E.2d 10 (2d Dist. 1972) The trier of fact may determine the genuineness of disputed handwriting specimens by comparison and without benefit of expert opinion. However, the comparison must in the first instance be made in open court in the presence of defendant. It has been held to be error for such samples of handwriting to be taken to the jury room.

Buckingham v. Ewing, 15 Ill.App.3d 839, 305 N.E.2d 278 (1st Dist. 1973) A non-expert witness may give an opinion authenticating handwriting if he has sufficient familiarity with the handwriting of the alleged writer, such as that gained from having seen the person write or from having been acquainted with his handwriting in the course of business dealings.

Yelm v. Masters, 81 Ill.App.2d 186, 225 N.E.2d 152 (3d Dist. 1967) A non-expert witness may not voice an opinion based upon a comparison of writings, such as a comparison between specimen handwriting and a disputed handwriting.

Cumulative Digest Case Summaries **§19-27(f)**

People v. Coleman, 2014 IL App (5th) 110274 (No. 5-11-0274, 12/31/14)

1. Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle is sufficiently established to have gained general acceptance in its particular field. But **Frye** only applies to scientific evidence. If an expert's opinion is derived solely from his observations and experiences, it is not scientific evidence.

Following a **Frye** hearing, the State was allowed to introduce the testimony of an expert linguist who compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the **Frye** test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

2. The trial court properly admitted the testimony of five witnesses about hearsay statements made by the decedent, defendant's wife, that defendant wanted a divorce. This evidence was properly admissible (a) under the statutory hearsay exception for the intentional murder of a witness; (b) under the doctrine of forfeiture by wrong doing; and (c) to establish defendant's motive.

(a) Under 725 ILCS 5/115-10.6(a), a hearsay statement is admissible if it is offered against a defendant who killed the declarant to prevent her from being a witness in a criminal or civil proceeding. The statute requires a pretrial hearing to determine the admissibility of the statements.

Here the trial court properly found at the pretrial hearing that defendant murdered his wife to prevent her from being a witness at a potential dissolution proceeding. Moreover, the statutory provision applies even though defendant had not initiated divorce proceedings.

(b) The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for out-of-court statements made by an unavailable witness if the defendant intentionally prevented the witness from testifying. Here defendant intentionally prevented his wife from testifying by killing her, and thus her out-of-court statements were admissible.

(c) The deceased wife's out-of-court statements were also admissible to show defendant's motive. Her statements indicated that defendant wanted a divorce but might lose his job if he tried to obtain one. The statements thus provided a motive for killing her.

3. The trial court did not abuse its discretion in allowing an expert in document examination to compare writings spray-painted on the wall of the murder scene with defendant's known writings in documents. Although there is some difficulty in comparing writing in documents with spray-painted writing on a wall, the expert merely pointed out similarities between the writings and never identified defendant as the actual author of the wall writing. The jury, which saw photographs of the wall writing was thus free to accept or reject the expert's testimony. Defense counsel thoroughly cross-examined the expert, and presented his own expert who cast doubt on the ability to make such comparisons.

4. The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the

administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

5. The trial court properly admitted the testimony of an officer who reviewed Master Card statements and determined that spray paint was purchased using a credit card traced to defendant. Illinois Rule of Evidence 803(24) provides an exception to the hearsay rule and allows a receipt or paid bill to serve as *prima facie* evidence of the fact of a payment.

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§19-27(g)
Blood; Hair; DNA

People v. Miller, 173 Ill.2d 167, 670 N.E.2d 721 (1996) The trial court did not abuse its discretion by admitting DNA evidence.

1. DNA analysis involves a two-step process: (1) the physical analysis of DNA samples to determine whether a physical match exists, and (2) a statistical calculation of the frequency with which such a match would occur in the population as a whole. The fact that a DNA "match" exists does not necessarily establish that defendant is the donor of the unknown sample, but merely that he cannot be eliminated as a potential source.

A critical component of DNA analysis is the calculation of a ratio expressing the statistical likelihood that an unrelated person chosen at random could have been the donor of the unknown sample. The "product rule," which was used in this case, determines the probability ratio by multiplying the frequency with which certain DNA characteristics occur in the population as a whole. The "product rule" has been criticized for dramatically understating the probability of a random match.

2. The process used here to perform the physical analysis (the six-step "Restriction Fragment Length Polymorphism" or RFLP) technique has clearly achieved acceptance in the scientific community. In addition, this method of DNA analysis has been widely approved by courts in various jurisdictions.

3. While there has been controversy over use of the "product rule" to calculate the frequency of a DNA match, that controversy "seems to be dissipating" as the scientific and legal status for the rule continues to evolve. The Court found that the "most recent courts to consider the use of the product rule have concluded that it is a generally accepted statistical method for estimating the frequency of a DNA match." Thus, "given the testimony the trial court had before it and the current level of acceptance of the RFLP process and the statistical analysis, the trial court did not abuse its discretion" by admitting the DNA evidence. See also, **People v. Pope**, 284 Ill.App.3d 695, 672 N.E.2d 1321 (4th Dist. 1996) (the Polymerase Change Reaction (PCR) method of DNA analysis has achieved scientific acceptance).

People v. Thomas, 137 Ill.2d 500, 561 N.E.2d 57 (1990) The Court upheld the use of the process of "electrophoresis," stating that it is generally accepted by forensic scientists as a reliable method of detecting genetic markers in blood.

People v. Gillespie, 24 Ill.App.3d 567, 321 N.E.2d 398 (2d Dist. 1974) The Court recognized the scientific reliability of the ABO system of blood groupings. Thus, an expert was properly allowed to testify that the blood found at the crime scene was the same type as defendant's and concerning the percentages of the population with various blood types.

People v. Schulz, 154 Ill.App.3d 358, 506 N.E.2d 1343 (1st Dist. 1987) At the defendant's trial for murder and deviate sexual assault, the State, over objection, was allowed to introduce expert testimony concerning

the results of blood and enzyme testing. The conclusions of the experts were that the samples came from 20% of the population, which included defendant, and that defendant therefore could not be excluded as the source.

The Appellate Court held that the above evidence should have been excluded because it was not relevant. By merely placing defendant in an extremely large category of possible donors, the evidence did not tend to make the likelihood that defendant committed the crimes more or less probable.

People v. Wheeler, 334 Ill.App.3d 273, 777 N.E.2d 961 (3d Dist. 2002) At least in the absence of visible evidence of blood, the Leuco-Malachite Green (LMG) test, which purports to disclose the possible presence of blood by use of a chemical to enhance blood that is invisible to the naked eye, is not generally accepted in the scientific community as raising a presumption that blood is present.

People v. Owens, 155 Ill.App.3d 990, 508 N.E.2d 1088 (4th Dist. 1987) A police officer was improperly allowed to testify about "blood-spatter analysis" to show the position of the decedent when he was shot. The reliability of "blood-spatter analysis" has not been recognized in Illinois, and the State did not demonstrate its reliability or establish the officer's qualifications as an expert.

People v. Columbo, 118 Ill.App.3d 882, 455 N.E.2d 733 (1st Dist. 1983) An expert may properly testify that the defendant's hair is similar in color and characteristics to hair found at the crime scene. The fact that the expert could not positively say that both hairs came from the same source, but only that it was possible, did not render the testimony inadmissible. An expert's lack of certainty goes to the weight of the testimony and not to its admissibility. Compare, **People v. Giangrande**, 101 Ill.App.3d 397, 428 N.E.2d 503 (1st Dist. 1981) (prosecutor improperly stated that defendant's hair was found at the crime scene, since the expert testimony was only that the hair could have originated from defendant).

Cumulative Digest Case Summaries **§19-27(g)**

People v. Nelson, 2013 IL App (1st) 102619 (No. 1-10-2619, 7/12/13)

At defendant's jury trial for aggravated kidnaping and aggravated criminal sexual assault, the State presented evidence that Cellmark, a private laboratory, extracted a DNA profile from a rape kit taken from the victim at the hospital. The DNA profile developed by Cellmark was subsequently matched by a different expert to the defendant's profile, which was contained in a database in Illinois.

The only evidence concerning the Cellmark report was the testimony of a Cellmark supervisor, who took cuttings from the rape kit, reviewed the data and documentation, and authored the report in this case. The witness testified that several people worked on various stages of extracting the DNA from the rape kit, and that much of the work was done by robotic instrumentation. The witness also testified that the controls utilized by Cellmark were in proper order and working correctly in this case.

The Appellate Court concluded that defendant's Sixth Amendment right to confrontation was not violated by admission of the supervisor's testimony concerning the Cellmark report.

1. In **Crawford v. Washington**, 541 U.S. 36 (2004), the U.S. Supreme Court held that the Confrontation Clause bars admission of "testimonial" statements by a witness who does not appear at trial, unless the witness is unavailable to testify and there was a prior opportunity for cross-examination. Subsequent cases have reached conflicting conclusions concerning what constitutes a "testimonial" statement. The most recent case involving forensic reports was **Williams v. Illinois**, 567 U.S. ___, 132 S.Ct. 2221, ___ L.Ed.2d ___ (2012), in which the controlling interpretation was that of Justice Thomas's concurrence, which held that the forensic report in that case lacked sufficient formality and solemnity to be considered "testimonial." By contrast, the plurality in **Williams** found that testimonial statements are those which accuse a particular person of a crime.

After reviewing U.S. Supreme Court precedent, the court concluded that no confrontation clause violation occurred. First, the court found that the evidence not testimonial under Justice Thomas's rationale in **Williams**, which required forensic reports to be formalized and sufficiently solemn. Furthermore, the evidence was not "testimonial" under the plurality's definition in **Williams** because it did not accuse a particular person of a crime.

2. Alternatively, the court concluded that a supervisor who participated in the DNA extraction process may testify concerning the process by which the DNA profile was developed. The court concluded that the case involves an issue which has been left open by the U.S. Supreme Court - where DNA evidence is developed by a team, how many members of the team must testify in order to satisfy the defendant's confrontation rights. Without explaining its holding, the court concluded that the testimony of a supervisor who actually participated in the DNA testing is sufficient to satisfy the defendant's confrontation rights and that the State was not required to call other members of the team.

Defendant's convictions for aggravated kidnaping and aggravated criminal sexual assault were affirmed.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

People v. Pike, 2016 IL App (1st) 122626 (No. 1-12-2626, 1/27/16)

Evidence is admissible only if it is relevant to an issue in dispute. Relevant evidence is defined as evidence that makes the existence of any consequential fact more probable or less probable than it would be without the evidence. Ill. R. Evid. 401.

The State's expert compared a DNA profile found on a firearm connected to the offense with defendant's DNA profile and concluded that he could not be excluded as a contributor. But the expert's statistical analysis showed that approximately 50% of unrelated individuals also could not be excluded as contributors to the DNA profile found on the firearm. In other words, one out of every two randomly selected individuals could not be excluded. Defendant did not object to this testimony.

The Appellate Court held that the expert's testimony was irrelevant and should not have been admitted. Since the statistical evidence showed that 50% of the population could not be excluded as potential contributors, that probability did not make defendant's identification any more or less probable. It was thus irrelevant.

But the court further held that the admission of this testimony was not plain error. The evidence was not closely balanced and the error was not serious error and thus neither prong of the plain error doctrine was satisfied. Defendant's conviction was affirmed.

The dissent believed the evidence was closely balanced and thus would have reversed defendant's conviction.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)

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§19-27(h)
Post-Trial Forensic Testing (725 ILCS 5/116-3)

People v. Savory, 197 Ill.2d 203, 756 N.E.2d 804 (2001) 1. 725 ILCS 5/116-3 provides that physical evidence may be tested where such testing was not available at the time of trial. To obtain testing, the defendant must present a *prima facie* case that: (1) identity was an issue at trial, (2) the evidence has been subjected to a chain of custody sufficient to establish that it has not been replaced or altered, and (3) the testing both employs a scientific method generally accepted within the relevant scientific community and "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence."

