EVIDENCE

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I. A GENERAL INTRODUCTION AND RULES 101–06: PRESERVATION OF OBJECTIONS AND REVIEW OF EVIDENTIARY RULINGS

A. Introduction

This Article covers developments in evidentiary law in Michigan state courts and within the federal Sixth Circuit (and a couple cases from the U.S. Supreme Court) during the period of June 1, 2013 through May 31, 2014. As I have done in past articles, the organization of this Article mirrors the structure of the rules of evidence—for example, just as Rules 801 through 807 cover the hearsay rule and its exceptions, part VIII of this Article analyzes the cases interpreting those same rules. Each part begins with a brief overview of the topic and then proceeds to discuss the holdings and the facts of the cases interpreting the applicable rule or

rules. I only discuss published opinions of the courts, as only published cases are precedentially binding.[1]

Whether you are a student, a practitioner, an academic, or a judge, I hope you find this Article useful. I have tried (and probably failed) to relegate my personal opinions to the footnotes so that the Article primarily focuses on the holdings and the reasoning behind them. As writing about each case is itself a learning experience, I hope that you do not hesitate to write me with criticism if you conclude I have missed the mark.[2] Enjoy!

B. Appeals and Error[3]

1. Issue Preservation

Under Rule 103 of the Michigan and federal rules, a party generally may not appeal a trial court's ruling *admitting* evidence unless the party objected on the record while clearly specifying the grounds for its objection or, if the trial court *excluded* that party's evidence, the party made an offer of proof or through some other means made the trial court aware of the nature of the evidence it was excluding.[4] Specificity is critical, as "an objection on one ground is insufficient to preserve an appellate argument based on a different ground."[5] The rules require that "if the [trial] court's ruling is in any way qualified or conditional, the burden is on counsel to [again] raise objection to preserve [the] error."[6] (However, as the Michigan Court of Appeals recently emphasized, litigants should avoid "speaking objections" in jury trials: "Proceedings shall be conducted, to the extent practicable, so as to prevent

1. In Michigan: MICH. CT. R. 7.215(C); People v. Metamora Water Servs., Inc., 276 Mich. App. 376, 382, 741 N.W.2d 61, 65 (2007) (citing People v. Hunt, 171 Mich. App. 174, 180, 429 N.W.2d 824, 826 (1988)). In the Sixth Circuit: Rutherford v. Columbia Gas, 575 F.3d 616, 619 (6th Cir. 2009) (quoting Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985)).

2. My email address is meizlish@umich.edu.

3. The issue-preservation and standard-of-review sections are substantially similar to the corresponding portions of last year's article, as the case law has been mostly static. *See* Louis F. Meizlish, *Evidence*, 59 WAYNE L. REV. 1033, 1037–40 (2014).

4. *Id.* at 1037; *see* MICH. R. EVID. 103(a); FED. R. EVID. 103(a); *see also* KBD & Assocs., Inc. v. Great Lakes Foam Techs., Inc., 295 Mich. App. 666, 676, 816 N.W.2d 464, 470 (2012).

5. People v. Danto, 294 Mich. App. 596, 605, 822 N.W.2d 600, 605 (2011) (citation omitted).

6. United States v. Nixon, 694 F.3d 623, 628 (6th Cir. 2012) (alteration in original) (quoting United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999)) (internal quotation marks omitted).

inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."[7] Such objections risk prejudicing the jury.[8])

The major exception to this default rule is the "plain-error" doctrine.[9] If a party fails to preserve its claim of error in the trial court, it must make three showings on appeal to avoid forfeiture of the issue: "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."[10] In the 1999 case of *People v. Carines*,[11] the Michigan Supreme Court followed the U.S. Supreme Court's lead and extended the plain-error rule to claims of constitutional error, as well as non-constitutional error.[12]

But the inquiry is not over. Once establishing a plain error, in order to secure a reversal, an appellant must establish that "the plain, forfeited error resulted in the conviction of an actually innocent defendant or [that the] error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."[13]

It is important to distinguish waiver from forfeiture. Whereas forfeiture results from a sin of omission (failing to raise a timely objection), waiver results from a sin of commission (the "intentional relinquishment or abandonment of a known right").[14] "One who waives his rights . . . may not then seek appellate review of a claimed deprivation of those rights, for his waiver has *extinguished any error*."[15] (See part VI.A.1, where I discuss the fact that, in Michigan, a criminal defendant's failure to testify at a criminal trial *waives*, rather than *forfeits*, his opportunity to appeal the trial court's decision to permit the prosecution to impeach him with a prior conviction.)[16]

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7. Zaremba Equip., Inc. v. Harco Nat'l Ins. Co., 302 Mich. App. 7, 22, 837 N.W.2d 686, 696 (2013) (quoting MICH. R. EVID. 103(c)).

8. *Id.*

9. MICH. R. EVID. 103(d); FED. R. EVID. 103(e).

10. People v. Carines, 460 Mich. 750, 763, 597 N.W.2d 130, 138 (1999) (citing United States v. Olano, 507 U.S. 725, 731–34 (1993)).

11. *Id.*

12. *Id.* at 763–64, 597 N.W.2d at 138.

13. *Id.* (quoting *Olano*, 507 U.S. at 736–37) (internal quotation marks omitted).

14. *Id.* at 762 n.7, 597 N.W.2d at 138 n.7 (quoting *Olano*, 507 U.S. at 733).

15. People v. Carter, 462 Mich. 206, 215, 612 N.W.2d 144, 149 (2000) (emphasis added) (citations omitted) (quoting United States v. Griffin, 84 F.3d 912, 924 (7th Cir. 1996)). The only caveat to this otherwise hard-and-fast rule applies in criminal cases: a court may review a decision in spite of defense trial counsel's waiver if trial counsel's decision to waive any objection constituted ineffective assistance of counsel within the meaning of the federal and state constitutions. People v. Marshall, 298 Mich. App. 607, 610, 616 n.2, 830 N.W.2d 414, 418, 421 n.2 (2012), *vacated in part on other grounds*, 493 Mich. 1020, 829 N.W.2d 876 (2013).

16. *See generally* People v. McDonald, 303 Mich. App. 424, 844 N.W.2d 168 (2013).

2. Standard of Review

Assuming a party has preserved the issue, the appellate tribunal—in Michigan state courts or the Sixth Circuit—reviews the trial court's evidentiary rulings for an abuse of discretion.[17] In Michigan, an abuse of discretion in admitting or excluding evidence occurs when a "decision falls outside the range of principled outcomes."[18] The Sixth Circuit has similarly held that an abuse of discretion occurs when the reviewing tribunal is "left with the definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[19] During this *Survey* period, the Sixth Circuit had occasion to reaffirm its case law that, in examining a district court's application of the balancing principles of Rule 403, "the district court's decision is afforded great deference."[20] Before reviewing the ultimate evidentiary ruling, however, the appellate tribunal must determine if the trial court's evidentiary ruling involved a preliminary ruling on an issue of law, such as an interpretation of the rules of evidence, statutory law, or constitutional law, in which case the appellate tribunal will subject the preliminary legal ruling to de novo review.[21]

On the other hand, appellate courts will accord great deference to *factual findings* by applying the "clear error" standard "and will uphold those findings unless left with a definite and firm conviction that a mistake was made."[22] For a "roadmap" that illustrates the interaction of objections, preservation of issues, and appellate review of evidentiary rulings, see the 2012 *Survey* article on evidence.[23]

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17. People v. Danto, 294 Mich. App. 596, 598–99, 822 N.W.2d 600, 602 (2011); United States v. Sims, 708 F.3d 832, 834 (6th Cir. 2013) (citing United States v. Stout, 509 F.3d 796, 799 (6th Cir. 2007)).

18. *Danto*, 294 Mich. App. at 599, 822 N.W.2d at 602 (citing People v. Blackston, 481 Mich. 451, 460, 751 N.W.2d 408, 412 (2008)); *see* People v. Babcock, 469 Mich. 247, 269, 666 N.W.2d 231, 243 (2003).

19. United States v. Qin, 688 F.3d 257, 261 (6th Cir. 2012) (quoting United States v. Jenkins, 345 F.3d 928, 936 (6th Cir. 2003)). Be aware, however, of the Sixth Circuit's intra-circuit split as to the proper standard for reviewing determinations as to the admissibility of other acts pursuant to Rule 404(b). *See* Louis F. Meizlish, *Evidence*, 58 WAYNE L. REV. 739, 745 n.17 (2013).

20. United States v. Stafford, 721 F.3d 380, 395 (6th Cir. 2013) (quoting United States v. Bell, 516 F.3d 432, 445 (6th Cir. 2008)) (internal quotation marks omitted).

21. People v. Benton, 294 Mich. App. 191, 195, 817 N.W.2d 599, 603 (2011) (citing People v. Dobek, 274 Mich. App. 58, 93, 732 N.W.2d 546, 570 (2007)).

22. People v. Brown, 279 Mich. App. 116, 127, 755 N.W.2d 664, 675 (2008) (citing People v. Taylor, 253 Mich. App. 399, 403, 655 N.W.2d 291, 295 (2002)).

23. Louis F. Meizlish, *Evidence*, 58 WAYNE L. REV. 739, 746–48 (2012).

II. RULES 201–02: JUDICIAL NOTICE

There were no significant cases during the *Survey* period that discussed judicial notice.

III. RULES 301–02: PRESUMPTIONS

There were no significant cases during the *Survey* period that discussed presumptions.

IV. RULES 401–15: RELEVANCE, CHARACTER EVIDENCE, OTHER ACTS OF CONDUCT, RULE 403 BALANCING, AND EVIDENCE OF COMPROMISE OR SETTLEMENT

A. Relevance Generally

Only relevant evidence is admissible.[24] In fact, all relevant evidence is admissible unless (and this is perhaps the greatest caveat in the legal profession) another rule or a statutory or constitutional provision renders it inadmissible.[25]

The relevancy rule requires only a showing that the evidence has "*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[26] This definition of relevancy has two components: that the evidence is (a) probative of a fact, and (b) that fact is one that "is of consequence"—that is material to the action.[27] However, "[a] material fact need not be an element of a crime or cause of action or defense but it must, at least, be in issue in the sense that it is within the range of litigated matters in controversy."[28]

Relevance is a low hurdle in both Michigan state courts and within the Sixth Circuit. "The threshold is minimal: 'any' tendency is sufficient probative force."[29] In other words, in Michigan, "evidence is relevant if it

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24. FED. R. EVID. 402; MICH. R. EVID. 402. This introductory material to the rules pertaining to relevance borrows heavily, if not entirely, from the previous year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1053–54.

25. FED. R. EVID. 402; MICH. R. EVID. 402.

26. MICH. R. EVID. 401 (emphasis added); *see also* FED. R. EVID. 401.

27. MICH. R. EVID. 401; FED. R. EVID. 401; *see also* People v. Crawford, 458 Mich. 376, 388, 582 N.W.2d 785, 792 (1998).

28. People v. Powell, 303 Mich. App. 271, 277, 842 N.W.2d 538, 543 (2013) (quoting People v. Brooks, 453 Mich. 511, 518, 557 N.W.2d 106, 109 (1996)) (internal quotation marks omitted).

29. Hardrick v. Auto Club Ins. Ass'n, 294 Mich. App. 651, 668, 819 N.W.2d 28 (2011) (quoting *Crawford*, 458 Mich. at 390, 582 N.W.2d at 792).

'in some degree advances the inquiry.'"[30] Similarly, the Sixth Circuit has held that "[t]he standard for relevancy is 'extremely liberal' under the Federal Rules of Evidence."[31]

In ruling on relevancy questions, both the state and the Sixth Circuit have adopted a de facto totality-of-the-circumstances approach. In Michigan, "[t]he relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material."[32] Likewise, the Sixth Circuit held that "[t]he *purpose* of an item of evidence cannot be determined solely by reference to its *content*. That is because '[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'"[33]

1. Relevance of a Defendant's Concealed-Pistol License in Felony-Firearm Trials

A Wayne County jury found Willie D. Powell guilty of the crime of possession of a firearm during the commission of a felony[34] but acquitted him of delivery/manufacture of marijuana and maintaining a drug house.[35] At trial, the defense had sought to introduce evidence that the defendant had obtained a concealed pistol license (CPL), but the trial court excluded the evidence.[36] Following the conviction, the trial court granted Powell's motion for a new trial on the ground that it erred in excluding the CPL evidence.[37] The prosecution filed an application to the Michigan Court of Appeals, which granted leave to appeal.[38]

Observing that "[e]vidence is 'admissible if it is helpful in throwing light on any material point,'" the appellate court agreed that the trial court erred in excluding the CPL evidence and saw no error in its

30. *Id.* (quoting KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE § 185, at 736 (6th ed. 2007)).

31. Dortch v. Fowler, 588 F.3d 396, 400 (6th Cir. 2009) (quoting United States v. Whittington, 455 F.3d 736, 738 (6th Cir. 2006)).

32. *Powell*, 303 Mich. App. at 277, 842 N.W.2d at 543 (citation omitted) (quoting People v. VanderVliet, 444 Mich. 52, 75, 508 N.W.2d 114, 126 (1993)) (internal quotation marks omitted).

33. United States v. Parkes, 668 F.3d 295, 304 (6th Cir. 2012) (quoting FED. R. EVID. 401 advisory committee's note).

34. *Powell*, 303 Mich. App. at 272–73, 842 N.W.2d at 541.

35. People v. Powell, Case No. 11-3453-FH, Wayne County Circuit Court, *available at* https://cmspublic.3rdcc.org/CaseDetail.aspx?CaseID=1231073.

36. *Powell*, 303 Mich. App. at 276, 842 N.W.2d at 543.

37. *Id.* at 272–73, 276, 842 N.W.2d at 541, 543.

38. *Id.* at 272–73, 842 N.W.2d at 541.

decision to grant a new trial.[39] The appellate panel barely touched on the facts of the case, but explained its ruling as follows:

> The CPL evidence was relevant and admissible. Defendant's argument was that he was innocently present in a flat where someone else had marijuana. A relevant fact was whether defendant was using a handgun in a legal manner. The prosecution specifically argued that defendant's possession of the handgun was evidence that he was involved in selling the marijuana. This argument implied that defendant was not using the handgun in a legal manner. Defendant argued that he was using the weapon in a legal manner. Defendant's CPL evidence lent credibility to his argument that he legally possessed the handgun. Therefore, defendant's testimony that he had a valid CPL was 'within the range of litigated matters in controversy.'[40]

The panel—Judges David H. Sawyer, Peter D. O'Connell, and Kirsten Frank Kelly, in a per curiam opinion[41]—also saw no error in the trial court's determination that its earlier decision excluding the CPL evidence denied the defendant his constitutional right to present a defense.[42] Because the trial court did not abuse its discretion in granting a new trial, the appeals court affirmed its decision.[43]

2. Relevance of a Defendant's Status as a Medical Marijuana Patient in Criminal Drug-Delivery Cases

A "medical-marijuana defense" is irrelevant and inadmissible where, prior to the trial, the court has already concluded that the defendant's conduct fell outside the protections of the Michigan Medical Marihuana Act.[44] Such was the holding of the Michigan Court of Appeals in *People v. Vansickle* in September 2013.[45]

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39. *Id.* at 278, 842 N.W.2d at 543 (quoting People v. Aldrich, 246 Mich. App. 101, 114, 631 N.W.2d 67, 75 (2001)).

40. *Id.* (quoting People v. Brooks, 453 Mich. 511, 518, 557 N.W.2d 106, 109 (1996)).

41. *Id.* at 271, 842 N.W.2d at 540.

42. *Id.* at 278–79, 842 N.W.2d at 543 (citing People v. Anstey, 476 Mich. 436, 460, 719 N.W.2d 579 (2006)).

43. *Id.* at 280, 842 N.W.2d at 544.

44. People v. Vansickle, 303 Mich. App. 111, 117–20, 842 N.W.2d 289, 294–96 (2013).

45. *Id.*

Undercover Oakland County narcotics officers met with Jason L. Vansickle at a marijuana dispensary.[46] The defendant told the officers he had a surplus of marijuana from the amount he harvested and offered to sell them an ounce.[47] They told him they had insufficient funds to purchase an ounce, prompting Vansickle to offer to sell a smaller amount.[48] The officers and the defendant went outside and entered Vansickle's truck, where the defendant sold them some amount of marijuana for $50.[49] In the midst of the transaction, Vansickle handled a digital scale and a glass jar of marijuana.[50] Afterward, the officers and the defendant discussed "future transactions involving larger amounts of marijuana."[51]

Prior to trial, the trial court granted the prosecutor's motion in limine to preclude any reference to defendant's claim of immunity pursuant to MMMA, along with any reference to Vansickle's status as a "medical marijuana patient."[52] The defendant then consented to a bench trial, which resulted in his conviction; he then appealed.[53]

In considering whether the trial court properly ruled on the evidentiary question, the Michigan Court of Appeals held that, as a threshold matter, "there is no provision in the MMMA that expressly grants 'a qualifying patient' the right to sell marijuana to another allegedly 'qualifying patient.'"[54] Accordingly, because the "[d]efendant did not have the right to sell marijuana under section 4 of the MMMA[,] . . . defendant's alleged status as a legitimate 'medical marijuana' patient" was irrelevant, a unanimous panel held.[55] The trial court did not abuse its discretion in excluding evidence of Vansickle's status, the appellate court determined.[56] Thus, for this and other reasons, the panel of Judges Deborah A. Servitto, Mark J. Cavanagh, and Kurtis T. Wilder, in a per curiam opinion,[57] affirmed Vansickle's conviction.[58]

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46. *Id.* at 113–14, 842 N.W.2d at 292.
47. *Id.*
48. *Id.*
49. *Id.* at 114, 842 N.W.2d at 292.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 120, 842 N.W.2d at 295 (citing State v. McQueen, 493 Mich. 135, 156, 828 N.W.2d 644 (2013); MICH. COMP. LAWS ANN. § 333.26424 (West 2015)).
55. *Id.* at 120, 842 N.W.2d at 296.
56. *Id.*
57. *Id.* at 112–13, 842 N.W.2d at 292.
58. *Id.* at 122, 842 N.W.2d at 296.

3. Relevance of 'Post-Petition' Facts in Cases Involving Termination of Parental Rights

Civil proceedings to terminate an individual's parental rights commence with an individual's filing a petition in the probate or family court.[59] The petition "apprises the parent of the charges levied against him or her and affords a reasonable time to prepare a defense."[60]

A judge determines whether there is probable cause to support the allegations and if she does so, then "authorizes" the petition, at which juncture the family court takes "temporary jurisdiction" over the child.[61]

What follows the court's authorization of a petition in termination proceedings is the jurisdictional, or "adjudicative" phase, where the rules of evidence apply and the petitioner must establish, by a preponderance, one or more of the statutory grounds for termination.[62]

Among the questions before the Michigan Court of Appeals in *In re Dearmon* was whether a petitioner seeking to terminate the respondent's parental rights could introduce evidence it uncovered *after filing the petition* in the adjudicative/jurisdictional phase.[63] As a matter of constitutional due process, a unanimous panel concluded that where the "evidence of post-petition facts *qualifies as relevant* to an issue presented in an adjudication trial and is otherwise admissible under the rules of evidence, it may be admitted,"[64] and that there is no due process violation where the respondent had notice of the evidence.[65] The foregoing discusses why the *Dearmon* court concluded post-petition facts were relevant.

In *Dearmon*, petitioner Michigan Department of Human Services, through Children's Protective Services (CPS) worker Courtni Adamec, received a report of an incident of domestic violence between respondent Erika Harverson and her boyfriend in the presence of the boyfriend's four-year-old daughter.[66] During their second of two phone conversations, the respondent, who had already lost her parental rights to

59. *In re* Dearmon, 303 Mich. App. 684, 693, 847 N.W.2d 514, 519 (2014); *see also* MICH. COMP. LAWS ANN. § 712A.2(b).

60. *Dearmon*, 303 Mich. App. at 694, 847 N.W.2d at 519.

61. MICH. CT. R. 3.965(B)(11); *In re* Hatcher, 443 Mich. 426, 436–38, 505 N.W.2d 834, 839–40 (1993).

62. MICH. COMP. LAWS ANN. § 712A.2(b).

63. *Dearmon*, 303 Mich. App. at 687–88, 847 N.W.2d at 516.

64. *Id.* at 696, 847 N.W.2d at 521 (emphasis added).

65. *Id.* at 698, 847 N.W.2d at 522 (citing MICH. CT. R. 3.922(A)(1)(a)).

66. *Id.* at 688, 847 N.W.2d at 516.

another child, told the worker that "she would 'ship her children off' if CPS and the courts 'get involved.'"[67]

During her home visit, Adamec noticed the respondent's two black eyes and swollen face.[68] Harverson initially refused to answer questions but then said she would press charges for the assault and had already obtained a personal-protection order (PPO) against her boyfriend, Desmond Long.[69]

Adamec learned that police had recently arrested Long for assault on Harverson and that a condition of his pretrial release in the criminal case was that he have no contact with the respondent.[70] The CPS worker was unable to locate the PPO the respondent claimed to have obtained.[71]

Adamec conducted a forensic interview of Long's child, ML.[72] "ML recounted that Long and respondent had fought in respondent's apartment and that both combatants had wielded knives. During the altercation, ML and respondent's children attempted to hide behind a mattress. ML recalled that respondent had been bleeding."[73] ML's statements contradicted the respondent's denial that her children had not been present.[74]

After DHS filed its petition to terminate her rights to ML, Harverson exercised her right to a trial, whereby a jury would determine whether there were statutory grounds for the family court to assume jurisdiction over ML.[75] At trial, the petitioner's theory of the case was that the respondent's conduct exposed her children to domestic violence, which "places [the children] at a substantial risk of harm in her care and makes their home environment unfit."[76] Harverson's attorney argued that the respondent was a victim of domestic violence, that she wanted to prosecute her abuser, and that she "was doing everything pro-actively to prevent this from happening again."[77]

A panel of the Michigan Court of Appeals summarized the petitioner's evidence at trial:

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67. *Id.* at 688, 847 N.W.2d at 517.
68. *Id.*
69. *Id.*
70. *Id.* at 689, 847 N.W.2d at 517.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 688, 847 N.W.2d at 517.
75. *Id.* at 690, 847 N.W.2d at 517–18.
76. *Id.* at 690, 847 N.W.2d at 518 (internal quotation marks omitted).
77. *Id.* (internal quotation marks omitted).