2. The court rejected the Appellate Court's finding that §116-3 authorizes testing only where a result favorable to the defense will, in and of itself, completely vindicate the defendant of the crime. In light of the specific language chosen by the legislature, a motion for testing must be granted where the results will "significantly advance" a claim of innocence. The court rejected the argument that comments by the sponsor of the legislation creating §116-3 could be read to justify a more restrictive legislative intent than that suggested by the plain and unambiguous language chosen by the legislature.

3. Here, defendant could not establish that the test results would significantly advance his claim of innocence. The evidence in question - the source of blood stains on trousers defendant was wearing at the time of the offense - was "only a minor part of the State's evidence."

4. The trial court's denial of a motion for scientific testing under §116-3 is an appealable "order" under Supreme Court Rule 2(b)(2). See also, **People v. Kliner**, 203 Ill.2d 402, 786 N.E.2d 976 (2002) (trial court's order granting a motion to allow DNA testing under 725 ILCS 5/116-3, even if a final order, may not be appealed by the prosecution; State appeal from an order granting a motion for post-trial DNA testing is not permitted by Supreme Court Rule 604 or any other provision); **People v. Shum**, 207 Ill.2d 47, 797 N.E.2d 609 (2003) (an order denying a request for DNA testing is reviewed *de novo*).

People v. O'Connell, 227 Ill.2d 31, 879 N.E.2d 315 (2007) 1.725 ILCS 5/116-3 authorizes fingerprint or forensic testing which was not available at trial if the defendant makes several showings, including that identity was an issue at trial. The court concluded that the plain language of §116-3 precludes motions for DNA testing by persons who were convicted on guilty pleas.

2. Trial court's denial of motion for §116-3 testing is reviewed *de novo*.

People v. Johnson, 205 Ill.2d 381, 793 N.E.2d 591 (2002) Where 725 ILCS 5/116-3 became effective after defendant filed his amended post-conviction petition but before the petition was dismissed, the defense motion made a *prima facie* case for DNA testing of a rape kit where it alleged that identity was the central issue at trial and that the rape kit had been subjected to a secure chain of custody. Although defendant failed to present any evidence concerning the location of the kit since trial, the court found that evidence on that point would not be available to the defendant because the kit likely remained in the custody of the circuit clerk.

In addition, defendant established that the test results had the potential to produce "materially relevant" evidence of innocence. Under **Savory**, evidence is "materially relevant" where it tends to "significantly advance" a claim of actual innocence. The proposed testing clearly satisfied this test - defendant was not seeking to merely impeach the State's evidence from trial, but to present previously unavailable evidence about the genetic identity of the person who committed the crime. In addition, the State presented a largely circumstantial case at trial, and defendant made no admissions placing himself at the scene of the crime. See also, **People v. Hockenberry**, 316 Ill.App.3d 752, 737 N.E.2d 1088 (2d Dist. 2000) (defendant failed to establish a *prima facie* case that identity was an issue on home invasion where at trial he admitted that he entered residence and the complainant testified that he did so without consent; however, identity was issue as to aggravated criminal sexual assault where defendant claimed that he had no sexual contact with the complainant but physical evidence suggested that the complainant engaged in sexual activity with someone).

People v. Brooks, 221 Ill.2d 381, 851 N.E.2d 59 (2006) The trial court did not err by denying defendant's motion for DNA testing of a vaginal swab; the motion asserted only that the testing had not been performed at the time of trial, without asserting that the relevant technology was unavailable. The court noted that several judicial holdings at the time of defendant's trial had found that the testing in question was generally accepted by the scientific community; "if the requested test was not done on the genetic samples . . . the reason . . . was not because the technology for the testing was unavailable at the time of defendant's trial."

People v. Love, 312 Ill.App.3d 424, 727 N.E.2d 680 (2d Dist. 2000) A defendant has no right to the effective assistance of counsel on a motion for DNA testing under 725 ILCS 5/116-3. Because there is no constitutional or statutory right to the assistance of counsel for purposes of a §116-3 motion, defendant cannot challenge the performance of an attorney whom the trial court chooses to appoint.

The court also rejected the argument that a §116-3 movant is entitled to a "reasonable" level of assistance.

People v. Rokita, 316 Ill.App.3d 292, 736 N.E.2d 205 (5th Dist. 2000) 1. In denying a motion for DNA testing, the trial judge erred by considering the potential effect of the test results on the overall sufficiency of the evidence to convict. "[T]he ultimate impact of the new, noncumulative evidence on the defendant's conviction is not relevant to the determination of whether a defendant is entitled to such testing."

2. The court rejected the State's argument that a §116-3 motion is appropriate only in connection with a timely post-conviction petition, and is barred once post-conviction relief has been denied or the statute of limitations has expired. Neither the plain language of §116-3 nor the act's legislative history suggest that the legislature intended to impose any time limit on the ability to move for DNA testing that was unavailable at the time of trial.

People v. Henderson, 343 Ill.App.3d 1108, 799 N.E.2d 682 (1st Dist. 2003) 1. Section 116-3 does not establish a time limit for filing an appropriate motion once the technology in question has become available. Thus, where DNA testing was not available at defendant's trial, relief was not precluded by the fact that such testing had been available for some 15 years before defendant filed a §116-3 motion. See also, **People v. Price**, 345 Ill.App.3d 129, 801 N.E.2d 1187 (2d Dist. 2003) (defendant's motion was not untimely because it was not filed within the statute of limitations for a post-conviction petition; §116-3 does not contain a specific time limit within which testing must be requested, and the applicable legislative history does not suggest an intention to impose the time limitations of the Post-Conviction Hearing Act).

2. Where the record showed that the evidence had been impounded by the circuit clerk's office, the court rejected the State's argument that defendant could not make a *prima facie* case that the evidence had been subject to a sufficient chain of custody.

3. The DNA testing requested by the motion had the scientific potential to produce "materially relevant" evidence concerning an assertion of actual innocence. Although there was overwhelming evidence of defendant's guilt, the proposed testing need not completely vindicate the defendant in order to satisfy the "materially relevant" standard. In other words, if the testing would "significantly advance" a claim of actual innocence, the §116-3 motion should be granted.

Nor was denial of the motion justified merely because there were multiple offenders and defendant was tried both as a principal and an accomplice. First, defendant claimed that he had not been involved in the offense, and made no admissions of conduct that would have justified a finding that he was accountable even if the DNA testing was negative. Second, although it "may be much more difficult to successfully analyze 'mixed samples' (those containing genetic materials from more than one person) . . ., it is not impossible."

The court added that any concern about "mixed samples" would not apply to at least one piece of evidence - blood stains on defendant's pants which, according to the evidence at trial, resulted from a cut on the victim's hand. "Whether the stains were caused by the victim appears to be a question which is easily solved with today's technology."

People v. Price, 345 Ill.App.3d 129, 801 N.E.2d 1187 (2d Dist. 2003) The trial court erred by denying defendant's motion for §116-3 testing.

1. To determine whether evidence is "materially relevant" to a claim of actual innocence, the court must consider the evidence at trial and the importance of the evidence to be tested. Although the exculpatory potential of a favorable test result is to be considered, the likelihood of a favorable result is not an

appropriate factor in determining whether to order testing. In other words, if testing has the potential to produce materially relevant evidence, it should be authorized no matter "how slight the chance that it will, in fact, yield a favorable result."

Although the evidence against defendant was "certainly compelling," a favorable DNA test could significantly advance defendant's claim of actual innocence. Because multiple perpetrators were involved, it was possible that defendant may have committed the crime even if DNA tests revealed a non-match with the sample. Even with multiple offenders, however, a non-match "would nonetheless support defendant's position that he did not engage in a sexual act" with the complainant.

2. Identity was an issue at trial - the only evidence of defendant's guilt was the testimony that defendant performed the offense, while defendant maintained that the witnesses were lying and that he had not engaged in any illegal acts.

3. The chain of custody was sufficient to establish that the evidence had not been altered; the samples were placed in the custody of the clerk of the circuit court after trial and submitted to the Appellate Court as part of the record on appeal. The court noted that under **People v. Johnson**, 205 Ill.2d 381, 793 N.E.2d 591 (2002), the defendant's failure to establish the whereabouts of evidence does not preclude a §116-3 motion where the samples have been in the safekeeping of the State.

Although it found that defendant had made a *prima facie* case concerning chain of custody, the court noted that on remand the State could attempt to establish that the evidence had been altered or tampered with.

4. Section 116-3 authorizes only testing which was unavailable at the time of trial. The court concluded that two of the five tests requested by the defendant were available at the time of trial, and were generally accepted in the scientific community at that time. Thus, those tests were unavailable under §116-3.

Because it was unclear whether the remaining three tests were available at the time of trial, the cause was remanded for the trial judge to determine that question.

5. Although the defendant has no statutory right to counsel under §116-3, the trial court may appoint an attorney if the assistance of counsel is necessary to assure meaningful access to the courts.

People v. Pursley, 341 Ill.App.3d 230, 792 N.E.2d 378 (2d Dist. 2003) 1. 725 ILCS 5/116-3 was intended to apply only to fingerprint and forensic DNA testing. The court rejected the argument that §116-3 authorized a motion for ballistic testing.

2. Limiting §116-3 to forensic DNA and fingerprint testing does not violate equal protection and due process. The limitation bears a rational relationship to a legitimate state goal - the legislature may have restricted testing to genetic materials "because the reliability of such tests has been established."

People v. Gibson, 357 Ill.App.3d 480, 828 N.E.2d 881 (4th Dist. 2005) 1. The trial judge erred by denying defendant's motion for DNA testing of the evidence used at defendant's trial for home invasion, rape, deviate sexual assault, burglary and felony theft. Testing performed at the time of trial on blood and semen recovered at the home were consistent with defendant's blood type, but did not conclusively establish him as the perpetrator.

A. First, identity was a central issue at trial - defendant consistently maintained his innocence, the victim identified defendant only through hypnotically refreshed testimony which was subsequently held to have been improperly admitted, and the only other testimony identifying defendant was given by a co-defendant. Defendant did not contest whether the crimes occurred or raise an affirmative defense which would have eliminated identity as an issue, and argued at trial that he was not the perpetrator.

B. The DNA testing had the potential to produce new, non-cumulative evidence which was materially relevant to defendant's assertion of actual innocence. The complainant testified that of the three intruders, only the individual wearing white gloves assaulted her anally. The State's theory at trial was that defendant had been the intruder in the white gloves. A DNA test of a rectal swab taken from the complainant would significantly advance defendant's claim of actual innocence if it failed to show a DNA match with the defendant.

2. The State waived several other arguments by failing to raise them in the trial court, including that the motion for forensic testing was deficient because it failed to specify the type of DNA test to be performed, did not include any support for the allegation that DNA testing was unavailable at the time of trial, and made only a bare allegation that the requested testing employed a scientific method generally accepted within the relevant scientific community.

People v. Stevens, 315 Ill.App.3d 781, 733 N.E.2d 1283 (4th Dist. 2000) 725 ILCS 5/116-3, which under certain circumstances authorizes a defendant to obtain DNA testing which was not available at the time of trial, does not mandate a hearing before the trial court rules on the motion. But see, **People v. Dodds**, 344 Ill.App.3d 513, 801 N.E.2d 63 (1st Dist. 2003) (although an evidentiary hearing is not necessarily required whenever post-trial DNA testing is ordered and the post-conviction petition alleges actual innocence, when the test results are at least somewhat favorable to the defendant "an evidentiary hearing is necessary to determine . . . whether the DNA results would or would not likely change the results upon a retrial").

People v. Bailey, 386 Ill.App.3d 68, 897 N.E.2d 378 (1st Dist. 2008) 1. The trial court has authority to *sua sponte* deny a §116-3 motion where the requesting party is not entitled to relief as a matter of law. The trial court's decision to *sua sponte* dismiss a §116-3 motion is reviewed de novo. The trial court acted appropriately by *sua sponte* denying a §116-3 motion where defendant could not make a *prima facie* case that relief was authorized.

2. 725 ILCS 5/116-3 does not impose a limitation on the number of motions which can be filed. Thus, although defendant elected not to appeal the denial of his first §116-3 motion, he could appeal from the denial of a second, similar motion filed approximately one year later.

People v. Sanchez, 363 Ill.App.3d 470, 842 N.E.2d 1246 (2d Dist. 2006) The trial court erred by denying defendant's motion for post-trial DNA testing in an ex parte hearing at which the State made unsworn representations about whether the evidence to be tested was still available. The court held that if a motion for post-trial DNA testing is sufficient on its face to satisfy the requirements of the statute, the defendant is entitled to notice and an opportunity to respond to the State's allegations about the existence and condition of the evidence for which testing is sought. The court also noted that the trial court has authority to allow limited discovery concerning the "chain of custody requirement" for a §116-3 motion.

The court distinguished **People v. Franks**, 323 Ill.App.3d 660, 752 N.E.2d 1274 (5th Dist. 2001), in which the trial court denied a petition that was "wholly insufficient on its face to satisfy the requirements" of 725 ILCS 5/116-3, and **People v. Stevens**, 315 Ill.App.3d 781, 733 N.E.2d 1283 (4th Dist. 2000), in which the trial court denied a motion for DNA testing based on the pleadings and the trial transcript.

People v. Schutz, 344 Ill.App.3d 87, 799 N.E.2d 930 (1st Dist. 2003) 1. The court rejected the State's argument that §116-3 authorizes testing only if the defendant is incarcerated at the time of the request.

2. However, where the evidence which the defendant seeks to have tested has been destroyed, the trial court is not necessarily required to hold a hearing to determine whether that destruction was in bad faith. Although defendant contended in his motion that the practice of the Chicago Police Department was to retain evidence in murder cases indefinitely, he did not contend that an order requiring preservation of the evidence had been entered or that the evidence had been destroyed in bad faith. Under such circumstances, the motion for testing was properly denied because defendant could not make a *prima facie* showing that the evidence had been subjected to a sufficient chain of custody. The court contrasted this situation to **People v. Barksdale**, 327 Ill.App.3d 422, 762 N.E.2d 669 (1st Dist. 2001), in which the defendant established that the State had destroyed evidence despite an order requiring its preservation.

People v. Boatman, 386 Ill.App.3d 469, 898 N.E.2d 277 (4th Dist. 2008) Public Act 95-688 (eff. 10/23/07) amended 725 ILCS 5/116-3(a) to provide that a defendant is eligible for post-conviction DNA testing where:

(1) such testing was not performed at trial, or (2) additional testing methods have become available since the defendant's trial. Because the hearing on defendant's motion occurred after October 23, 2007, the trial court should have applied the amended version of §116-3(a) although defendant's conviction occurred before the effective date of the amendment.

Cumulative Digest Case Summaries **§19-27(h)**

District Attorney's Office for the Third Judicial District v. Osborne, ___ U.S. ___, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009)

Due process does not include a convicted defendant's right to post-conviction access to the State's evidence for DNA testing. The court noted, however, that 46 states (including Illinois) have enacted statutes which permit access to such evidence, and that other states permit such access where newly available DNA testing may establish actual innocence.

People v. Stoecker, 2014 IL 115756 (No. 115756, 5/22/14)

725 ILCS 5/116-3 provides that a defendant may obtain post-conviction DNA testing of evidence admitted at trial if the evidence was not previously subjected to testing (§116-3(a)(1)) or if additional testing utilizes a method that was not scientifically available at the time of trial and which provides a reasonable likelihood of more probative results (§116-3(a)(2)).

Section 116-3(b) provides that the defendant presents a *prima facie* case for testing where: (1) identity was the issue in the trial which resulted in the conviction; and (2) the evidence has been subject to an adequate chain of custody. In determining whether to grant a motion for testing, the trial court must consider whether: (1) the result of the testing has the scientific potential to produce new, noncumulative evidence that is materially relevant to an assertion of actual innocence even if the results may not completely exonerate the defendant (§116-3(c)(1)), and (2) whether the requested testing employs a scientific method that is generally accepted within the relevant scientific community (§116-3(c)(2)).

At defendant's trial for first degree murder and aggravated criminal sexual assault, the State presented DNA evidence based on PCR testing. More than 10 years after his conviction, defendant moved under 725 ILCS 5/116-3 to obtain Y-STR testing. Defendant alleged that Y-STR testing allows resolution of a mixed sample from male and female DNA, and had the potential to exclude him as the source of the male DNA recovered from the victim. However, defendant did not assert that Y-STR testing provided a reasonable likelihood of producing more probative results than the PCR testing that had been done for the trial, as is required by §116-3(a)(2). Defendant argued that there is no meaningful distinction between subsections (a)(2) and (c)(1), because new, noncumulative evidence that is materially relevant to an assertion of actual innocence necessarily utilizes a method that provides a reasonable likelihood of more probative results.

1. The court rejected defendant's argument, concluding that a defendant who seeks testing under §116-3 is required to satisfy (a)(2) by alleging that the new testing provides a reasonable likelihood of more probative results. Because the legislature added (a)(2) several years after §116-3 was enacted, it is presumed to have intended to change the law and not to add a section that was essentially identical to an existing provision of the statute. The court concluded that the legislature intended that movants who are seeking retesting of previously tested evidence must carry a higher burden than persons who seek to test previously untested evidence, and must show that the additional testing is likely to produce more probative results.

Because defendant failed to allege that the Y-STR testing had the potential to produce more probative evidence than the previously performed testing, he failed to meet the pleading requirements for obtaining new DNA testing.

2. Even had the pleading requirements of the statute been satisfied, there would have been an insufficient basis for the trial court to find that defendant had satisfied the (c)(1) requirement by showing that

Y-STR testing had the scientific potential to produce new, noncumulative evidence that was relevant to a claim of actual innocence. The DNA testing performed at the time of the trial indicated that the profile generated by the testing would be expected to occur in one of approximately 1.1 trillion Caucasians. Given such decisive DNA test results at trial, there was no likelihood that additional testing under the Y-STR method would result in defendant being exonerated, at least where there was no indication of some inaccuracy in the original testing.

The trial court's denial of defendant's motion for additional DNA testing was affirmed.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Barrow, 2011 IL App (3d) 100086 (No. 3-10-0086, 9/7/11)

1. The statute permitting post-conviction forensic testing is silent regarding whether witnesses may be called to testify at a hearing on such a motion. 725 ILCS 5/116-3. Because it is not the prerogative of courts to read into a statute limitations that the legislature chose not to include, the statute does not prohibit the use of witnesses, even though the statute does not expressly permit their use.

2. A defendant is entitled to post-conviction forensic testing if the result of the testing has the "scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." 725 ILCS 5/116-3(c)(1). Evidence is "materially relevant" if it tends to significantly advance a defendant's claim of actual innocence.

The circuit court did not err in denying testing that the defendant requested of the clothes of the deceased and a seat cushion used to muffle the gunshot to the head of the deceased. There was no likelihood that the offender's DNA was on the clothing or the cushion absent evidence of a struggle. There was no evidence of a struggle, only that the premises were ransacked in an attempt to locate valuables. The court rejected defendant's argument that the items should be tested to determine whether stains found on the items had any evidentiary value. The statute does not provide a general means to discover evidence.

3. Section 116-3 allows for performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing. The plain language of the statute does not allow for comparison testing of shoe prints.

Moreover, even where the statute does authorize testing, defendant must show that the evidence was not subject to the testing he requests at the time of trial, or that, although previously tested, the evidence can now be subject to testing using a method not available at the time of trial. The shoe-print evidence was subject to some testing prior to trial, and defendant did not demonstrate that there was further testing that could be performed that was not available at trial.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Grant, 2016 IL App (3d) 140211 (No. 3-14-0211, 1/29/16)

1. Under section 116-3 of the Code of Criminal Procedure, a defendant may make a motion in the trial court for the performance of forensic DNA testing. To prevail on the motion, a defendant must make a *prima facie* showing that identity was at issue in his trial and that the evidence has been subject to a proper chain of custody. Once defendant makes a *prima facie* showing, the court shall allow testing if it employs a generally accepted scientific method and has the potential to produce new, non-cumulative evidence materially relevant to defendant's actual innocence, even though the results may not completely exonerate defendant. 725 ILCS 5/116-3.

2. Defendant was convicted of aggravated sexual assault. At trial, defendant testified that he did not commit the offense. Instead, another person residing in the same house committed the offense. Following his conviction, defendant filed a motion for forensic testing on a hair found on the victim. This evidence had been collected prior to trial but never tested. The trial court denied defendant's motion.

3. On appeal, the State defended the trial court's dismissal by arguing that (1) identity was not at issue during trial; and (2) testing would not produce evidence materially relevant to actual innocence. The Appellate Court rejected both of these arguments.

First, the court held that identity had been an issue at trial. In the context of a 116-3 motion, identity is at issue if it was disputed at trial as to whether defendant or someone else committed the offense. A defendant makes the requisite *prima facie* showing by denying at trial that he committed the offense.

Here defendant put identity at issue during trial by testifying that he did not commit the offense. The court specifically rejected the State's argument that identity was not at issue because there was overwhelming evidence of defendant's guilt. The amount of evidence presented by the State has no bearing on whether identity was at issue during trial. The only question is whether, as here, defendant denied committing the offense.

Second, the court held that testing had the potential to produce materially relevant evidence of defendant's actual innocence. Evidence it materially relevant if it significantly advances defendant's claim of actual innocence. No physical evidence linking defendant to the offense was introduced at trial. Thus if the hair found on the victim did not match defendant's DNA profile, "that result would stand alone, rather than being weighed against other forensic evidence against defendant." And if the hair matched the DNA of the person defendant claimed was the true perpetrator, it would significantly bolster defendant's case.

Although the State was correct that a non-match would not completely exonerate defendant, it was arguable that such a result would advance defendant's claim of actual innocence.

The cause was remanded for further forensic testing.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Kines, 2015 IL App (2d) 140518 (No. 2-14-0518, 7/24/15)

1. Defendant was convicted of a 1988 first degree murder based on being accountable for strangling the victim with the sleeve of a blouse. Defendant was identified as being one of three offenders by an 11-year old acquaintance. At trial, defendant denied being involved.

In 2002, defendant filed an initial petition for DNA testing of the blouse sleeve, the victim's clothing and other evidence recovered at the scene pursuant to 725 ILCS 5/116-3. At that time, the DNA testing statute required defendant to show that the requested testing was not available at the time of trial. 116-3(a). The trial court denied defendant's petition on the basis that the requested testing had been available at the time of trial, and the Appellate Court affirmed.

Defendant filed a second petition for DNA testing in 2013. By this time, the DNA testing statute had been amended to only require defendant to show that the evidence was not subject to the testing now requested. 116-3(a)(1). The statute also required defendant to make a *prima facie* showing that identity was an issue at trial and the evidence tested was subject to a chain of custody. 116-3(b). The court must allow testing if the testing procedure is generally accepted in the scientific community and the "result of testing has the scientific potential to produce new, non-cumulative evidence materially relevant to defendant's actual innocence even though the result may not completely exonerate him." 116-3(c).