> Adamec described her investigation to the jury and explained her decision to file a petition seeking jurisdiction. The testimony of several other witnesses supported that ML and respondent's children had been present during the July 15 assault. Law enforcement personnel testified about two other episodes of domestic violence between respondent and Long predating the July 15 fight. A sheriff's deputy opined that respondent had initiated the first assault by striking the first blow. The second assault led to Long's prosecution for domestic violence despite respondent's refusal to cooperate. By brawling with respondent on July 15, Long violated a bond condition imposed when he was charged with the second of the three assaults.[78]

The prosecution then introduced recordings of telephone conversations between the respondent and her boyfriend when the latter was in jail—conversations which occurred after DHS filed its petition.[79] There was no transcript of the conversations, but the appellate panel inferred from the trial transcript that "the calls reflected respondent's desire to maintain a close relationship with Long."[80] In overruling Harverson's objection and admitting the recordings, the trial court concluded that the respondent had "opened the door to the introduction of the tapes by asserting . . . that respondent had separated from Long and had no voluntary contact with him after the first of the three assaults in the summer of 2012."[81]

The jury concluded there was a statutory basis for the court to assume jurisdiction over ML.[82] The respondent appealed this adjudication to the Michigan Court of Appeals.[83] (After further proceedings, the family court terminated Harverson's rights, a decision which Harverson also appealed.[84])

In a per curiam opinion, Judges William C. Whitbeck, Joel P. Hoekstra, and Elizabeth L. Gleicher[85] observed that there was no statutory or court rule of evidence that mandates that the family court exclude evidence of post-petition events in termination proceedings.[86]

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78. *Id.* at 690–91, 847 N.W.2d at 518.
79. *Id.* at 691, 847 N.W.2d at 518.
80. *Id.*
81. *Id.*
82. *Id.* at 691–92, 847 N.W.2d at 518.
83. *Id.*
84. *Id.* at 692, 847 N.W.2d at 519.
85. *Id.* at 700, 847 N.W.2d at 523.
86. *Id.* at 696, 847 N.W.2d at 520.

The court concluded that the evidence *was* relevant to contradict the respondent's defense:

> Petitioner structured its jurisdictional claim on the argument that respondent was unable to extricate herself from her relationship with Long and that their inherently violent, abusive relationship endangered respondent's children. Respondent countered that Long had entered her home without permission on July 15, denied that her children had witnessed this altercation, and insisted that she had done everything in her power to distance herself from Long. Obviously, respondent's credibility was at issue given petitioner's contrary evidence. The jailhouse tapes bore directly on respondent's credibility. They tended to discredit her disavowal of voluntary contact with Long after the first assault.[87]

The panel further observed that the court had instructed the jury that, when listening to the recordings, it should not consider the statements of the prisoner (presumably Long), as they were hearsay.[88] The respondent's statements, however, "bore directly on her credibility, [and] were relevant regardless of the date she uttered them."[89] Accordingly, the panel affirmed the adjudication (and subsequent termination) for this and other reasons.[90]

B. Other Acts of Conduct

The general prohibition on propensity evidence, Rule 404(b), forbids "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith."[91] However, the rules do not bar such evidence for a *non*-propensity, or non-character, purpose, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material."[92] (Also, various statutory and court rules of evidence permit "propensity" evidence in

87. *Id.* at 697–98, 847 N.W.2d at 521.

88. *Id.* at 699, 847 N.W.2d at 522.

89. *Id.*

90. *Id.* at 700, 847 N.W.2d at 523.

91. MICH. R. EVID. 404(b)(1); *see also* FED. R. EVID. 404(b)(1). This introductory material to Rule 404 borrows heavily, if not entirely, from the previous year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1070–72.

92. MICH. R. EVID. 404(b)(1); *see also* FED. R. EVID. 404(b)(2).

very specific situations.[93]) While many often refer to such evidence as "prior bad acts,"[94] the Michigan rules specifically provide that such acts need be neither "prior" nor "bad" to trigger Rule 404(b)'s application, and the federal rules' wording leads directly to the same conclusion.[95] Accordingly, I refer to such evidence merely as "*other* acts."

In Michigan, to admit such evidence, its proponent must establish to the court that: "(1) the evidence [is] offered for a proper purpose; (2) the evidence [is] relevant; and (3) the probative value of the evidence [is] not substantially outweighed by unfair prejudice."[96] The Sixth Circuit's approach differs slightly. There, the applicable test requires the district court to: (1) "make a preliminary determination as to whether sufficient evidence exists that the prior act occurred, (2) make a determination as to whether the 'other act' is admissible for a proper purpose under Rule 404(b), and (3) determine whether the 'other acts' evidence is more prejudicial than probative under Rule 403."[97]

As to the first prong, the Sixth Circuit has explained that "sufficient evidence" does not require a preponderance of the evidence that the act occurred, "but [a party] may not present similar acts 'connected to the defendant only by unsubstantiated innuendo.'"[98] Subject to Rule 403, Michigan courts take an "inclusionary" approach to other-acts evidence:

> Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an

93. *See* Meizlish, *supra* note 3, at 1096–101.

94. People v. VanderVliet, 444 Mich. 52, 84 n.43, 508 N.W.2d 114, 130 n.43 (1993) ("Rule 404(b) permits the government to prove intent by evidence of prior bad acts . . . .").

95. *See* FED. R. EVID. 404(b)(1) ("Evidence of a crime, wrong, *or other act* is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." (emphasis added)); MICH. R. EVID. 404(b)(1) (providing that the rule applies "whether such other crimes, wrongs, *or acts* are *contemporaneous* with, or prior *or subsequent* to the conduct at issue in the case" (emphasis added)).

96. People v. Kahley, 277 Mich. App. 182, 184–85, 744 N.W.2d 194, 196–97 (2007) (citing People v. Knox, 469 Mich. 502, 509, 674 N.W.2d 366, 369 (2004)).

97. United States v. Poulsen, 655 F.3d 492, 508 (2011) (quoting United States v. Mack, 258 F.3d 548, 552–53 (6th Cir. 2001)) (internal quotation marks omitted).

98. United States v. Mack, 729 F.3d 594, 601–02 (6th Cir. 2013) (quoting Huddleston v. United States, 485 U.S. 681, 689 (1988)).

> inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ."[99]

1. Other Burglaries

People v. Roscoe involved a murder at an Ann Arbor car dealership.[100] Shane Noel Roscoe and his co-defendant, a cousin, broke into the dealership at nighttime to steal paint and chemical hardeners.[101] When one of the dealership employees discovered them, the defendant and his cousin struck the man in the head twice and then ran him over with a vehicle, causing his death some days later.[102] A Washtenaw County jury found Roscoe guilty of first-degree felony murder, safe breaking, breaking and entering a building with intent to commit larceny, and resisting or obstructing a police officer.[103]

The trial court admitted evidence of the defendant's prior burglaries in 1991, 2000 and 2008, pursuant to Rule 404(b), a decision that Roscoe argued on appeal was error.[104] The defendant, however, failed to persuade the panel of Judges Donald S. Owens, Stephen L. Borrello, and Elizabeth L. Gleicher.[105] The evidence was probative, the panel concluded, of the defendant's common scheme or plan in burglarizing buildings:

> The evidence shows a common scheme or plan by defendant of targeting car dealerships. The evidence also shows that defendant has a tendency to steal items that may not be of much value to the average person, but actually have a high resale value when sold together, such as the granite and setting materials. The similarity between the other incidents and this case make the evidence highly probative of a common scheme or plan, particularly because in this case defendant targeted a car dealership and the items missing were paint and hardening

99. People v. Danto, 294 Mich. App. 596, 599–600, 822 N.W.2d 600, 603 (citations omitted) (quoting People v. Mardlin, 487 Mich. 609, 615–16, 790 N.W.2d 607 (2010)).

100. People v. Roscoe, 303 Mich. App. 633, 638–39, 846 N.W.2d 402, 406 (2014).

101. *Id.* at 639, 846 N.W.2d at 406.

102. *Id.*

103. *Id.* at 638, 846 N.W.2d at 406.

104. *Id.* at 645, 846 N.W.2d at 410.

105. *Id.* at 650, 846 N.W.2d at 412.

> chemicals, which to the average person have little value, but defendant had knowledge of their high resale value.[106]

The evidence's prejudicial effect did not trigger Rule 403, as the prejudice did not outweigh its probative value, and the trial court properly instructed the jury to only consider the evidence for its proper purpose.[107] Accordingly, the panel affirmed Roscoe's conviction for this and other reasons.[108]

2. Other Armed Robberies

A federal grand jury in the Eastern District of Tennessee indicted Rodney B. Mack, Jr. on three counts of aiding and abetting carjacking, three counts of aiding and abetting robbery in interstate commerce, and three counts of aiding or abetting the carrying of a firearm in a crime of violence.[109] The charges pertained to three incidents in the Knoxville area in late July 2009.[110] As the Sixth Circuit summarized the three incidents:

> On each occasion, one of the men called in a food order to a pizza restaurant and requested delivery to a vacant house where the two men waited. When the delivery driver arrived, the men robbed the driver at gunpoint, taking the car, money, cell phone, food, and other property.[111]

During their investigation of the first of the three incidents, police found the delivery driver's car in the parking lot of the defendant's apartment complex.[112] While executing a search warrant at Mack's apartment, police found shoes and shorts similar to the clothing one of the robbers wore during the robbery, as well as a small cellular telephone that the victim identified as her phone at trial.[113] The driver positively identified the defendant in court as the robber, after earlier identifying him in the police's photographic lineup.[114] The driver testified during the

106. *Id.* at 646, 846 N.W.2d at 410–11.
107. *Id.* at 646, 846 N.W.2d at 411.
108. *Id.* at 649–50, 846 N.W.2d at 412.
109. United States v. Mack, 729 F.3d 594, 598 (6th Cir. 2013).
110. *Id.*
111. *Id.*
112. *Id.* at 599.
113. *Id.*
114. *Id.*

trial that when the defendant pointed the gun at her, she heard it make a "click-click" noise.[115]

Similarly, during the third of the three incidents, the defendant "pulled out a heavy, black, metal pistol, and pointed it at [delivery driver Ryan] Johnson's face. Johnson heard the man rack the slide on the firearm, placing a bullet into the chamber."[116] Johnson positively identified Mack as the gun-carrying robber.[117]

At trial, the district court permitted the government to introduce a transcript of the defendant's guilty plea to a similarly charged offense in Georgia state court about 17 months before the Tennessee carjackings.[118]

> Although the defendant in that case, Rodney Bernard Mack, Jr., was initially charged with a serious robbery offense, he entered a guilty plea to a reduced misdemeanor charge of disorderly conduct. According to the state prosecutor's factual basis statement presented to support the guilty plea, the robbery victim was approached by the defendant and his accomplice on a public sidewalk. The victim took special note of the shorter of the two men because he had short twists in his hair and he was dressed in blue jean shorts and a white tank top. The taller man, who wore a black jacket, told the victim he had a Glock in his pocket and demanded the victim's property. The victim immediately turned over his food and his cell phone.[119]

The government contended that its purpose in offering the other-acts evidence was to establish the defendant's identity as one of the culprits in the three Tennessee robbery/carjackings.[120] On appeal, Mack argued the district court erred in admitting evidence of the Georgia robbery because the evidence was unfairly prejudicial to him.[121]

The appellate panel began by considering the first prong of a Rule 404(b) analysis in the Sixth Circuit—whether there was "sufficient evidence" that Mack had committed the Georgia robbery.[122] Here, the Sixth Circuit concluded that the district court plainly erred because "the government had not confirmed on the record that the Rodney Bernard Mack, Jr. who pled guilty in Georgia state court was the same Rodney B.

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115. *Id.*
116. *Id.* at 600.
117. *Id.*
118. *Id.* at 601.
119. *Id.* at 601–02.
120. *Id.* at 602.
121. *Id.*
122. *Id.* at 601.