The trial court denied defendant's second petition finding that it was (1) barred by *res judicata* and (2) even if another person's DNA were found on the evidence, "it would not change the evidence indicating" defendant's guilt.

2. The Appellate Court held that defendant's second petition was not barred by *res judicata*. *Res judicata* is an equitable doctrine that bars relitigation of issues that were raised and adjudicated, or could have been raised and adjudicated, in a prior proceeding. But *res judicata* is "first and foremost an equitable doctrine which may be relaxed where justice requires." A well-established exception to the doctrine exists where the earlier judgment was "plainly inconsistent with the equitable implementation of a statutory scheme."

The statutory scheme here, 116-3(a), had changed in a dispositive manner between the first and second petitions. The statute applicable to the first petition required a showing that the testing procedures were unavailable at the time of trial, a showing defendant could not make. The statute applicable to the second petition merely required a showing that the evidence had not been previously subject to the testing procedures, a showing defendant could make. Given the change in the statute, the court declined to hold that

the earlier decision constituted a *res judicata* bar against filing the second petition.

3. The court also found that defendant presented a *prima facie* case that identity was an issue at trial and the evidence was subject to a chain of custody to ensure its integrity. 116-3(b). At trial defendant argued that he was mistakenly identified as one of the perpetrators, making identity an issue. And defendant was excused from establishing a chain of custody since the evidence was admitted at his trial and presumably "would have remained within the custody of the circuit court clerk."

And finally the court found that the DNA testing is generally accepted within the scientific community and has the potential to produce new, noncumulative evidence materially relevant to defendant's claim of actual innocence. 116-3(c). Evidence is materially relevant if it tends to significantly advance a claim, and need not completely exonerate defendant.

The State's primary evidence came from the witness who identified defendant and he made inconsistent statements to the police. The court found that it could not "dismiss the very real possibility that DNA testing might result in a viable third-party suspect," and thus significantly advance defendant's claim of innocence even if it did not completely exonerate him.

The cause was remanded for DNA testing.

People v. Patterson, 2012 IL App (4th) 090656 (No. 4-09-0656, 7/11/12)

1. A defendant may not complain of inadequate assistance of counsel if he has no right to counsel. If not constitutionally guaranteed, the right to counsel must be statutorily provided. Unlike the Post-Conviction Hearing Act, 725 ILCS 5/116-3 contains no provision for appointment of counsel on a motion for forensic testing. Therefore, a defendant cannot claim inadequate assistance of counsel on a §116-3 motion. Where a request for forensic testing is included in a post-conviction petition, however, defendant can claim inadequate assistance of counsel with respect to the post-conviction claim for forensic testing.

Defendant filed a *pro se* post-conviction petition and a separate §116-3 motion for DNA testing. Counsel appointed to represent defendant in the post-conviction proceeding amended the petition to include the request for §116-3 testing. Because the request for §116-3 testing was included in the post-conviction petition, defendant could claim that he received unreasonable assistance of counsel as to that claim, even though defendant was not entitled to counsel on the independent § 116-3 motion. The Appellate Court declined to decide whether a §116-3 claim was an appropriate subject of a post-conviction petition. Even when a pleading should not be considered as a post-conviction petition, but the trial court elects to treat it as if it were, appointed counsel must comply with his duties under the Post-Conviction Hearing Act and Supreme Court Rule 651.

2. In post-conviction proceedings, defendant is entitled to the reasonable assistance of counsel. Supreme Court Rule 651(c) requires that counsel: (1) consult with the defendant, (2) examine the record, and (3) make any necessary amendments to the *pro se* petition for an adequate presentation of the defendant's contentions. Failure to make a routine amendment to a post-conviction petition that would overcome a procedural bar constitutes unreasonable assistance in violation of Rule 651(c). It is equally unreasonable for post-conviction counsel to amend a *pro se* petition in a way that creates a procedural bar for a defendant.

Post-conviction counsel amended the *pro se* petition to include the §116-3 claim, but failed to present any evidence or argument in support of that request to prevent the dismissal of that claim. Counsel thus effectively created a procedural bar of *res judicata* to defendant's §116-3 motion. Even though successive motions are permissible under §116-3, *res judicata* will bar a successive motion if the exact same issue is raised in both motions.

Because counsel rendered unreasonable assistance of counsel as to the §116-3 post-conviction claim, the Appellate Court reversed the denial of the petition as to this claim and remanded for further proceedings.

(Defendant was represented by Assistant Defender Paige Strawn, Mt. Vernon.)

People v. Perez, 2016 IL App (3d) 130784 (No. 3-13-0784, 7/21/16)

Under 725 ILCS 5/116-3, a defendant may make a motion in the trial court for forensic DNA testing.

To prevail on the motion, the defendant must present a *prima facie* case that identity was the issue at trial and the evidence has been subject to a chain of custody. If the defendant makes a *prima facie* case, the court shall allow testing where it has "the scientific potential to produce new, non-cumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant."

Here defendant was convicted of predatory criminal sexual assault. After trial he filed a motion for forensic testing on blood and hair found on two pairs of the victim's underwear. The trial court denied the motion. The Appellate Court reversed the trial court and held that defendant was entitled to forensic testing.

First, defendant made a *prima facie* case that identity was at issue in his trial. During trial, defendant questioned the physical evidence linking him to the offense and the credibility of the victim. The court held that the question of whether identity was an issue was unrelated to the strength of the State's evidence. Defendant's denial at trial that he committed the offense is enough to place identity in issue. The court also held that identity may be placed in issue even if defendant does not testify.

Defendant also made a *prima facie* showing that there was a sufficient chain of custody since the evidence has remained in the State's control since trial. Even though a number of people handled the evidence before it was turned over to the police, the chain of custody requirement does not apply to evidence before it is taken into custody.

Finally, the tests have the potential to produce new, non-cumulative material evidence relevant to Defendant's actual innocence. A result that did not match defendant or the victim would be quite relevant since it would be antithetical to the State's theory that defendant alone assaulted the victim.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

People v. Pursley, 407 Ill.App.3d 526, 943 N.E.2d 98 (2d Dist. 2011)

Integrated Ballistic Integrated System (IBIS) is a database consisting of digital images of ballistic evidence gathered by law enforcement pursuant to criminal investigations. IBIS allows law enforcement agencies to acquire digital images of markings recovered from crime scenes and test evidence and compare those images against earlier entries in IBIS. If a high-confidence match emerges, firearm examiners confirm the match by comparing the original evidence using a microscope.

As with fingerprint and DNA evidence, a defendant may move for post-conviction IBIS testing of evidence that was secured in relation to the trial resulting in his conviction. 725 ILCS 5/116-3.

1. Under subsection (a) of 116-3, defendant is entitled to IBIS testing if the evidence was either: (1) not subject to IBIS testing at the time of trial; or (2) although previously subject to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. 725 ILCS 5/116-3(a)(1) and (2). Defendant need not satisfy both alternatives (1) and (2). The court rejected the State's interpretation of the statute that would require defendant to satisfy alternative (2) because the State had tested the ballistics evidence at the time of defendant's trial.

Even if defendant were required to satisfy both alternatives, because the IBIS database was not in existence at the time of defendant's trial, defendant has satisfied alternative (2). It does not matter that the technology utilized by IBIS was in existence at the time of defendant's trial.

2. The parties do not dispute that the requirement of a *prima facie* case set forth in subsection (b) of 116-3 was met. 725 ILCS 5/116-3(b)(1) and (2) (identity was the issue in the trial that led to the conviction, and the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect).

3. Under subsection (c) of 116-3, defendant is entitled to testing if: (1) the testing has the scientific potential to produce new, noncumulative evidence that is materially relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate the defendant; and (2) the testing employs a generally accepted scientific method. The second factor is not in dispute.

After reviewing the evidence at trial, the court determined that the defendant was entitled to testing

under subsection (c). The best outcome for defendant from IBIS testing would be a determination that the crime scene evidence matched evidence of another crime that occurred after the police confiscated defendant's gun. At defendant's trial, a prosecution expert testified that the crime scene evidence matched bullets test-fired from defendant's gun. A defense expert testified that there were dissimilarities between the test-fired evidence and the crime scene evidence that excluded defendant's gun as the murder weapon. Two eyewitnesses gave descriptions of the offender that were inconsistent in some respects, and neither identified defendant. A witness testified that defendant had confessed his responsibility for the murder to him, but he also admitted receiving a monetary reward for this information, and had charges pending against him at the time of defendant's trial. Defendant's girlfriend gave the police a statement implicating defendant in the murder, but repudiated this statement at trial, claiming it was coerced, and testified in support of defendant's alibi defense. Even though the State's case was not completely dependent on the ballistics evidence, much of the State's remaining evidence was circumstantial. Defendant did maintain his innocence and new evidence would have the potential to significantly advance his claim of innocence. The court noted that it only held that defendant was entitled to testing. To obtain any substantive relief, defendant would have to prevail in a post-conviction proceeding.

4. The circuit court had denied testing, reasoning that even if IBIS testing were performed, a hands-on comparison would have to follow any high-confidence match, and such hands-on testing had been conducted prior to trial. Any testing that would be performed following a high-confidence match would not be identical to the testing that had been performed, however, as it would involve additional crime scene evidence and possibly test evidence of another weapon found in the IBIS database.

5. With respect to the State's argument that an IBIS search was a fishing expedition, the court observed:

> [T]he legislature obviously believes otherwise since it amended the statute to specifically allow for IBIS testing. Even if we agreed with the State, we cannot render the statute meaningless. Whether IBIS is a "forensic test" or and "investigative tool," as the State argues, the legislature has decided that a defendant satisfying the statutory requirements may seek postconviction IBIS testing. The pros and cons of the IBIS system as argued by the State are irrelevant because section 116-3 has already been amended to include IBIS testing, rightly or wrongly.

People v. Rozo, 2012 IL App (2d) 100308 (No. 2-10-0308, 5/21/12)

1. The court's ruling on a motion pursuant to 725 ILCS 5/116-3 is reviewed *de novo* where the court's decision is based on its assessment of the pleadings and trial transcripts as opposed to the credibility of any witnesses.

2. A defendant may seek certain forensic testing of evidence that was "secured in relation to the trial" that resulted in defendant's conviction if the evidence: "1) was not subject to the testing which is now requested at the time of trial; or 2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." 725 ILCS 5/116-3(a).

The tissue/blood samples found under the murder victim's fingernails were never tested and therefore could be tested pursuant to §116-3(a).

Samples of blood found at the scene and on defendant's jacket were previously subjected to DNA testing. The court rejected defendant's request that the samples be subjected to DNA-STR testing because DNA-STR testing was available at the time of defendant's trial. Although the Illinois State Police crime lab did not use DNA-STR testing at the time of defendant's trial, the standard is not whether the lab that tested the evidence employed that method of testing, but whether it was scientifically available.

3. To be entitled to the fingernail testing, defendant must also demonstrate that the result of such testing "has the scientific potential to produce new, noncumulative evidence materially relevant to the

defendant's assertion of actual innocence even though the results may not completely exonerate the defendant." 725 ILCS 5/116-3(c)(1). Materially-relevant evidence is that which tends to significantly advance a claim of actual innocence. The determination of whether such evidence would be materially relevant requires an evaluation of the trial evidence and the evidence that the defendant seeks to acquire through the testing. The strength of the State's evidence is not a hurdle that the defendant must overcome to meet the requirements of the statute.

The evidence at the murder trial showed that a violent struggle occurred in which the victim sustained multiple types of trauma as well as defensive wounds. It was not inconceivable that the victim could have gotten the blood or skin of his assailant under his fingernails while trying to protect himself from the attack. If DNA found under his nails did not match defendant's, such evidence would advance defendant's claim of actual innocence. If it matched the DNA of a third person whom defendant testified he saw make a bloody exit from the victim's bedroom on the day of the murder, it would have even greater significance. Therefore, defendant was entitled to testing of the evidence.

4. The statute also allows for comparison analysis of genetic marker groupings of recovered evidence to those of "other forensic evidence" as well as to those of qualifying persons maintained by the Illinois State Police pursuant to 730 ILCS 5/5-4-3. This testing would not have been available to a defendant at the time of trial because §116-3 is a post-trial remedy that does not apply to trial.

Defendant alleged in his §116-3 motion that the third person he saw exiting the victim's bedroom had submitted to DNA testing pursuant to §5-4-3 while he was in prison, and a private investigator had collected samples of the DNA of that person's roommate and paramour. The Appellate Court agreed that there was no reason not to compare the existing DNA evidence of these two men to the fingernail evidence as defendant alleges those men were actually involved in the murder and those results could be materially relevant to defendant's claim of innocence. "Based upon the totality of the present record, we need not wait for another motion to request such comparison testing at a later date."

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Slover, 2011 IL App (4th) 100276 (No. 4-10-0276, 9/9/11)

1. 725 ILCS 5/116-3 authorizes post-conviction forensic testing when several requirements are met, including that the testing has the scientific potential to produce new, noncumulative evidence that is materially relevant to an assertion of actual innocence. Generally, *de novo* review is applied to the trial court's disposition of a §116–3 motion.

The Appellate Court held, however, that *de novo* review was inappropriate where the trial court conducted an evidentiary hearing on the motion and based its ruling in part on its assessment of witness credibility. Finding that review of a §116-3 proceeding in which an evidentiary hearing was held is analogous to review of a third stage post-conviction proceeding, the court held that the same "manifestly erroneous" standard of review should be utilized. The court also noted that in this case the conclusion would be the same under either the "manifestly erroneous" standard or the two-part standard of review urged by the defendant, which would have reviewed the trial court's factual findings under the manifest weight of the evidence standard but applied *de novo* review to the judge's ultimate ruling.

2. A ruling is manifestly erroneous only if it contains error that is clearly evident, plain, and indisputable. The court concluded that the trial judge did not commit manifest error by concluding that the fingerprint testing which the defendants requested lacked the scientific potential to produce new, noncumulative evidence that was materially relevant to an assertion of actual innocence. Two experts testified at the evidentiary hearing; the defense expert testified that a partial print was suitable for testing with modified procedures, while the State's expert testified that the print was not suitable for testing and that the modified procedures suggested by the defense expert were "contrary to her training." The trial court "executed its function" by resolving the conflict in the testimony, and did not commit manifest error by concluding that the State's expert was more credible.

The court's denial of defendant's §116-3 motion was affirmed.

People v. Smith, 2014 IL App (1st) 113265 (No. 1-11-3265, 3/27/14)

1. Under section 116-3 of the Code of Criminal Procedure, a defendant may make a post-conviction request for forensic DNA testing to be performed on evidence secured in relation to his trial. To be entitled to testing, defendant must first show that the evidence was either (1) not subject to the testing now requested or (2) if previously tested, it is subject to new testing methods that were not scientifically available at the time of trial.

Next, defendant must present a *prima facie* case that identity was at issue in his trial and that the evidence has been subject to a chain of custody sufficient to show that it has not been tampered with, replaced, or altered in any material respect.

Finally, defendant must show that (1) testing has the scientific potential to produce new, non-cumulative evidence materially relevant to his assertion of actual innocence, even though the results may not completely exonerate him, and (2) the requested tests are generally accepted within the scientific community. 725 ILCS 5/116-3.

2. The Appellate Court held that defendant satisfied the requirements of 116-3 and was entitled to DNA testing on two items of clothing, a gray sweatshirt and gloves, that were connected to the offense. The court first rejected the State's argument that defendant was not entitled to testing because he failed to show that DNA testing was unavailable at the time of trial. Although a prior version of the statute placed this limitation on testing, the current version allows testing if the evidence at issue was not subjected to testing at the time if trial, with no need to show that the type of testing was unavailable. Since the State conceded that the clothing was not previously tested, defendant was not required to show that DNA testing was unavailable at trial.

The parties agreed that identity was an issue at trial and that the evidence was subject to a proper chain of custody. The State, however, argued that defendant failed to show that testing had the potential to produce evidence materially relevant to a claim of actual innocence. Evidence is materially relevant to a claim of actual innocence if it tends to significantly advance that claim. It does not need to completely exonerate defendant. In deciding this issue, courts may consider the trial evidence as well as the evidence to be tested.

3. At defendant's trial for first degree murder, two eyewitnesses identified him as the offender, and both said the offender was wearing a gray sweatshirt. One of the eyewitnesses identified a van as the getaway vehicle, and later that day, when the police stopped a van matching the description of the vehicle, they saw a gun "come flying" out the rear passenger window. They then found defendant sitting on a gray sweatshirt in the rear passenger seat. Three other men were in the van, including Lorenzo Banks in the front passenger seat. The owner of the van testified that he loaned the van to Banks on the day of the offense.

When the police processed the van they recovered gloves inside a pouch of the gray sweatshirt. Two cartridge cases found at the scene matched the gun thrown out of the van. Gunshot residue tests were negative for defendant and inconclusive for Banks.

Defendant testified that on the day of the offense, he ran into Banks and another friend, and accepted their invitation to drink with them in their van. They drove around listening to music until the police stopped them. Defendant then saw Banks throw a gun, which he had never seen before, out the front passenger window. Defendant was sitting on a gray sweatshirt, but it did not belong to him. Defendant argued that Banks was the shooter, pointing out that Banks borrowed the van in question, defendant saw Banks throw the gun out the van's window, and Banks' gunshot residue test was inconclusive.

4. The court held that in light of the trial evidence, testing the sweatshirt and gloves had the potential to produce material evidence of actual innocence. Defendant made no inculpatory statements and neither eyewitness was previously acquainted with defendant. The two articles of clothing were a central focus of the trial, especially where the absence of gunshot residue was explained by the existence of the gloves.

Although the sweatshirt and gloves were not intimate objects and thus could have contained another person's DNA through casual contact, defendant's argument also centered on the absence of his own DNA from the items. If the testing revealed that defendant's DNA was not present, but Banks was, it would

strongly support his theory that Banks was the shooter, and thereby advance his claim of actual innocence.

The case was remanded for DNA testing.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

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§19-28
Writings

§19-28(a)
Best Evidence Rule

People v. Ristau, 363 Ill. 583, 2 N.E.2d 833 (1936) The best evidence rule applies only to proof of the contents of documents, and requires that the original document be produced or an explanation made for its unavailability before secondary evidence may be introduced.

People v. Taylor, 40 Ill.2d 569, 241 N.E.2d 409 (1968) The State was properly allowed to introduce a copy of defendant's confession where neither the State nor defense could produce the original after a diligent search; in view of the unavailability of the original, the court reporter's copy was the best evidence of the statement.

People v. Brengettsy, 25 Ill.2d 228, 184 N.E.2d 849 (1962) Police officer properly testified about capsules found during search — the testimony was not subject to objection that the best evidence was the capsules themselves. See also, People v. Ristau, 363 Ill. 583, 2 N.E.2d 833 (1936) (description of clothing).

People v. Pelegri, 39 Ill.2d 568, 237 N.E.2d 453 (1968) Where witness admits making a prior inconsistent statement, the best evidence rule does not require that the statement itself be introduced.

People v. Baptist, 76 Ill.2d 19, 389 N.E.2d 1200 (1979) A State witness was properly allowed to testify about the contents of a letter she allegedly received from the defendant, though the letter itself was not introduced. A sufficient foundation was laid to permit parole evidence of the contents where the witness was the recipient and custodian of the letter, stated when she received it, described its return address and signature (the defendant's), and explained the reason for the letter's unavailability (destroyed by fire).

People v. Klisnick, 73 Ill.App.3d 148, 390 N.E.2d 1330 (1st Dist. 1979) The best evidence rule applies only when proof of the contents of a document (as distinguished from its existence) is at issue. The original of a document is not required if it is lost and was not lost by the proponent in bad faith. Furthermore, parole proof may be admitted only after secondary evidence, such as duplicates or copies, are accounted for.

People v. Munoz, 70 Ill.App.3d 76, 388 N.E.2d 133 (1st Dist. 1979) The Court discussed the authentication of documents and held that a letter allegedly written by defendant was properly admitted into evidence. The letter appeared to emanate from defendant's cell, bore his signature and nickname, and included information known to him.

People v. Lopez, 107 Ill.App.3d 792, 438 N.E.2d 504 (1st Dist. 1982) Trial court did not err in allowing the State to introduce photocopies of two evidence envelopes and three pages from the crime laboratory log book. The copies showed the initials of certain officers, the date and the case number. Both an officer and a chemist identified the copies as true and accurate. The originals had been lost, but not in bad faith.

People v. Ripa, 80 Ill.App.3d 674, 399 N.E.2d 1000 (2d Dist. 1980) Police officer properly testified about various items which had defendant's name on them. The inscriptions or labels were not within the best evidence rule - the sole question was whether the defendant's name was in fact affixed rather than the content of the writing.

Cumulative Digest Case Summaries **§19-28(a)**

People v. Davis, 2014 IL App (4th) 121040 (No. 4-12-1040, 12/8/14)

Defendant argued that his trial counsel was ineffective for failing to object to the introduction of a text message used to prove his intent to deliver cocaine. The State introduced evidence that a detective searched defendant's cell phone and found a text message asking to meet defendant "for a 30 or a 40." During defendant's interrogation (recorded on video and played at trial), the detective confronted defendant with this message. The detective then testified that he believed this message was about trying to purchase $30 or $40 of cocaine.

Defendant argued that counsel should have objected to the text message on three grounds: (1) lack of foundation; (2) violation of the best evidence rule; and (3) hearsay. The Appellate Court held that counsel was not ineffective since none of these objections would have succeeded.

1. The court rejected the foundation argument because it rested on a faulty assumption that the State had to lay a foundation for the introduction of a document. The State, however, never introduced any document. It simply played a video of the interrogation where the detective confronted defendant with the text message and then asked the detective what the message meant. Once the detective testified that he had read the message, there was a proper foundation for him to testify about its contents.

2. The court rejected the best evidence rule argument because it only applies when the contents of a writing are at issue. Here the State did not try to prove the content of the text message; it instead used the text message as circumstantial evidence that defendant intended to deliver cocaine. The actual content of the message did not matter.

3. Finally, the court rejected the hearsay argument because the detective's testimony about the contents of the text message was not offered to prove the truth of the matter asserted in the message. Instead, it was offered to show police investigation and circumstantial evidence of defendant's intent.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

People v. Diomedes, 2014 IL App (2d) 121080 (No. 2-12-1080, 6/16/14)

1. In order to admit a document as substantive evidence, the proponent must authenticate its authorship. A document may be authenticated through circumstantial evidence. In other words, the authentication requirement is satisfied where the document's contents, in conjunction with other circumstances, reflect distinctive characteristics which connect it to the author. Illinois Rule of Evidence 901(b)(4).

2. At defendant's trial for disorderly conduct based on transmitting by email a threat of violence, the email in question was properly authenticated by circumstantial evidence. Thus, the email was properly admitted substantively.

The court noted that the email raised several matters that were also contained in notes on a folder which was confiscated from defendant. Under the circumstances, it would have been reasonable for the trial court to find that the same person wrote both the email and the notes on the folder. The court also noted that in a voluntary written statement, defendant stated that he had written the email.

Under these circumstances, the email was sufficiently authenticated to be admitted. The court rejected defendant's argument that to authenticate an email, the State was required to present evidence to "connect" defendant to the IP address from which the email was sent.