Mack, Jr., who was then on trial."[123] Second, the panel held, the Georgia robbery did not constitute proper "identity" evidence because the Georgia incident was not "sufficiently similar to the charged crimes to establish the defendant's pattern, modus operandi, or 'signature.'"[124] A unanimous panel of Judge Jane Branstetter Stranch, writing for herself and Judges Raymond M. Kethledge and Karen Nelson Moore,[125] differentiated the incidents:

> The three Tennessee robberies were committed in a similar pattern or by use of a similar modus operandi. But the Georgia charge arose from a typical street robbery in which the victim fortuitously turned over a cell phone and food to the robbers. *The Georgia crime did not involve calling in food orders, luring delivery drivers to vacant houses, stealing cell phones that were later used to set up future robberies, or carjacking.* Because the Georgia robbery lacked the pattern or modus operandi of the Tennessee robberies, the jury essentially heard forbidden propensity evidence because the jurors were required to pile 'inference upon inference' to draw the conclusion that the defendant was involved in all of the incidents.[126]

Accordingly, the panel concluded, the Georgia evidence failed all three prongs of the Rule 404(b) analysis—1) insufficient evidence, 2) insufficient probative value as to a non-character purpose, and 3) prejudicial effect outbalancing the probative value.[127] The panel held that the district court abused its discretion in admitting evidence of the Georgia robbery.[128] Nevertheless, the court affirmed the conviction on harmless-error grounds in light of the overwhelming evidence of Mack's guilt (namely, two of the three victims' positive identification of him as the culprit, his possession of the first and third Tennessee victims' cell phones, and the clothes police found in his apartment that were similar to the clothes one of the robbers was wearing during the incidents).[129]

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123. *Id.* at 602. The Sixth Circuit's opinion is silent as to whether Mack raised this issue in the district court. It is possible that his counsel *knew* the government had the evidence that the two Rodney B. Macks were the same individuals, and elected not to dispute identity so as to further draw the jury's attention to the defendant's prior act.

124. *Id.* (citing United States v. Clay, 667 F.3d 689, 693 (6th Cir. 2012)).

125. *Id.* at 598.

126. *Id.* at 602–03 (emphasis added) (citing *Clay*, 667 F.3d at 699).

127. *Id.* at 603.

128. *Id.*

129. *Id.*

3. Other Acts of Pimping

In *United States v. Willoughby*, a 16-year old girl ("SW") ran away from her Toledo, Ohio-area foster home and linked herself with the thirty-four-year old defendant, Anthony C. Willoughby.[130] Willoughby allowed SW to live at his house and allowed SW to become totally dependent on him for the basic necessities of life.[131] SW later reported that the defendant would have sex with her every day and that he would force her to have anal sex, including the use of anal beads.[132] The intercourse would often occur on a tan pillow in Willoughby's living room.[133]

Willoughby forced SW to become a prostitute and kept records of customers and potential customers in a notebook whose cover bore Barbie stickers.[134] The defendant would have SW "cold call" the names in the book and record whether the person was interested in sex with her.[135] These calls resulted in at least two meetings for sex at customers' homes.[136]

The defendant provided a fee structure: $50 for oral sex, $75 for intercourse, and $100 for both oral sex and intercourse.[137] He provided SW with undergarments and condoms, and he drove her to potential meet-ups, including one trip to a red-light district and another to a swingers' convention.[138] The defendant became upset when these trips did not produce the business he wanted.[139]

Two months into the "relationship," Willoughby began beating SW, usually for failing to comply with his rules.[140] SW bit her lip and induced vomiting in a successful effort to convince the defendant she was sick and vomiting blood.[141] Willoughby drove SW to her foster home and threatened her and her family if she disclosed what had occurred.[142] SW, nevertheless, disclosed what happened and the family contacted police.[143]

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130. United States v. Willoughby, 742 F.3d 229, 232 (6th Cir. 2014).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 232–33.
139. *Id.* at 233.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*

When executing a search warrant at the defendant's home, officers located:

> the undergarments that Willoughby had bought for SW, a list of truck stops in nearby states, the notebook with Barbie stickers, another notebook in which Willoughby wrote rap lyrics about pimping, a camera with photos of SW, handwritten notes with phone numbers (including numbers for Miles and Tusin), a makeup bag with a condom in it, anal beads, and the tan pillow, among other things.[144]

A federal jury in the Northern District of Ohio convicted Willougby of sex trafficking a minor through force, fraud or coercion, and the district court imposed a sentence of 30 years in prison.[145]

On appeal, Willoughby argued that the trial court erred in admitting the testimony of two women—one of whom, Amber Higginbotham, testified that the defendant was her pimp and another, Renee Todd, who said the defendant repeatedly asked her to work for him as a prostitute.[146] The defense did not contest the evidence outright on Rule 404(b) grounds; rather, Willoughby argued that Todd's testimony—that the defendant offered her drugs for sex—would poison the jury into concluding he was a drug dealer deserving of punishment.[147]

The Sixth Circuit first turned to the question of whether the government had a legitimate non-character purpose, within Rule 404(b)'s meaning, in offering the evidence.[148] The government argued that the two women's testimony was probative of Willoughby's knowledge, as "[t]o convict Willoughby, the government was required to prove that he recruited, enticed, harbored, or transported her *knowing that she would be caused to engage in a commercial sex act.*"[149] At trial, SW testified that the defendant would drive her to Lagrange Street, "a notorious location for prostitution in Toledo."[150] Higginbotham testified that she solicited customers on Lagrange while in Willoughby's employ, and Todd testified that the defendant asked her to solicit customers on the same street.[151] Higginbotham and Todd's testimony, the appellate panel

144. *Id.*
145. *Id.* at 231, 233.
146. *Id.* at 236.
147. *Id.*
148. *Id.* at 237.
149. *Id.* (emphasis added) (citing 18 U.S.C.A. § 1591(a) (West 2014)).
150. *Id.*
151. *Id.*

observed, helped establish that Willoughby *knew* Lagrange—"the track"—was an area of prostitution.[152]

The Sixth Circuit rejected the defendant's argument that establishing his knowledge was *not* a proper purpose (he emphasized that he had not put his mental state at issue).[153] The panel observed that "knowledge was an element of the charged crime, not an affirmative defense; and that means the government was required to prove his knowledge—beyond a reasonable doubt, no less—regardless of whether Willoughby himself put it 'in issue.'"[154]

Finally, the appellate panel had to consider whether the evidence's prejudicial effect (establishing defendant's character as a pimp) substantially outweighed the probative value (establishing his knowledge of Lagrange) within the meaning of Rule 403.[155] The risk of unfair prejudice, the judges observed, is "a danger always to be taken seriously in cases where the prior crime and the charged crime are the same."[156] That danger was present in *Willoughby*, the judges observed, noting that "[w]hen jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact."[157]

The fact that Lagrange was a "track"—an area known for high levels of prostitution—"was common knowledge;" thus the evidence of the defendant's pimping "merely showed that Willoughby knew what everyone else knew,"[158] the panel opined, noting that "one factor in balancing unfair prejudice against probative value under Rule 403 is the availability of other means of proof."[159] Here, "the government already had overwhelming proof that, when Willoughby drove SW to the residences of two johns, he knew full well that she would be caused to engage in a commercial sex act there."[160] Accordingly, the panel observed, the evidence's prejudicial effect substantially outweighed its probative value.[161]

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152. *Id.*

153. *Id.*

154. *Id.* (citing United States v. Merriweather, 78 F.3d 1070, 1076–78 (6th Cir. 1996)).

155. *Id.* at 237–38.

156. *Id.*

157. *Id.* at 238 (quoting United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994)) (internal quotation marks omitted).

158. *Id.*

159. *Id.* (quoting United States v. Jenkins, 593 F.3d 480, 485–86 (6th Cir. 2010)) (internal quotation marks omitted).

160. *Id.*

161. *Id.*

The panel noted, however, that its standard of review was deferential, that it could not conclude that the district court abused its discretion in admitting the evidence, as "the testimony had a proper purpose, and that on this record the government bore a significant burden in seeking to prove Willoughby's knowledge at trial."[162] Furthermore, given that the defense did not preserve the issue at trial, the panel also could not find plain error.[163] Finally, even if Willoughby had properly preserved the issue, the panel noted that the evidence was overwhelming and thus the error was harmless beyond a reasonable doubt.[164] It explained:

> [The evidence] was overwhelming specifically because it corroborated SW's testimony in so many ways. SW testified that Willoughby had intercourse with her daily, often on a tan pillow, and that on at least one occasion he forced her to use anal beads; the jury heard unrebutted expert testimony that DNA from Willoughby and SW was on both the pillow and the beads. SW testified that Willoughby directed her to cold-call potential johns, and that he gave her scripts of what to say; the jury saw the handwritten call logs and scripts as exhibits at trial. SW testified that she engaged in sex with "Chip" and "Ed" for money (which she then handed over to Willoughby); the jury heard each man say the same thing. SW testified that Willoughby drove her to Lagrange Street to look for johns; the jury heard another prostitute, Amber Higginbotham, testify that she saw Willoughby drop SW off there. SW testified that she called Willoughby for a ride home from a party store on Lagrange; the jury saw the store's phone records, which indeed showed a call to Willoughby's number during the time frame when SW said she was there. SW testified that Willoughby took her to a hotel during a swingers' convention to look for johns; the jury saw hotel receipts that showed Willoughby was at the hotel during the convention. And SW testified that Willoughby provided her with an array of paraphernalia—undergarments with specific patterns and colors, a notebook with Barbie stickers and johns' phone numbers inside, and a makeup bag containing

162. *Id.*
163. *Id.*
164. *Id.* (citing United States v. Mack, 729 F.3d 594, 603 (6th Cir. 2013)).

> baby oil, a condom, and wipes—all of which, the jury was later told, were seized during a search of Willoughby's home.[165]

Accordingly, the unanimous panel, in an opinion by Judge Raymond M. Kethledge for himself and Judge Jeffrey S. Sutton and U.S. District Judge Robert M. Dow,[166] affirmed the defendant's conviction and sentence, for this and other reasons.[167]

C. Rule 403 Balancing[168]

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[169] In interpreting this rule, the Michigan Supreme Court has explained that "[a]ll evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded."[170] The rule serves to prevent a court's admission of "evidence with little probative value [that] will be given too much weight by the jury."[171] "This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock."[172]

Because Rule 403 balancing in most cases ties particularly closely to a court's application of other rules (such as the provision of Rule 404(b)[173] allowing evidence of other acts of conduct) and is very specific to the facts, it is difficult to devote a lengthy section solely to this rule. Below I list the *Survey* period cases in this Article that involved a more-

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165. *Id.* at 235.

166. Judge Dow, of the Northern District of Illinois, sat by designation on the Sixth Circuit panel. *Id.* at 231.

167. *Id.* at 243.

168. This portion of the Article—an introductory explanation about Rule 403 balancing—borrows heavily, if not entirely, from last year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1106.

169. MICH. R. EVID. 403; *see also* FED. R. EVID. 403.

170. People v. Mills, 450 Mich. 61, 75, 537 N.W.2d 909, 917 (1995).

171. People v. McGhee, 268 Mich. App. 600, 614, 709 N.W.2d 595, 607 (2005) (citing *Mills*, 450 Mich. at 75, 537 N.W.2d at 917).

172. People v. Fisher, 449 Mich. 441, 452, 537 N.W.2d 577, 582 (1995) (quoting People v. Goree, 132 Mich. App. 693, 702–03, 349 N.W.2d 220, 225 (1984)).