(Defendant was represented by Assistant Defender Kathleen Weck, Chicago.)

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§19-28(b)
Business and Public Records

The admission of business records is subject to 725 ILCS 5/115-5 ("Business Records as Evidence") (formerly Ch. 38, §115-5(c)(2)).

People v. Smith, 141 Ill.2d 40, 565 N.E.2d 900 (1990) Writings, records and reports of police officers relating to police investigations are generally excluded from the business records exception to the hearsay rule. Such documents generally lack the earmarks of trustworthiness and reliability which are the true basis for the business records exception to the rule against hearsay and which business records are presumed to have.

Prison incident reports also lack the necessary earmarks of trustworthiness and reliability, and are not admissible under the business record exception. See also, **In re N.W.**, 293 Ill.App.3d 794, 688 N.E.2d 855 (1st Dist. 1997) (error to admit "unusual incident reports" prepared by juvenile facility in anticipation of disciplinary proceedings).

People v. Holowko, 109 Ill.2d 187, 486 N.E.2d 877 (1985) Chapter 38, §115-5(c)(2), which provides that records made in the regular course of business are inadmissible if made "during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind," is inapplicable to a phone "trap" or "tracer" (i.e., an electronic device whereby a computer automatically records the telephone numbers of all calls coming into the "trapped" telephone.) "[T]he printout of results of computerized telephone tracing equipment is not hearsay evidence of the type contemplated by section 115-5(c)(2)." Such a printout merely "represents a self-generated record of [the device's] operations, much like a seismograph can produce a record of geophysical occurrences" or a flight recorder creates a record of physical conditions on board aircraft. Such records are admissible with a foundation consisting of proof of the method in which the information was recorded and that the device was properly functioning.

People v. Jackson, 41 Ill.2d 102, 242 N.E.2d 160 (1968) A jail inmate card, kept as a statutory requirement and containing such information as a description of the person, was properly admitted into evidence.

People v. Hagan, 145 Ill.2d 287, 583 N.E.2d 494 (1991) While defendant was negotiating with a man named Flynn to obtain a certain lease agreement, he went to a mailing business and "faxed" a financial statement to Flynn. The Supreme Court held that the foundational requirements for introducing the "faxed" document were satisfied.

An employee of the mailing business testified that defendant came to the business on the day in question and had a document faxed. This employee also explained the procedures involved, including the fact that the business name, date, and time appeared on the "faxed" document. In addition, Flynn testified that he received the document on the afternoon it was sent.

People v. Cheek, 93 Ill.2d 82, 442 N.E.2d 877 (1982) Trial court properly excluded an FBI "rap sheet" from evidence. Because no witness could actually say how the "rap sheet" was received, it was not properly authenticated.

People v. Collins, 69 Ill.App.3d 413, 387 N.E.2d 995 (1st Dist. 1979) A writing made as a memorandum of any event shall be admissible of such event if it was made in regular course of any business and if it was the regular course of business to make such memorandum at the time of such event or within a reasonable time

thereafter.

People v. Johnson, 376 Ill.App.3d 175, 875 N.E.2d 1256 (1st Dist. 2007) 1. To establish the admissibility of computer generated records as business records, the proponent must show that the evidence was created in the regular course of a business, that standard equipment was used, that the particular computer on which the records were created generates accurate records when used appropriately, that the computer was used appropriately when the records were created, and that trustworthiness is shown by the sources of information, method of recording, and time of preparation. The court noted with approval a Nebraska case indicating that an officer's background and training in computer crimes are relevant "when the crime charged required the use of a computer and the evidence necessitated an understanding of computer files, data recovery, and on-line chat rooms as well as instant messaging." (See **State v. Atchison**, 15 Neb.App. 422, 730 N.W.2d 115 (2007).)

2. The State failed to establish a sufficient foundation to submit computer-generated transcripts of conversations between the defendant and an undercover officer who was posing as a 14-year-old girl. The State "did nothing" to establish a foundation for the computer-generated records; it did not address the accuracy of the transcripts, the accuracy of the software used to compile them, or the undercover officer's competence to operate the software. In addition, an unexplained malfunction resulted in the loss of at least one conversation, and "[t]here was no evidence as to the cause or correction of the malfunction."

3. The failure to require an adequate foundation for the computer-generated transcripts constituted plain error where the trial judge appeared to rely on the transcripts despite his statement that they would be stricken. "Given the ambiguity of the court's ruling about what evidence was suppressed and the uncertainty about what evidence the trial court relied on to convict, we can only conclude that defendant was unfairly prejudiced."

People v. Lombardi, 305 Ill.App.3d 33, 711 N.E.2d 426 (2d Dist. 1999) 1. Before a computer-generated record may be admitted under the business record exception to the hearsay rule, the proponent of the evidence must show that: (1) the electronic computing equipment is recognized as standard; (2) the input is entered in the regular course of business reasonably close to the time of the occurrence of the events recorded; and (3) the sources of information and method and time of preparation establish that the record is trustworthy. A trial court's decision to admit evidence under the business record exception will not be disturbed absent an abuse of discretion.

2. The State laid a sufficient foundation to justify admission of computer-generated banking records. Witnesses from the bank testified that in the normal course of business the information reflected by the exhibits was immediately entered into the computer system by tellers or automatic teller machines and was instantaneously stored in the mainframe computer, updating previous records stored there. Verification and accuracy of the system were shown by testimony that the computer systems were audited by three separate entities and that accounts were reconciled and balanced daily. There was also testimony that the copies of checks and other records were created in the ordinary course of business by bank employees using bank equipment.

Although the State did not specifically elicit testimony that the computer systems used by the bank were standard in the banking industry, there was testimony that the mainframe software was used by other banking institutions and that the software on the teller network was used by more than 500 institutions. Under these circumstances, there was a sufficient foundation to show that the records were trustworthy. Compare, **People v. Bovio**, 118 Ill.App.3d 836, 455 N.E.2d 829 (2d Dist. 1983) (computer-generated bank records were improperly admitted into evidence where testimony showed only that such records were kept by the bank in the regular course of business, without demonstrating that the equipment was standard or that the method of preparation indicated trustworthiness); **People v. Friedland**, 202 Ill.App.3d 1094, 560 N.E.2d 1012 (1st Dist. 1990)(evidence properly excluded where there was no evidence of the type of computer system used by the bank and whether the system was recognized as standard, and no testimony to establish that the

sources of information, method and time of preparation indicated the records were trustworthy).

People v. Downin, 357 Ill.App.3d 193, 828 N.E.2d 341 (3d Dist. 2005) 1. The decision to admit a document is reviewed under an abuse of discretion standard. A finding that there is an adequate foundation to admit a document is merely a finding of sufficient evidence to justify presenting the evidence to the trier of fact; the opponent of the evidence is not precluded from contesting the genuineness of the document or the weight which it should be given.

2. In order to establish a sufficient foundation for the admission of e-mails, the prosecution was required to show a rational basis upon which the factfinder could conclude that the messages had been sent by the defendant. The factors used to authenticate writings in general also apply to e-mail messages.

Among the methods of establishing authorship of a document is showing that the writing reflects knowledge of an obscure matter known to only a small group of individuals. The court found that there was a rational basis to believe that e-mails were genuine where: (1) the defendant and complainant communicated by e-mail, (2) the complainant sent an e-mail at a police officer's request to the same e-mail address she had used in the past to contact the defendant, (3) the complainant testified that she received a response from the defendant's e-mail address to her e-mail address, and (4)that e-mail was responsive to the message the complainant had sent. Thus, the trial court did not abuse its discretion by admitting the messages.

People v. Virgin, 302 Ill.App.3d 438, 707 N.E.2d 97 (1st Dist. 1998) The trial judge improperly admitted, as a business record, a receipt from the Animal Control Department which showed that only a single, mixed breed dog was removed from the premises where defendant was arrested. The receipt was admitted to rebut defendant's claim that he was arrested because he objected to officers' plan to steal his three expensive dogs.

The rationale for the business record exception "is the recognition that businesses are motivated to keep routinely accurate records and that they are unlikely to falsify records kept in the ordinary course of business and upon which they depend." To establish the exception, a witness familiar with the business and its operations must testify that: (1) the record was made in the regular course of business, and (2) it was the regular practice of the business to make such a record. Here, there was no such testimony from anyone affiliated with the Animal Control Unit or familiar with its operations.

People v. Davis, 322 Ill.App.3d 762, 751 N.E.2d 65 (1st Dist. 2001) 1. Documents prepared in anticipation of litigation are not admissible as business records; however, retrieval of previously-made records in anticipation of litigation does not disqualify documents as business records.

2. The State did not establish a sufficient foundation to admit a printout showing the catalog numbers and prices of jewelry allegedly stolen by the defendant. The witness called to authenticate the document testified only that she retrieved the printout, and said nothing about the process by which the records were created, the nature of the occurrence that was recorded, or when the record was made. In addition, the witness claimed that she retrieved such records in the regular course of business, not that the merchant made the records in the regular course of its business.

People v. Gayton, 293 Ill.App.3d 442, 688 N.E.2d 1206 (3d Dist. 1997) Under 725 ILCS 5/115-5(c)(2), records compiled during "any" investigation relating to "any" pending or anticipated litigation may not be admitted under the business record exception. In a prosecution for theft by deception, the trial court erred by admitting defendant's driver's abstract and testimony concerning his criminal history sheet. Although the records were not prepared in connection with the instant prosecution, the compilation of information submitted in relation to prior arrests and convictions is "made within the context of investigating pending or anticipated criminal prosecutions."

Easley v. Apollo, 69 Ill.App.3d 920, 387 N.E.2d 1241 (1st Dist. 1979) Once records are admitted as business records, the absence of an entry therein could properly be admitted if accompanied by testimony that an entry

would normally have been made.

People v. Morris, 65 Ill.App.3d 155, 382 N.E.2d 383 (1st Dist. 1978) Police reports are not admissible as business records, but may be used for impeachment or refreshing a witness's recollection.

People v. Berberena & Santiago, 265 Ill.App.3d 1033, 639 N.E.2d 599 (1st Dist. 1994) Defendants contended that the trial court erred by admitting, under the "business records" exception, a "gang roster" listing the names of persons who had allegedly attended a gang meeting just before the crime. The Appellate Court held that the gang roster did not meet the requirements of the "business record" exception.

To admit a document as a business record, the proponent must show that: (1) the writing was made as a memorandum or record of an act or event, (2) the writing was made in the regular course of business, and (3) it was the regular course of the business to make such a record at the time of the transaction or within a reasonable time thereafter. Here, the State failed to show that it was in the regular course of the gang's business to make such records - the evidence showed that the record was prepared at the meeting, but not that it had been made in a "regular, prompt and systematic" manner. Furthermore, there was no evidence that anyone used or relied on the record, which was merely a sheet of paper found in a spiral notebook.

People v. McClinton, 59 Ill.App.3d 168, 375 N.E.2d 1342 (1st Dist. 1978) It was improper for a police officer to testify that a certain weapon was checked through the firearms registration section and found to be registered to the defendant. "Generally, under the public records exception it is the record itself which is admissible and not the oral testimony of a witness concerning the contents of the record." However, oral testimony is admissible when the witness examined the record and it is physically impossible to produce the record in court.

In re Smith, 109 Ill.App.3d 786, 441 N.E.2d 92 (5th Dist. 1982) Attendance records kept by the Department of Mental Health are admissible as "records maintained by public officials." Records kept by persons in public office, which they are required to maintain in connection with the performance of their official duties, are admissible. See also, **People v. Williams**, 143 Ill.App.3d 658, 493 N.E.2d 362 (1st Dist. 1986) (a document consisting of certificates of vehicle title stapled to computer print-out sheets did not qualify as a public record where there was no evidence that the document was made in the ordinary course of business and authorized by statute or agency regulation or required by the nature of the public office).