173. MICH. R. EVID. 404(b).

than-de-minimis amount of Rule 403 balancing, with cross-references to the sections of this Article in which I discuss the cases and their importance for Rule 403 jurisprudence.

Case	Related issues	Cross-reference
Brumley v. Albert E. Brumley & Sons, Inc.	Hearsay exception: ancient documents	VII.C.1.c
United States v. Stafford	Expert opinion: gunshot residue	Part VII.C
People v. Roscoe	Other acts of conduct: burglaries	Part IV.B.1
United States v. Willoughby	Other acts of conduct: pimping	Part IV.B.3

D. Rape-Shield Provisions

The Michigan rape-shield statute, section 520j of the penal code, provides that evidence of specific instances of a rape victim's past sexual conduct, along with reputation and opinion evidence of his or her past conduct, is inadmissible in criminal sexual conduct cases.[174] Section 520j, the Michigan Court of Appeals explained in a 1978 case,

> represents an explicit legislative decision to eliminate trial practices under former law which had effectually frustrated society's vital interests in the prosecution of sexual crimes. In the past, countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.[175]

174. MICH. COMP. LAWS ANN. § 750.520j(1) (West 2015). The federal courts have promulgated a similar, but non-statutory, rape-shield provision. *See* FED. R. EVID. 412. This introduction to the rape-shield rule borrows heavily, if not entirely, from the previous year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1102.

175. People v. Khan, 80 Mich. App. 605, 613, 264 N.W.2d 360, 364 (1978).

Similarly, the Sixth Circuit has explained that the purpose of Rule 412 is to "encourage[] victims of sexual abuse to report their abusers by protecting the victims' privacy."[176]

The Michigan statute, however, permits the following evidence as exceptions to the rape shield: "(a) Evidence of the victim's past sexual conduct with the actor [and] (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."[177] To admit such evidence under either of these exceptions in the rape-shield statute, the court must find "that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."[178]

The corresponding provision in the Federal Rules of Evidence, Rule 412, is similar but differs in some respects.[179] Both the Michigan statute and the federal rule contain an exception for evidence "showing the source or origin of semen, pregnancy, or disease."[180] On the other hand, while the Michigan statute has an exception for "[e]vidence of the victim's past sexual conduct with the actor,"[181] the narrower exception in the federal rule permits "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, *if offered by the defendant to prove consent or if offered by the prosecutor.*"[182] Second, unlike the Michigan statute, the federal rule does not require the trial judge to subject evidence falling within one of the two exceptions to a probative-versus-inflammatory-effect balancing before admitting such evidence.[183] Third, in civil cases only, the federal rule, unlike the Michigan statute, permits evidence of a victim's sexual behavior or disposition "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy."[184] Finally, the procedural time limits and mechanisms differ slightly between the federal and state provisions.[185]

In *United States v. Willoughby*, a case I previously referenced in Part IV.B.3 of this Article, the Sixth Circuit held that Rule 412 does not operate to preclude cross-examination of a rape victim concerning her

176. United States v. Ogden, 685 F.3d 600, 606 (6th Cir. 2012).
177. MICH. COMP. LAWS ANN. § 750.520j(1).
178. *Id.*
179. FED. R. EVID. 412.
180. MICH. COMP. LAWS ANN. § 750.520j(1)(b); *see also* FED. R. EVID. 412(b)(1)(A).
181. MICH. COMP. LAWS ANN. § 750.520j(1)(a).
182. FED. R. EVID. 412(b)(1)(B) (emphasis added).
183. See MICH. COMP. LAWS ANN. § 750.520j(1); FED. R. EVID. 412(b)(1).
184. FED. R. EVID. 412(b)(2).
185. *Compare* MICH. COMP. LAWS ANN. § 750.520j(2), *with* FED. R. EVID. 412(c).

prior false *allegations* of sexual abuse.[186] One of the errors the defendant alleged on appeal was the trial court's decision to preclude the defense from cross-examining SW about a previous allegation of sexual abuse she made and later recanted against a counselor at a foster home at which she had lived.[187] The defense argued that the recantation was probative of SW's credibility and not within the purview of the rape-shield provision in Rule 412.[188]

A unanimous panel of the Sixth Circuit, in an opinion by Judge Raymond M. Kethledge for himself and Judge Jeffrey S. Sutton and U.S. District Judge Robert M. Dow,[189] concluded that the district court erred in excluding the evidence of SW's recantation.[190] The recantation, the panel explained, "was not 'offered to prove that [SW] engaged in other sexual behavior'—because the testimony's whole predicate was that there was no 'other sexual behavior' to begin with. For the same reason, the testimony was not 'offered to prove [SW]'s sexual predisposition.'"[191] The panel further rejected the government's contention that exploring the recantation would have provoked a mini-trial as to the truth of the prior recantation.[192] Rather, the appellate judges observed that Rule 608(b) precludes extrinsic evidence of prior acts of dishonesty—in other words, the defense would have been unable to introduce testimony or evidence of the false recantation if SW denied lying about the former incident.[193] (See the discussion on Rule 608(b) in part VI.A.2 of this Article.) Nevertheless, the panel affirmed the defendant's conviction, on harmless-error grounds.[194]

E. Evidence of Compromise or Settlement

In Rule 408, the federal and state rules both disallow a party's use of an adverse party's offer of settlement, or statements the adverse party made during settlement negotiations, to prove the validity or invalidity of a claim or to prove the amount for which the offeror is liable.[195] In plain

186. United States v. Willoughby, 742 F.3d 229, 234–35 (6th Cir. 2014).
187. *Id.* at 234.
188. *Id.*
189. *Id.* at 231.
190. *Id.* at 234.
191. *Id.* (quoting FED. R. EVID. 412(a)).
192. *Id.* at 235.
193. *Id.* (citing FED. R. EVID. 608(b)).
194. *Id.* at 243.
195. FED. R. EVID. 408(a); MICH. R. EVID. 408. The federal and state rules diverge slightly in that the federal rules add that such evidence of compromise or statements in settlement negotiations is also inadmissible "to impeach by a prior inconsistent statement or a contradiction." FED. R. EVID. 408(a). Note that this introductory material to Rule 408

English, this means party P cannot show that party D is liable for X amount because D offered to *settle* the case, nor may it use statements D made during settlement talks to show that the amount of the damage is X. Similarly, a party may not introduce evidence that the opposing party settled with a non-party.[196] For a discussion of the policy underlining the rule, see the 2012 *Survey* article on evidence.[197]

Frank Cona, the petitioner in *Cona v. Avondale School District*, began working as a teacher at the Avondale School District in Oakland County in 1997, obtaining tenure during the 2001–02 academic year.[198] In early 2010, as part of a plea bargain, Cona pled guilty to a criminal charge of impaired driving and received a sentence of twelve months of probation.[199] The petitioner failed to comply with probation by testing for alcohol and marijuana, which led to two successive probation violations.[200] The second violation hearing occurred on a school day, and Cona told the school district

> that his absence from work was due to illness. Petitioner was offered a choice between jail time and an additional year of probation. Petitioner chose jail because he believed that his probation officer would recommend a 15-day sentence and that he would be permitted to serve the sentence on weekends, thereby allowing him to continue teaching during the week. However, petitioner was mistaken. After pleading guilty to the charge of violating his probation, petitioner was sentenced to 30 days in jail. The district court ordered that his sentence begin immediately.[201]

While in jail, Cona instructed his ex-wife to log in to his account on the district's electronic school-absence system and list "personal days" as the reason for his long absence.[202] The system rejected that entry, prompting future unsuccessful attempts to enter "family illness" and "leave of absence."[203] Eventually, at the petitioner's direction, his ex-

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borrows heavily from the 2012 *Survey* article on evidence. *See* Meizlish, *supra* note 23, at 804.

196. Windemuller Elec. Co. v. Blodgett Mem'l Med. Ctr., 130 Mich. App. 17, 23, 343 N.W.2d 223, 225 (1983).

197. Meizlish, *supra* note 23, at 804–05.

198. Cona v. Avondale School Dist., 303 Mich. App. 123, 125–126, 842 N.W.2d 277, 279 (2013).

199. *Id.* at 126, 842 N.W.2d at 279.

200. *Id.*

201. *Id.* at 126–27, 842 N.W.2d at 280 (footnote omitted).

202. *Id.* at 127, 842 N.W.2d at 280.

203. *Id.*

wife met with the superintendent and explained where Cona truly was.[204] At some point during his incarceration, word spread among the students that one of their teachers was in jail.[205]

Shortly after his release in early May 2011, the petitioner met with the superintendent and asked to return to his position.[206] Instead, the district placed him on leave for the balance of the school year.[207]

> On June 22, 2011, [Superintendent George] Heitsch sent petitioner a letter stating that '[p]ending the successful resolution of [his] suspension,' petitioner would be placed as a social studies teacher in the middle school for the 2011-2012 school year. The parties then entered into settlement negotiations, but the negotiations eventually broke down and no resolution was ever reached.[208]

The school district subsequently discharged the petitioner.[209] Cona appealed to the Michigan Tenure Commission, which held a hearing before a referee and then affirmed the discharge.[210] The petitioner then filed an application with the Michigan Court of Appeals, which granted leave to appeal.[211]

On appeal, the petitioner argued that the tenure commission erred in its final determination and that in arriving at that determination, the commission's referee erred in excluding evidence of the settlement negotiations.[212] He argued that the evidence would have established the district's earlier intent to reassign him, and that it would have impeached the superintendent's credibility.[213]

The appellate panel acknowledged that Rule 408 generally operates to exclude evidence of compromise to establish a party's liability "but 'does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness.'"[214] Here, however, the panel concluded that Heitsch's efforts to negotiate a

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204. *Id.* at 127–28, 842 N.W.2d at 280.
205. *Id.* at 128, 842 N.W.2d at 281.
206. *Id.*
207. *Id.*
208. *Id.* at 128, 842 N.W.2d at 280–81.
209. *Id.* at 130, 842 N.W.2d at 281.
210. *Id.* at 130–36, 842 N.W.2d at 281–285.
211. *Id.* at 136, 842 N.W.2d at 285 (citing Cona v. Avondale Sch. Dist., No. 310893, 2013 Mich. App. LEXIS 1815, at *1 (Mar. 19, 2013)).
212. *Id.* at 141, 842 N.W.2d at 287.
213. *Id.*
214. *Id.* (quoting MICH. R. EVID. 408).

resolution with Cona did not establish bias on his part.[215] Furthermore, assuming arguendo that the rules permit a party's use of a witness's prior statements in compromise negotiations to impeach the witness, "the record . . . contain[s] no allegations of fact that call into question the testimony of Dr. Heitsch or [Avondale High School Principal Frederick] Cromie."[216] Accordingly, Judge Kathleen Jansen, writing for a unanimous panel of herself and Judges Donald S. Owens and Joel P. Hoekstra,[217] found no grounds to disturb the commission's ruling and affirmed Cona's discharge.[218]

F. Statements During Plea Negotiations

Rule 410(4) of the Michigan Rules of Evidence provides that an adverse party in a civil or criminal proceeding may not use a defendant's prior statements "made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."[219] Subsequent to the *Survey* period, the Michigan Supreme Court agreed with the court of appeals' *Survey*-period decision in *People v. Smart* that Rule 410(4) "does not require that a statement made during plea discussions be made

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215. *Id.* at 141–42, 842 N.W.2d at 287–88.

216. *Id.* at 142, 842 N.W.2d at 288 (internal quotation marks omitted).

217. *Id.* at 124, 842 N.W.2d at 279.

218. *Id.* at 144–45, 842 N.W.2d at 289. Jansen explained:

> Respondent had principled reasons for discharging petitioner from employment. The written tenure charges were developed with reference to specific circumstances and conduct that, in Heitsch's professional judgment, affected petitioner's ability to continue serving as a teacher. Petitioner had been convicted of driving while impaired, had violated the terms of his probation by using drugs and alcohol, had missed 17 days of work as a result of his incarceration, and had provided false reasons for his absence. Moreover, petitioner's 17-day absence disrupted the learning process at Avondale High School, at least for those students in petitioner's classes. Respondent's reasons for discharging petitioner were developed with reference to these particular facts and circumstances, and were not freakish, whimsical, or apt to change suddenly. Nor is there any evidence to suggest that respondent's reasons were based on prejudice, animus, or improper motives. In light of the record evidence presented in this case, the Commission determined that respondent's reasons were 'not arbitrary or capricious' within the meaning of MCL 38.101(1), as amended. We conclude that the Commission's determination in this regard was authorized by law and supported by competent, material, and substantial evidence on the whole record.

Id. at 143–44, 842 N.W.2d at 289 (citations omitted).

219. MICH. R. EVID. 410(4). The federal rule is virtually identical. *See* FED. R. EVID. 410(4).

in the presence of an attorney for the prosecuting authority" for the statement to be inadmissible under the subrule.[220]

The one-paragraph order from the supreme court[221] overruled *People v. Hannold*, which suggested that a prosecuting attorney must be physically present during the plea negotiations to trigger application of Rule 410(4).[222]

Under existing law, to trigger Rule 410(4), "the defendant must . . . have an actual subjective expectation to negotiate a plea at the time of the discussion and that such expectation be reasonable under the totality of the circumstances."[223] Furthermore, while the prosecuting attorney need not be physically present, negotiations must be underway with the prosecutor's office, as "'[i]n the course of' means 'in the process of, during the progress of.' It is conceivable that a defendant may speak to persons other than an attorney for the prosecuting authority in the course of plea discussions."[224] Such was the court of appeals' holding in *People v. Smart*, a decision the court delivered during the *Survey* period.[225]

Genesee County charged Mantrease Datrell Smart with several felony counts, including felony murder and armed robbery, for his

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220. People v. Smart, 497 Mich. 950, 950, 857 N.W.2d 658, 658 (2015).

221. *Id.*

222. People v. Hannold, 217 Mich. App. 382, 391, 551 N.W.2d 710, 714 (1996). One might fairly characterize *Hannold*'s statement about the physical presence of the prosecuting attorney as more dicta than holding:

> Specifically, defendant contends that these statements were made in the context of plea negotiations and therefore were admitted in violation of MRE 410 (inadmissibility of pleas, plea discussions, and related statements). However, defendant failed to object at trial to the admission of these statements. Accordingly, this issue is not preserved. *People v Mooney*, 216 Mich. App. 367, 375; 549 N.W.2d 65, 69 (1996). In any event we find no error. Our review of the trial record, including defendant's trial testimony, reveals no evidence or indication that defendant had a subjective expectation to negotiate a plea when he made his incriminating statements to the police on October 3, 1991. Nor is there any evidence or indication that any such expectation would have been reasonable under the circumstances. See, generally, *People v Dunn*, 446 Mich. 409, 415–416; 521 N.W.2d 255 (1994). Moreover, the record clearly reveals that no prosecuting attorney was present at the time defendant made his incriminating statements to the police. Thus, MRE 410, which was amended two days before defendant was arrested in this case, is simply inapplicable. Because the statements were not erroneously admitted, defendant has failed to demonstrate that counsel erred in failing to object to their admission. *People v Briseno*, 211 Mich. App. 11, 17; 535 N.W.2d 559 (1995).

Hannold, 217 Mich. App. at 391, 551 N.W.2d at 714.

223. People v. Smart, 304 Mich. App. 244, 253, 850 N.W.2d 579, 582 (2014) (citing People v. Dunn, 446 Mich. 409, 415, 521 N.W.2d 255, 258 (1994)).

224. *Id.* at 252 (quoting I OXFORD ENGLISH DICTIONARY 1088 (compact ed. 1971)).

225. *Id.* at 251–53, 850 N.W.2d at 582–83.

having supplied a gun to two individuals who executed a robbery and shot the victim.[226] The court of appeals supplied the basic facts of the plea negotiations:

> Defendant's involvement was unknown until he was charged in another incident and advised his attorney in that case, Patricia Lazzio, that he had information concerning a homicide. Hoping to work out a favorable plea bargain in the pending case against him, Lazzio spoke with Assistant Prosecuting Attorney Richmond Riggs of the Genesee County Prosecutor's Office and thereafter arranged a meeting with Sergeant Mitch Brown, the officer in charge of the homicide case, to discuss the instant matter. Lazzio, believing that defendant may have been a witness to the murder, elicited an agreement from Riggs that the information defendant provided at the meeting would not be used against him. At the March 15, 2011 meeting attended by Sergeant Brown, defendant, and Lazzio, defendant (to Lazzio's surprise) admitted to providing a weapon to the individuals who planned the robbery of Kreuzer and then witnessing the shooting. Thereafter, defendant entered into a written plea agreement in the case pending against him. Defendant subsequently desired to schedule another meeting with Sergeant Brown because defendant questioned whether his attorney had secured the best possible plea agreement. Sergeant Brown and Lazzio both believed the plea agreement would not change, and Lazzio asked Sergeant Brown to tell defendant that the plea agreement would not improve. Nevertheless, the prosecutor's office urged Sergeant Brown to meet with defendant again to see if he could obtain more information from defendant about the homicide.
>
> As a result, a second interview between defendant, Lazzio, and Sergeant Brown took place on June 8, 2011. At that meeting, Sergeant Brown told defendant that he did not think that the plea agreement was going to get any better and that it was the prosecutor's office that decided what plea deals to offer. Defendant and Sergeant Brown still continued to converse and defendant ultimately revealed further information about the robbery and homicide that implicated him more than he had

226. *Id.* at 247, 850 N.W.2d at 580.

originally admitted. Defendant was thereafter charged in the instant case.[227]

Prior to trial, the prosecution conceded that the March 15 statement was inadmissible, but contended that the June 8 statement did not fall within the ambit of Rule 410(4) as the defendant did not have a reasonable expectation at *that* juncture to negotiate a plea.[228] The trial court suppressed both statements.[229]

A two-person majority on the court of appeals affirmed the trial court's order suppressing the statements.[230] Judge Deborah A. Servitto, writing for herself and Judge Mark J. Cavanagh, concluded that the defendant's expectation prior to the June 8 meeting *was* reasonable in light of the circumstances, given the tweaks to Smart's plea agreement the parties made after that meeting.[231] Judge Servitto observed:

> [D]efendant initiated the June 8, 2011 meeting by telling his attorney that he thought he should get a better plea deal. In response, [defense attorney Patricia] Lazzio arranged the meeting with Sergeant [Mitch] Brown. Lazzio did ask Sergeant Brown to tell defendant that the deal was not going to get better. But, importantly, Sergeant Brown did not simply call defendant and tell him that the plea agreement was not going to improve or that he needed to talk to the prosecuting authority. Instead, Sergeant Brown spoke to the prosecuting authority and, with the prosecution's urging, scheduled another meeting with defendant as requested. The prosecuting authority was involved in the process of scheduling the June 8, 2011 meeting, just as it was with the March 15, 2011 meeting, and directed Sergeant Brown to see what information he could obtain from defendant about the homicide, just as it had with the March 15, 2011 meeting. This was not a situation in which the prosecution took a hands-off approach after the March 15, 2011 meeting was held. Furthermore, all parties were well aware that defendant was specifically requesting the second meeting to see if he could negotiate a better plea agreement. In holding the meeting with the knowledge that defendant requested and would appear at the meeting in an attempt to negotiate a better plea deal, Sergeant

227. *Id.* at 247–48, 850 N.W.2d at 580–81.
228. *Id.* at 249, 850 N.W.2d at 581.
229. *Id.*, 850 N.W.2d at 581.
230. *Id.* at 247, 850 N.W.2d at 580.
231. *Id.* at 254–57, 850 N.W.2d at 584–85.

> Brown, at the prosecution's direction, gave defendant a reasonable belief that plea negotiations would take place at the June 8, 2011 meeting—just as they had when defendant requested the March 15, 2011 meeting for purposes of negotiating a plea agreement.
>
> At the meeting, Sergeant Brown did communicate to defendant that he did not believe the deal would get any better. Sergeant Brown also, however, told defendant that the decision was not his to make, but rather, a decision made by the prosecutor's office. In addition, Sergeant Brown told defendant that he would 'give this information to the Prosecutor and they would be very interested in hearing what you just told me.' This statement could also serve to bolster defendant's belief that a potentially more promising plea agreement could be forthcoming.[232]

Accordingly, the panel affirmed the trial court's order suppressing the statements.[233] It was the prosecutor's application for leave to appeal Servitto's opinion that led to the supreme court's brief order overruling *Hannold*. Judge Kurtis T. Wilder, dissenting, would have reversed the trial court's suppression of the June 8 statement.[234]

V. RULES 501–02: PRIVILEGES

A party's proper invocation of a privilege, similar to a court's suppression order, has the powerful impact of rendering otherwise competent, relevant, and admissible evidence inadmissible.[235] Relatedly, while the court rules allow for generally liberal discovery,[236] the courts have limited the scope of discovery to *non*-privileged material.[237] In Michigan, courts look to the common law for the parameters of

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232. *Id.*

233. *Id.* at 257, 850 N.W.2d at 585.

234. *Id.* at 257–77, 850 N.W.2d at 585–95 (Wilder, J., dissenting).

235. MICH. R. EVID. 402 (stating that "all relevant evidence is admissible, *except as otherwise provided* by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court" (emphasis added)); MICH. R. EVID. 501 (noting that "privilege is governed by the common law, except as modified by statute or court rule"). This introductory material to privileges is substantially similar, if not identical, to the previous year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1110–11.

236. *See* MICH. CT. R. 2.302(B)(1).

237. *Id.* ("Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." (emphasis added)).

privileges, unless court rules or legislative statutes otherwise modify those privileges.[238] The "general rule" Michigan courts follow is to construe privileges narrowly,[239] as "they are in derogation of the search for truth."[240]

Under Michigan law, a court may not compel a witness to testify against his or her spouse in a civil or criminal action, over the witness's objection, subject to various exceptions.[241] One of those exceptions, in which the privilege does not apply and where the trial court, thus, *may* force the witness to testify against his spouse (against the witness's wishes), is "[i]n a cause of action that grows out of a personal wrong or injury done by one to the other or that grows out of the refusal or neglect to furnish the spouse or children with suitable support."[242]

In *People v. Szabo*, the Michigan Court of Appeals held that the spousal privilege statute, MCL 600.2162, is unambiguous and that where the witness is a victim of a crime the defendant-spouse commits, no privilege applies, and the trial court may force the witness to testify against his or her spouse.[243]

Kevin Thomas Szabo armed himself with a rifle and entered the Wayne County home of his estranged wife and three children on January 30, 2011.[244] Szabo's wife, Michelle, and a man named Michael were in the home.[245] During the encounter—the appellate opinion lacks specificity—Michael received a gunshot wound.[246] Lincoln Park police responded to the scene and discovered bullet holes in two walls of the house and found Michelle Szabo "visibly upset."[247]

Prosecutors charged the defendant with assault with intent to murder, two counts of felonious assault, and one count of felony firearm.[248] Prior

238. MICH. R. EVID. 501. In federal cases, it is the federal courts' interpretation of the common law that sets the parameters of those privileges. FED. R. EVID. 501. Federal courts will only defer to the state law on privileges in civil cases, and only "regarding a claim or defense for which state law supplies the rule of decision." *Id.*

239. Harrison v. Munson Healthcare, Inc., 304 Mich. App. 1, 24, 851 N.W.2d 549, 563 (2014).

240. Howe v. Detroit Free Press, 440 Mich. 203, 228 n.1, 487 N.W.2d 374, 585 n.1 (1992) (Boyle, J., concurring in part and dissenting in part) (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)) (internal quotation marks omitted).