People v. Hawthorne, 60 Ill.App.3d 776, 377 N.E.2d 335 (2d Dist. 1978) Record kept by county jail may be admissible to prove that defendant told the jailer what his address was, but not to prove the truth of defendant's statement.

People v. Clark, 108 Ill.App.3d 1071, 440 N.E.2d 387 (1st Dist. 1982) Written lease agreements were properly excluded because the foundation witness had no personal knowledge of the business and its records.

People v. Shiflet, 125 Ill.App.3d 177, 465 N.E.2d 942 (2d Dist. 1984) Apartment building records were properly admitted as business records where there was testimony that a separate maintenance file was kept on each apartment, the witness was familiar with and routinely used the records, and transactions were noted in the records as they occurred.

People v. Lewis, 52 Ill.App.3d 477, 367 N.E.2d 710 (3d Dist. 1977) A motel ledger was properly introduced as a business record.

People v. Antonio, 404 Ill.App.3d 391, 935 N.E.2d 540 (1st Dist. 2010)

1. **Crawford v. Washington**, 541 U.S. 36, 55 (2004), identified business records as among the well-established hearsay exceptions that by their nature are not testimonial and subject to the Sixth Amendment cross-examination requirement.

Relying on 725 ILCS 5/115-5.1, the Appellate Court concluded that reports of postmortem examinations are business records that may be admitted without the requirement of an opportunity to cross-examine the declarant. Section 115-5.1 provides in pertinent part that "the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court in this State, to the extent permitted by this Section."

Because postmortem examinations are business records, a medical examiner properly testified to the results of examinations conducted by another medical examiner and a forensic anthropologist. The medical examiner who performed the autopsy of a decomposed, headless body found no trauma other than dismemberment, and could not determine the cause or manner of death. The anthropologist examined the skeletal remains, found no antemortem injuries, and also could not determine a cause of death.

Melendez-Diaz v. Massachusetts, U.S. , 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009), did not change this result. The United States Supreme Court concluded that reports of experts who tested controlled substances were comparable to affidavits offered to prove a fact at issue, and therefore among the core class of testimonial statements for which cross-examination was required. In contrast, the reports of the medical examiner and the anthropologist reached no conclusion as to the cause and manner of death, and did not prove the identity of the victim. There was little or nothing to confront in either report.

2. Generally, other crime evidence is admissible where relevant to a material issue other then propensity.

Defendant was charged with first degree murder but convicted of involuntary manslaughter based on his statement to the police that he and the deceased argued, he became angry and pushed her, and she fell and struck her head on a piece of furniture. At trial, the State offered evidence that three years earlier defendant had threatened the life of his ex-wife with a gun.

The other crime evidence was properly admitted to prove intent, absence of mistake, and *modus operandi*. The similarities of the two offenses were unmistakable, despite their differences. The evidence of the other crime illustrated defendant's manner of handling stressful or upsetting situations.

People v. Coleman, 2014 IL App (5th) 110274 (No. 5-11-0274, 12/31/14)

1. Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle is sufficiently established to have gained general acceptance in its particular field. But **Frye** only applies to scientific evidence. If an expert's opinion is derived solely from his observations and experiences, it is not scientific evidence.

Following a **Frye** hearing, the State was allowed to introduce the testimony of an expert linguist who compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the **Frye** test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

2. The trial court properly admitted the testimony of five witnesses about hearsay statements made

by the decedent, defendant's wife, that defendant wanted a divorce. This evidence was properly admissible (a) under the statutory hearsay exception for the intentional murder of a witness; (b) under the doctrine of forfeiture by wrong doing; and (c) to establish defendant's motive.

(a) Under 725 ILCS 5/115-10.6(a), a hearsay statement is admissible if it is offered against a defendant who killed the declarant to prevent her from being a witness in a criminal or civil proceeding. The statute requires a pretrial hearing to determine the admissibility of the statements.

Here the trial court properly found at the pretrial hearing that defendant murdered his wife to prevent her from being a witness at a potential dissolution proceeding. Moreover, the statutory provision applies even though defendant had not initiated divorce proceedings.

(b) The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for out-of-court statements made by an unavailable witness if the defendant intentionally prevented the witness from testifying. Here defendant intentionally prevented his wife from testifying by killing her, and thus her out-of-court statements were admissible.

(c) The deceased wife's out-of-court statements were also admissible to show defendant's motive. Her statements indicated that defendant wanted a divorce but might lose his job if he tried to obtain one. The statements thus provided a motive for killing her.

3. The trial court did not abuse its discretion in allowing an expert in document examination to compare writings spray-painted on the wall of the murder scene with defendant's known writings in documents. Although there is some difficulty in comparing writing in documents with spray-painted writing on a wall, the expert merely pointed out similarities between the writings and never identified defendant as the actual author of the wall writing. The jury, which saw photographs of the wall writing was thus free to accept or reject the expert's testimony. Defense counsel thoroughly cross-examined the expert, and presented his own expert who cast doubt on the ability to make such comparisons.

4. The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

5. The trial court properly admitted the testimony of an officer who reviewed Master Card statements and determined that spray paint was purchased using a credit card traced to defendant. Illinois Rule of Evidence 803(24) provides an exception to the hearsay rule and allows a receipt or paid bill to serve as *prima facie* evidence of the fact of a payment.

People v. Harris, 2014 IL App (2d) 120990 (No. 2-12-0990, 5/22/14)

1. To preserve an issue for appellate review, defendant must object at trial and include the issue in a post-trial motion. Under Illinois Rule of Evidence 103(a)(1), to properly object to the admission of evidence, a party must state the specific ground for the objection unless the specific ground is apparent from the record.

Here, the record showed that the specific grounds for defendant's objection (to the admission of a logbook showing that a Breathalyzer machine had been certified as accurate) was apparent from the context of the proceedings. When the State first attempted to enter the logbook into evidence, defense counsel objected on hearsay grounds. (A logbook is hearsay and thus would be admissible only where the State lays a proper foundation for its admission as an exception to the hearsay rule.) The court sustained the hearsay objection and the State attempted to lay a proper foundation.

Counsel again objected on the grounds that the logbook was not a business record. The court overruled this objection. Counsel continued to object to testimony about the logbook and the accuracy of the Breathalyzer, objections which the trial court characterized as a "continuing objection to the admissibility" of the logbook. In the post-trial motion, counsel preserved all objections made during trial, and during the

hearing on the motion, counsel stated that the State did not lay a proper foundation.

Although counsel may not have specifically stated during trial or in the post-trial motion that she was objecting to the lack of a proper foundation, that ground was apparent from the context of the proceedings. And both the State and the trial court understood the nature of the objection. Defendant thus did not forfeit the issue.

2. Instrument logs certifying the accuracy of a Breathalyzer machine are hearsay, but may be admitted under the business-records exception to hearsay if the State lays a proper foundation. This foundation is laid by showing that the writing or record was made in the regular course of business at the time of the event or transaction, or a reasonable time thereafter. 720 ILCS 5/115-5(a). Illinois Rule of Evidence 803(6) similarly requires that a business entry be made at or near the time of the event or transaction.

Here the State presented evidence that the entry in the instrument logbook (showing that a Breathalyzer machine had been certified as accurate) was made in the regular course of business, but no evidence that it was made at the time of the event or within a reasonable time thereafter. The State thus failed to lay the necessary foundation. Without the logbook, there was no evidence about the accuracy of the Breathalyzer machine, which in turn meant the results of the Breathalyzer test could not be relied upon to find defendant guilty of driving under the influence of alcohol. The court reversed his conviction and remanded for a new trial.

(Defendant was represented by Supervisor Josette Skelnik, Elgin.)

People v. Hutchinson, 2013 IL App (1st) 102332 (No. 1-10-2332, 11/8/13)

1. In Illinois criminal cases, medical records are generally inadmissible as business records. However, 625 ILCS 5/11-501.4 creates a business record exception to the hearsay rule which authorizes the admission of some blood alcohol test results in DUI prosecutions. Under §11-501.4, results from blood tests conducted on persons who are receiving medical treatment in a hospital emergency room are admissible in DUI prosecutions as a business record exception where: (1) the tests were ordered in the regular course of providing emergency medical treatment and not at the request of law enforcement authorities, and (2) the analysis was performed by the laboratory routinely used by the hospital. Under §501.4(a)(3), the results of such testing are admissible "regardless of the time that the records were prepared."

Thus, §11-501.4 creates a special exception to the general rule where the defendant is tried for DUI and the testing was performed as part of emergency medical treatment.

2. The court rejected the argument that at a trial for DUI, the State failed to satisfy the foundation requirements of §11-501.4 before introducing defendant's blood alcohol test results. Admission of test results under §11-501.4 requires a foundation that the defendant was receiving medical treatment in a hospital emergency room, the testing was ordered in the regular course of providing emergency medical treatment and not at the request of law enforcement authorities, and the analysis was performed by the laboratory routinely used by the hospital.

A trauma center nurse testified that it was standard procedure to draw blood from motor vehicle accident victims, that the testing was ordered as part of providing emergency treatment, and that she drew the blood sample, checked defendant's ID band, and labeled the sample. In accordance with hospital procedure, a second nurse confirmed that the blood was being drawn from the correct patient and initialed the sample. The nurse testified that the blood was sent to the hospital lab immediately, that the lab was wholly contained within the hospital, and that the lab was routinely used to process blood tests. The nurse also identified a hospital report which stated defendant's "Alcohol, Serum" level.

The court concluded that under these circumstances, the foundation requirements for the admissibility of the blood tests under §11-501.4 were satisfied.

3. The court rejected defendant's argument that the nurse's testimony could not satisfy the foundation requirements because she lacked knowledge of the hospital's blood testing and record keeping procedures. Under §11-501.4, there is no requirement that the foundational witness be familiar with the

actual making of the business record. Furthermore, even under the general business record exception to the hearsay rule, the maker or custodian of the record need not testify to satisfy the foundation requirements for the exception. Instead, anyone who is familiar with the business and its procedures may testify to the foundation for the business record exception.

4. The court also rejected defendant's argument that §11-501.4 did not survive the enactment of Illinois Rule of Evidence 803(6), which provides that medical records are not admissible in criminal cases under the business record exception. The Illinois Rules of Evidence were intended only to codify existing evidentiary law, and not to modify that law.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

People v. Leach, 391 Ill.App.3d 161, 908 N.E.2d 120 (1st Dist. 2009)
(See §19-10(b))

People v. Leach, 405 Ill.App.3d 297, 939 N.E.2d 537 (1st Dist. 2010)

1. Under **Crawford v. Washington**, "testimonial" hearsay may be admitted at trial only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination. Although **Crawford** did not definitively define the term "testimonial," it did note that certain records are historically deemed to be nontestimonial, including records prepared in the normal course of business. Because such records are routinely prepared and relied upon for the conduct of business, they are unlikely to be falsified.

Similarly, Illinois law recognizes a "public records" hearsay exception for records required or authorized to be maintained by a public officer and evincing matters properly required to be noted and maintained. Medical examiner records are a type of "public document," and are generally admissible. Furthermore, autopsy records are specifically admitted under the statutory hearsay exception adopted in 725 ILCS 5/115-5.1.

Because autopsy records are nontestimonial, **Crawford** does not apply to their admission. Thus, **Crawford** was not violated at a murder trial when an expert witness testified concerning the contents of the records of an autopsy that had been performed by a pathologist who had retired by the time of trial.

In the course of its holding, the court noted that the medical examiner's office is not a law enforcement agency, but an agency empowered to investigate deaths and perform autopsies in a number of situations, only one of which concerns the possibility that a death resulted from a criminal act.