241. MICH. COMP. LAWS ANN. § 600.2162(1), (2) (West 2015).

242. *Id.* § 600.2162(3)(d).

243. People v. Szabo, 303 Mich. App. 737, 748, 846 N.W.2d 412, 418 (2012) (citing People v. Cole, 491 Mich. 325, 330, 817 N.W.2d 497 (2012)).

244. *Id.* at 738, 846 N.W.2d at 414.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

to the preliminary examination in district court, Kevin Szabo's attorney told the district judge that:

> "It's my understanding that the, uh, government intends to call the wife of [defendant], and she—it's my understanding she's going to exercise her, uh, her spousal privilege." After the potential witnesses were sequestered, the prosecution called Szabo as its first witness. The court then asked: "You want to argue the spousal privilege, or call her first?" The prosecutor responded that he would call [Michelle] Szabo first.[249]

Both Michelle Szabo and a police detective testified, after which the district court bound over one count of felonious assault and one count of felony firearm.[250] Upon the case arriving in circuit court (the trial court for felonies), the defendant moved to quash the charges in light of their deriving from the testimony of his spouse and contended that the district court had unlawfully compelled the testimony in contravention of the spousal-privilege statute.[251] Contemporaneous with his motion, the defendant filed Michelle Szabo's affidavit, in which she asserted a privilege not to testify and that she did not fear her husband.[252] The circuit court agreed with the defense and dismissed the charges.[253]

A panel of the Michigan Court of Appeals noted that in the previous incarnation of the spousal-privilege statute, the defendant/nonwitness spouse held the privilege, unless an exception existed.[254] In a per curiam opinion, a unanimous panel of Judges Michael J. Kelly, Mark J. Cavanagh, and Douglas B. Shapiro,[255] however, explained that "[t]he spousal privilege statute at issue here *specifically denies* the victim-spouse a testimonial privilege in a case that grew out of a personal wrong or injury done by the defendant-spouse to the victim-spouse."[256] Accordingly, because the Szabo case concerned an injury/wrong by Kevin Szabo on Michelle Szabo, the "defendant's wife was not vested with a spousal privilege; thus, *her consent to testify was not required and she could be compelled* to testify against defendant in this criminal

249. *Id.* at 739, 846 N.W.2d at 414 (alteration in original).
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 740, 846 N.W.2d at 414.
254. *Id.* at 741–42, 846 N.W.2d at 415 (citing People v. Moorer, 262 Mich. App. 64, 76, 683 N.W.2d 736, 744 (2004); People v. Love, 425 Mich. 691, 700, 391 N.W.2d 738, 742 (1986)).
255. *Id.* at 749, 846 N.W.2d at 419.
256. *Id.* at 748, 846 N.W.2d at 419 (emphasis added).

prosecution."[257] The panel thus reversed the circuit court's dismissal of the charges and remanded the matter to the circuit court.[258]

VI. RULES 601–15: WITNESSES

A. Impeachment

1. Rule 609: Impeachment with a Witness's Prior Conviction

One of the means to discredit a witness at trial is through the use of the witness's prior convictions of a crime.[259] Both the Michigan rules and federal rules agree that a prior conviction for an offense containing an element of a dishonest act or false statement, regardless of whether it is a felony or misdemeanor, is admissible to impeach the witness, subject only to time limitations.[260] However, if the prior "impeaching" crime did not contain an element of dishonesty or false statement, then it must be a felony (and in Michigan, it must also contain an element of theft),[261] and the court must usually balance various factors appearing in Rule 609 before determining whether the prior conviction is admissible.[262] It is the balancing tests in Rule 609 that can render a trial somewhat unpredictable, as was the case in *People v. McDonald*.[263]

In *McDonald*, the court of appeals reaffirmed that when a trial court rules that a defendant's prior conviction is admissible to impeach him as a witness pursuant to Rule 609, the defendant must take the stand to preserve his challenge to the trial court's Rule 609 ruling.[264] A defendant who chooses not to take the stand in light of a Rule 609 ruling does not merely forfeit his objection to the ruling (which would render the trial court's review subject to *some* review under the highly-deferential plain-

257. *Id.* at 749, 846 N.W.2d at 418 (emphasis added).

258. *Id.*

259. *See* MICH. R. EVID. 609; FED. R. EVID. 609. This introduction to impeachment borrows from the previous year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1115. In the absence of a criminal conviction, both the federal and state rules permit a party to impeach a witness with evidence of that witness's dishonest acts, but the rules limit that source of the impeachment evidence (the dishonest acts) to one person: the witness. MICH. R. EVID. 608(b); FED. R. EVID. 608(b). In other words, a party may cross-examine a witness about specific acts that reflect adversely on the witness's character for truthfulness, but, if the witness denies committing the dishonest acts, the examining party may not introduce extrinsic evidence of the dishonest acts—it must, instead, "take the answer."

260. MICH. R. EVID. 609(a)(1)(c); FED. R. EVID. 609(a)(2)(b).

261. MICH. R. EVID. 609(a)(2); FED. R. EVID. 609(a)(1).

262. MICH. R. EVID. 609 (a)(2)(B); FED. R. EVID. 609(a)(1)(B).

263. 303 Mich. App. 424, 844 N.W.2d 168 (2013).

264. *Id.* at 429–30, 844 N.W.2d at 172.

error standard);[265] rather, the decision operates as a *waiver*, precluding *any* appellate review.[266] Quoting the Michigan Supreme Court's opinion in *People v. Finley*, the *McDonald* Court observed that "error does not occur until error occurs; that is, until the evidence is admitted."[267] The *Finley* court further explained:

> [I]f an offer of proof is made and the court erroneously permits the introduction of hearsay, character evidence, similar acts, or the myriad of evidence objectionable under the MRE, there is no error requiring reversal unless the evidence actually is introduced. Unless the defendant actually testifies, a number of questions remain open to speculation:
>
> > Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling. On a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction.[268]

Thus, the appellate tribunal summarized, the court of appeals is unable to evaluate the trial court's Rule 609 ruling without the "factual context" of the defendant's testimony in light of all the other evidence in the case.[269]

Prior to his trial on multiple felony charges; including first-degree home invasion, armed robbery, and felony firearm;[270] Gerald Duane

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265. *Id.* (citing People v. Finley, 431 Mich. 506, 431 N.W.2d 19 (1988); People v. Boyd, 470 Mich. 363, 682 N.W.2d 459 (2004); People v. Carter, 462 Mich. 206, 215, 612 N.W.2d 144, 149 (2000)).

266. *Id.*

267. *Id.* at 429, 844 N.W.2d at 172 (quoting *Finley*, 431 Mich. at 512, 431 N.W.2d at 21).

268. *Finley*, 431 Mich. at 512–13, 431 N.W.2d at 21 (quoting Luce v. United States, 469 U.S. 38, 41–42 (1984)).

269. *McDonald*, 303 Mich. App. at 430, 844 N.W.2d at 173 (citing *Luce*, 469 U.S. at 42; *Finley*, 431 Mich. at 512–513, 431 N.W.2d at 21).

270. *Id.* at 426, 844 N.W.2d at 170.

McDonald lost a motion in limine to preclude the prosecution from impeaching him with a prior conviction for first-degree home invasion, if he elected to testify in his own defense.[271]

A Calhoun County woman testified that in early November 2011, between 4 and 5 AM, she entered her dining room where she saw McDonald pointing a silver handgun at her, demanding money.[272] She had none to give, and the defendant exited her home after a few minutes.[273] The victim realized her purse was missing and called police with a description of the robber.[274] Police found the defendant about two blocks away, where there was a struggle, and they located a silver handgun near the site of the struggle after McDonald's arrest.[275] The homeowner identified the defendant as the home invader/robber about an hour after the incident, a second time when the defendant was in a lineup, and a third time at trial.[276]

The defendant did not testify at his trial, but an alleged girlfriend testified that she had been living with McDonald in November 2011 and that he had not left the apartment until minutes before his encounter with the police.[277] The jury found the defendant guilty as charged.[278]

Citing *Finley*, and holding that the defendant waived appellate review of the trial court's anticipatory ruling permitting the prosecution to impeach the defendant with his prior home-invasion conviction, the appellate panel of Chief Judge William B. Murphy, writing for himself and Judges E. Thomas Fitzgerald and Stephen L. Borrello,[279] affirmed the defendant's conviction, for this and other reasons.[280]

2. Rule 608(b): Impeachment with a Witness's Prior Acts of Dishonesty

Apart from impeaching a witness with her prior conviction of a crime,[281] a party may have another witness give testimony in the form of reputation or opinion as to the first witness's character for truthfulness.[282] However, while the impeaching party may cross-examine the witness

271. *Id.* at 428–29, 844 N.W.2d at 171–72.
272. *Id.* at 427, 844 N.W.2d at 171.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 427–28, 844 N.W.2d at 171.
277. *Id.* at 428, 844 N.W.2d at 171.
278. *Id.*
279. *Id.* at 440, 844 N.W.2d at 178.
280. *Id.* at 433, 440, 844 N.W.2d at 174, 178.
281. *See supra* Part VI.A.1.
282. MICH. R. EVID. 608(a); FED. R. EVID. 608(a).

about her prior acts of dishonesty (and hope that she acknowledges that the prior acts occurred), Rule 608(b) provides that he may not introduce extrinsic evidence of the witness committing the prior acts of dishonesty.[283] It is a "widely accepted rule of evidence law that generally precludes the admission of evidence of specific instances of a witness' conduct to prove the witness' character for untruthfulness."[284]

In *Nevada v. Jackson*, the U.S. Supreme Court recently explained that "[t]he admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial."[285] Rule 608(b)'s purpose "is to focus the fact-finder on the most important facts and conserve 'judicial resources by avoiding mini-trials on collateral issues.'"[286] (For a brief discussion of the Sixth Circuit's application of Rule 608(b) to a rape accuser's prior recantation of a sexual-abuse allegation, see Part IV.B.3 of this Article.)

In *Jackson*, a *Survey*-period case, the high court, in a unanimous per curiam opinion, held that Rule 608(b), when it operates to preclude a criminal defendant from introducing extrinsic evidence of a witness's prior acts of dishonesty, does not violate the Confrontation Clause of the Sixth Amendment.[287] "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to . . . expose [testimonial] infirmities through cross-examination."[288] The U.S. Supreme Court summarized the Jackson facts as follows:

> Respondent Calvin Jackson had a tumultuous decade-long romantic relationship with Annette Heathmon. In 1998, after several previous attempts to end the relationship, Heathmon relocated to a new apartment in North Las Vegas without telling respondent where she was moving. Respondent learned of Heathmon's whereabouts, and on the night of October 21, 1998, he visited her apartment. What happened next was the focus of respondent's trial.
>
> Heathmon told police and later testified that respondent forced his way into her apartment and threatened to kill her with a screwdriver if she did not have sex with him. After raping

283. MICH. R. EVID. 608(b); FED. R. EVID. 608(b).
284. Nevada v. Jackson, 133 S. Ct. 1990, 1993 (2013).
285. *Id.* at 1993–94.
286. *Id.* at 1993 (quoting Abbott v. State, 138 P.3d 462, 476 (Nev. 2006)).
287. *Id.* at 1994.
288. *Id.* (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (per curiam)) (internal quotation marks omitted).