2. Even if the autopsy records were testimonial, they would have been admissible because they were offered for a purpose other than to prove the truth of the matter asserted. **Crawford** holds only that the confrontation clause bars testimonial hearsay which is offered to prove the truth of the matter asserted. (**People v. Williams**, ___ Ill.2d ___, ___ N.E.2d ___ (2010) (No. 107550, 7/15/10).

Here, the testifying expert relied on the autopsy reports in reaching her own expert opinion concerning the cause of death, and testified about those records to explain her own opinion. Because the records were not offered for the truth of the matters asserted, **Crawford** did not apply.

3. The court also noted that the expert's testimony about the autopsy records was admissible under **Wilson v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981). Under **Wilson**, an expert may base her expert opinion on records of a type reasonably relied upon by experts in the field, and may testify concerning those records in order to explain that opinion.

(Defendant was represented by Assistant Defender Maya Szilak, Chicago.)

People v. Sundling, 2012 IL App (2d) 070455-B (No. 2-07-0455, 1/31/12)

1. In **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2011), the Supreme Court held that the defense has an adequate opportunity to cross-examine, and the Confrontation Clause is therefore satisfied, where the witness testifies on direct examination in sufficient detail to establish each element of the charged offenses. Here, the Confrontation Clause was satisfied where the victim testified and was subject to cross-examination, although the witness had gaps in his memory, because those gaps did not reach the point that

the witness provided insufficient detail to permit cross-examination. The eight-year-old witness, who was four years old at the time of the alleged sexual abuse, testified that he remembered meeting the defendant and remembered wrestling with him, but could not remember where the defendant touched him or whether defendant said anything.

Because the witness testified and willingly responded to all questions asked on direct examination, and was available for cross-examination had defense counsel sought to question him, the fact that he had trouble remembering some aspects of the incident did not make him unavailable for cross-examination. The court distinguished **People v. Learn**, 396 Ill.App.3d 891, 919 N.E.2d 1042 (2nd Dist. 2009), in which the witness "shut down emotionally and was unable to answer questions," because in this case the witness answered all the questions he was asked and provided enough detail to permit cross-examination.

2. Generally, other crimes evidence is inadmissible to demonstrate the defendant's propensity to commit the charged crime. Evidence regarding other crimes is admissible, however, if offered to prove intent, *modus operandi*, identity, motive, absence of mistake, or some relevant fact other than propensity. Before admitting evidence of other crimes, the trial court must weigh probative value against prejudicial effect. Other crimes evidence may be excluded if the prejudicial effect substantially outweighs the probative value.

In addition, 725 ILCS 5/115-7.3(a)(1) permits the admission of some other crimes evidence in prosecutions for certain sex offenses. However, §115-7.3(a)(1) also requires a balancing of probative value and prejudicial effect.

To be admissible, other crimes evidence must have some threshold similarity to the crime charged. As factual similarities increase, the probative value of the evidence also increases. Where the evidence is not offered to show *modus operandi*, mere general areas of similarities are sufficient to support admissibility.

Defendant was charged with aggravated criminal sexual abuse against two children. The court concluded that the trial judge erred by admitting three prior convictions for sex offenses against children.

The court held that it was error to admit a 1984 Cook County conviction for indecent liberties and a 1997 Michigan conviction for attempted criminal sexual conduct with a person under the age of 13, because the only evidence consisted of certified copies and a docketing statement for the Cook County case and a copy of the charge and sentencing order in the Michigan case. Because the supporting evidence was insufficient to permit the trial court to determine that there were similarities between the prior offenses and the instant charges, the evidence should have been excluded.

Similarly, the trial court erred by admitting a 1997 Indiana conviction for child molestation. Although the State introduced a probable cause affidavit from the Indiana case, the affidavit should have been excluded for two reasons. First, the affidavit lacked sufficient indicia of reliability concerning the conduct underlying the conviction because it related to the original charges, not to a subsequent guilty plea which defendant entered after an Appellate Court in Indiana overturned the original conviction.

Second, the affidavit was inadmissible hearsay because it was an out-of-court statement offered to prove the truth of the matters asserted. The court found that the affidavit could not qualify for the business record exception to the hearsay rule; the business record exception does not apply to documents which are prepared in anticipation of litigation, and a probable cause affidavit is clearly created for purposes of litigation.

However, the court concluded that the erroneous admission of the other crimes evidence was not plain error. The defendant did not claim that the error was so serious that it affected the fairness of the trial and challenged the integrity of the process, and the court concluded that the evidence was not closely balanced.

Defendant's convictions for aggravated criminal sexual abuse were affirmed.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Watkins, 2015 IL App (3rd) 120882 (No. 3-12-0882, 1/21/15)

A proper foundation is laid for admitting documentary evidence, including text messages, when the document is identified and authenticated. To authenticate a document, the proponent must demonstrate that

the document is what it is claimed to be. Documentary evidence may be authenticated by either direct or circumstantial evidence. Circumstantial evidence includes appearance, contents, substance, and distinctive characteristics. Documentary evidence may be authenticated by its contents if it contains information that would only be known by the author or a small group of people including the author.

Here, the State introduced text messages to show that defendant used the cell phone found in a drawer and thus, by implication, also possessed drugs found in the drawer. But the only evidence offered by the State to authenticate the text messages was that the cell phone was found in the same house as defendant, albeit in a drawer in a common area, and that some of the messages referred to, or were directed at, a person with the same first name as defendant. There were no cell phone records or eyewitness testimony showing that the phone belonged to or had been used by defendant, or that any of the messages were sent to defendant. And there were no identifying marks on the cell phone or its display screen indicating that it belonged to defendant.

Under these facts, the evidence did not properly authenticate that the text messages were sent to defendant, and thus the presence of the phone in the drawer did not show by implication that defendant also possessed the drugs. Defendant's conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Sharifa Rahmany, Chicago.)

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§19-28(c)
Summaries

People v. Crawford Dist. Co., 78 Ill.2d 70, 397 N.E.2d 1362 (1979) "(W)here originals consist of numerous documents, books, papers or records which cannot be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by a competent person who has examined the documents, provided the result is capable of being ascertained by calculation."

Admission of charts summarizing invoices was proper where it was inconvenient for the jurors to examine each of the more than 1200 invoices, the charts merely simplified and clarified what the invoices showed, and the State demonstrated that the investigator was an accountant who was capable of examining and summarizing the voluminous records.

People v. Albanese, 102 Ill.2d 54, 464 N.E.2d 206 (1984) An accountant called as an expert witness by the State was properly allowed to testify that, based on review of voluminous documents, defendant was in "critical financial condition." It was "unreasonable to expect the jury to examine hundreds of pages of complex financial documents and make accurate computations concerning fund transfers, cash flow and liquidity, to determine the financial condition of [defendant]."

People v. Nwadiei, 207 Ill.App.3d 869, 566 N.E.2d 470 (1st Dist. 1990) At the defendant's trial for making fraudulent Medicare billings, an accountant testified about the total number of claims and the amount of money involved. An exhibit, prepared by the accountant, was entitled "Amount of Medicaid Dollars Paid for Fraudulent Claims." This exhibit contained several amounts labeled as "false," and the accountant referred to the exhibit as representing false or fraudulent claims.

The Appellate Court held that the use of the above exhibit was improper because it invaded the province of the jury by presenting the ultimate issue (i.e., whether defendant's billings were false) as an evidentiary fact.

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§19-28(d)
Refreshing Recollection

People v. Krauser, 315 Ill. 485, 146 N.E. 593 (1925) A witness can testify only to facts within his knowledge and recollection, but is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry. It is not necessary that the writing was made by the witness himself or that it is an original writing, so long as after inspecting it the witness can speak to the facts from his own recollection. See also, **People v. Griswold**, 405 Ill. 533, 92 N.E.2d 91 (1950).

People v. Dixon, 28 Ill.2d 122, 190 N.E.2d 793 (1963) When a witness has some independent recollection of an incident but that recollection becomes exhausted, she may refer to notes to refresh her recollection.

People v. VanDyke, 40 Ill.App.3d 275, 352 N.E.2d 327 (1st Dist. 1976) A witness who is unable to recall relevant facts may use a written memorandum to refresh and assist his memory. The memorandum itself need not be evidence or have been prepared by the witness, so long as he can speak to the facts from his own recollection after he has examined the memorandum. The fact that the witness refers to the memorandum more than once does not necessarily indicate a lack of sufficient present recollection.

People v. DeMario, 112 Ill.App.2d 175, 251 N.E.2d 267 (1st Dist. 1969) A witness may refer to a memorandum to refresh recollection, regardless whether the memorandum is admissible or was prepared by the witness. Opposing counsel has the right to inspect a memorandum used to refresh recollection.

People v. Vance, 53 Ill.App.3d 573, 368 N.E.2d 758 (1st Dist. 1977) A nurse was improperly allowed to testify concerning the condition and treatment of defendant; the record showed that she did not testify from her own independent recollection, but only from the statements set out in her report.

People v. Morris, 65 Ill.App.3d 155, 382 N.E.2d 383 (1st Dist. 1978) Police reports may be used to refresh the recollection of a witness.

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§19-28(e)
Past Recollection Recorded

People v. Strother, 53 Ill.2d 95, 290 N.E.2d 201 (1972) List of serial numbers of money used in narcotics purchase was properly admitted as past recollection recorded.

People v. Carter, 72 Ill.App.3d 871, 391 N.E.2d 427 (1st Dist. 1979) A written document is admissible as past recollection recorded when a foundation consisting of the following elements is shown: (1) the witness has no present independent recollection of the incident, (2) the document does not refresh the witness's recollection, (3) the witness prepared the written document at the time of (or soon after) the incident, at a time when he or she had a clear and accurate memory of the incident, and (4) the witness vouches for the truth and accuracy of the document. It was improper to admit a report as past recollection recorded where the witness testified that he did not recall writing it.

People v. Jenkins, 10 Ill.App.3d 166, 294 N.E.2d 24 (1st Dist. 1973) Writing was not admissible as past recollection recorded where the witness testified only that he recognized his signature on the writing.

People v. Munoz, 31 Ill.App.3d 689, 335 N.E.2d 35 (2d Dist. 1975) It was improper to allow introduction

of a writing as past recollection recorded where witness failed to establish her firsthand knowledge of the event, failed to show that entry was made contemporaneously with event, and was unable to vouch for the accuracy of the entry.

People v. Andrews, 101 Ill.App.3d 808, 428 N.E.2d 1048 (1st Dist. 1981) The trial judge erred by refusing to admit a police report as past recollection recorded, for the limited purpose of impeachment. The crucial evidence in an armed robbery trial was the identification of the defendants, both of whom were dark skinned, by the victim and a customer. The police report in question listed the witness's brother as the customer, and showed that one of the robbers was described by the victim as "light-skinned." The officers who prepared the report could not recall who gave them the information contained in the report.

In finding that the report should have been admitted, the court noted that the requirements for past recollection recorded were satisfied. The officers who prepared the report had firsthand knowledge of what the witnesses told them, the report was made shortly after the interviews and while they had a clear memory of what was said, the officers testified the report was accurate when written, and they lacked recollection at the time of trial. See also, **Wilsey v. Schlawin**, 35 Ill.App.3d 892, 342 N.E.2d 417 (1st Dist. 1975) (where foundation is satisfied, police reports may be introduced as past recollection recorded).

People v. Olson, 59 Ill.App.3d 643, 375 N.E.2d 533 (4th Dist. 1978) State criminologists were properly allowed to testify directly from their notes — this procedure was not merely refreshing their recollection, but introducing evidence of their recorded past recollection without actually introducing the past writing itself. The doctrine of past recollection recorded does not require introduction of the writing if the adverse party fails to move for its admission.

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