> Heathmon, respondent hit her, stole a ring from her bedroom, and dragged her out of the apartment and toward his car by the neck and hair. A witness confronted the couple, and respondent fled. Police observed injuries to Heathmon's neck and scalp that were consistent with her account of events, and respondent was eventually arrested.[289]

Jackson—during an interview with police after his arrest—told police the sex was consensual but conceded that "Heathmon might have agreed to have sex because the two were alone and 'she was scared that [he] might do something.'"[290] Prior to trial, the victim sent the trial judge a letter in which she recanted her allegations and refused to testify in the matter.[291] Police took Heathmon into custody as a material witness.[292] Heathmon agreed to testify once in custody, and told the court at trial that three of Jackson's associates threatened to hurt her if she cooperated with authorities and coerced her into recanting her earlier allegations and writing the letter—whose contents she said were false.[293]

At trial, the defense cross-examined the victim about prior allegations of rape and/or assault she had made against Jackson, but the trial court precluded the defense from introducing police reports or other testimony to establish the falsity of the prior allegations.[294] The jury found Jackson guilty, a conviction that Nevada's appellate courts upheld.[295]

Jackson sought habeas relief in federal courts.[296] The district court denied relief, but the U.S. Court of Appeals for the Ninth Circuit granted his petition for a writ, ordering a retrial and concluding that the trial court's exclusion of the dishonest acts violated Jackson's Sixth Amendment right to present a complete defense.[297]

Whereas Nevada law permits impeachment by extrinsic acts of dishonesty where the victim denies making prior false allegations of sexual assault, the state requires defendants must serve notice upon the

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289. *Id.* at 1991.
290. *Id.*
291. *Id.*
292. *Id.* Both Michigan and federal law provide for the detention of material witnesses. *See* MICH. COMP. LAWS ANN. § 767.35 (West 2015); 18 U.S.C.A. § 3144 (West 2014).
293. *Jackson*, 133 S. Ct. at 1991.
294. *Id.*
295. *Id.*
296. *Id.* at 1992.
297. *Id.* (citing Jackson v. Nevada, 688 F.3d 1091 (9th Cir. 2012)).

prosecution of their intent to do so.[298] The defense filed no such notice in the Jackson case.[299]

Reversing the Ninth Circuit's order that Nevada retry Jackson, the high court explained that

> [n]o decision of this Court clearly establishes that this notice requirement is unconstitutional. Nor, contrary to the reasoning of the Ninth Circuit majority, . . . do our cases clearly establish that the Constitution requires a case-by-case balancing of interests before such a rule [precluding extrinsic acts of dishonesty to impeach a witness] can be enforced.[300]

3. Impeachment with a Defendant's Pre-Trial Silence, or Silence at a Previous Trial

It is well-settled law that a prosecutor may not comment at trial on a defendant's choice not to take the stand in his own defense.[301] Furthermore, pursuant to *Doyle v. Ohio*,[302] the prosecution may not impeach a testifying defendant who received *Miranda*[303] warnings with his post-arrest/post-*Miranda* silence.[304] On the other hand, a prosecutor may use a defendant's pre-arrest or post-arrest silence to impeach him as a witness if he elects to testify in his defense, provided the silence was not in response to *Miranda* warnings.[305]

a. Raffel v. United States*: Impeachment with Silence at an Earlier Trial During a Defendant's Testimony on Retrial*

The prosecution may impeach a testifying defendant during a retrial with the fact that he chose to remain silent during an earlier trial, the Michigan Supreme Court held in the *Survey* period case of *People v. Clary*.[306] The court approvingly quoted the U.S. Supreme Court's

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298. *Id.* at 1993 (citing Miller v. State, 779 P.2d 87, 88–89 (Nev. 1989)).

299. *Id.*

300. *Id.* (citing *Jackson*, 688 F.3d at 1103–04).

301. People v. Clary, 494 Mich. 260, 265, 833 N.W.2d 308, 312 (2013) (citing Griffin v. California, 380 U.S. 609, 615 (1965)).

302. Doyle v. Ohio, 426 U.S. 610, 618–19 (1976).

303. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

304. *Clary*, 494 Mich. at 265, 833 N.W.2d at 312 (citing *Doyle*, 426 U.S. at 618–19).

305. *Id.* at 266, 833 N.W.2d at 312 (citing Jenkins v. Anderson, 447 U.S. 231, 232, 238, 240 (1980) (pre-arrest silence); Fletcher v. Weir, 455 U.S. 603, 607 (1982) (post-arrest silence)).

306. 494 Mich. at 262–63, 833 N.W.2d at 310–11.

decision in *Raffel v. United States*,[307] where the high court explained the potential relevance of earlier silence in the face of a criminal charge:

> [I]f the cross-examination had revealed that the real reason for the defendant's failure to contradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own story, his answers would have a bearing on his credibility and on the truth of his own testimony in chief.
>
> It is elementary that a witness who upon direct examination denies making statements relevant to the issue, may be cross-examined with respect to conduct on his part inconsistent with this denial. The value of such testimony, as is always the case with cross-examination, must depend upon the nature of the answers elicited; and their weight is for the jury. But we cannot say that such questions are improper cross-examination, although the trial judge might appropriately instruct the jury that the failure of the defendant to take the stand in his own behalf is not in itself to be taken as an admission of the truth of the testimony which he did not deny.[308]

Courts must consider the underlying purposes of the Fifth Amendment privilege against self-incrimination and the due process clauses when considering the admissibility of silence at trial:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf *and not for those who do*. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify.[309]

During Rayfield Clary's first trial in Wayne County for assault with intent to murder and felony firearm, a witness testified that the defendant

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307. 271 U.S. 494, 497–98 (1926).

308. *Clary*, 494 Mich. at 267–68, 833 N.W.2d at 313–14 (quoting *Raffel*, 271 U.S. at 497–98).

309. *Id.* at 269, 833 N.W.2d at 314 (quoting *Raffel*, 271 U.S. at 499).

shot him.[310] Clary did not testify, and the presiding judge declared a mistrial after the jury was unable to reach a unanimous verdict.[311] During the second trial, Clary *did* testify in his own defense,[312] prompting the following questions from the prosecution: "'You didn't tell that jury [the previous jury] the same story you're telling this jury, did you, sir?' and '[I]f that was the truth and that was so important, why didn't you tell the last jury?'"[313]

During closing statements, the prosecutor remarked to the jury, "Well, ladies and gentleman, if it's the truth, if it's the truth and you're on trial, why wouldn't you tell the first jury?"[314] The jury convicted the defendant of both charges at the second trial's conclusion.[315] On appeal, however, a unanimous panel of the Michigan Court of Appeals reversed the conviction, concluding that the prosecution's references to Clary's silence during his first trial was improper impeachment,[316] but the Michigan Supreme Court granted the Wayne County prosecutor's application for leave to appeal.[317] The high court reversed the intermediate appellate tribunal's judgment as to impeaching the defendant with his silence at a prior trial.[318] Justice Stephen J. Markman, writing for a four-person majority of himself, Chief Justice Robert P. Young Jr., and Justices Mary Beth Kelly and Brian K. Zahra,[319] cited a law review article that distinguished between requiring the court's suppression of post-arrest/post-*Miranda* silence *generally* for impeachment purposes, and allowing impeachment by the use of post-arrest/post-*Miranda* silence *at an earlier trial* for impeachment purposes:

> [T]he government inducement to remain silent, which may be caused by the shock of arrest, the fearful nature of custody, the *Miranda* warnings, or any combination thereof, will gradually lose its influence on the defendant as pressure is diminished and

310. *Id.* at 263, 833 N.W.2d at 311.
311. *Id.*
312. *Id.*
313. *Id.* at 264 n.1, 833 N.W.2d at 311 n.1.
314. *Id.* at 264 n.2, 833 N.W.2d at 311 n.2 (internal quotation marks omitted).
315. *Id.*
316. People v. Clary, No. 301906, 2012 Mich. App. LEXIS 280, at *17 (Feb. 16, 2012).
317. People v. Clary, 491 Mich. 933, 814 N.W.2d 292 (2012).
318. *Clary*, 494 Mich. at 271, 833 N.W.2d at 315.
319. *Id.* at 281, 833 N.W.2d at 321.

> advice of counsel [is] obtained, silence occurring long after the *Miranda* 'inducement' may be used for impeachment.[320]

The majority stated that "if defendant chooses to testify at a third trial, the prosecutor may again refer to defendant's failure to testify at his first trial without violating defendant's constitutional rights."[321] Why would there be a third trial? Continue reading.

b. Doyle v. Ohio*: Impeachment with Post-Arrest/Post-*Miranda *Silence with Police*

A third trial (second retrial) was necessary because of the prosecution's references to the defendant's silence to police.[322] "At defendant's second trial, the prosecutor impeached Clary by asking him why, after his arrest and arraignment, he had not told the police that he did not shoot the complainant. The prosecutor also referred to this silence during her closing argument."[323] The prosecutor's statements violated the rule of *Doyle*, as the defendant had been aware of his *Miranda* rights no later than his arraignment on the charges.[324] Accordingly, the supreme court remanded the matter to the trial court for a retrial in light of the prosecutor's *Doyle* violation.[325]

c. Clary, Raffel, *and Fifth Amendment Concerns*

The supreme court explicitly recognized the "tension"[326] between the *Doyle* and *Raffel* holdings. "*Doyle* holds that post-*Miranda* silence is [in]admissible, *Raffel* holds that silence at an earlier trial is admissible to impeach a defendant who testifies at a subsequent trial, even though this silence is also post-*Miranda* silence."[327]

However, the *Clary* court adopted *Raffel's* response to the argument that *Raffel's* holding would force defendants to testify at trial because prosecutors could impeach them at a subsequent trial (if they chose to testify *then)* with their silence at the earlier trial:

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320. *Id.* at 273 n.9, 833 N.W.2d at 316 n.9 (quoting Note, *The Admissibility of Prior Silence to Impeach the Testimony of Criminal Defendants*, 18 U. MICH. J. L. REFORM 741, 752, 766 (1985)) (internal quotation marks omitted).

321. *Id.* at 271, 833 N.W.2d at 315.

322. *Id.* at 271, 833 N.W.2d at 315–16.

323. *Id.* at 271–72, 833 N.W.2d at 316.

324. *Id.* at 272, 833 N.W.2d at 316.

325. *Id.* at 280–81, 833 N.W.2d at 320–21.

326. *Id.* at 272, 833 N.W.2d at 316.

327. *Id.*

> We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence. When he does take the stand, he is under the same pressure: to testify fully, rather than avail himself of a partial immunity. And the accused at the second trial may well doubt whether the advantage lies with partial silence or with complete silence. Even if, on his first trial, he were to weigh the consequences of his failure to testify then, in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or at his option, testify fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.[328]

Accordingly, the Michigan Supreme Court held that the prosecutor's cross-examination and comment on the defendant's silence at the earlier trial did not chill his Fifth Amendment rights.[329]

For a table that explains the existing law on when the prosecution can introduce or comment on a defendant's silence, see Part VIII.B of this Article.

B. Rule 614: Courts' Discretion to Question Witnesses

Pursuant to Rule 614, both the Michigan and federal rules permit judges to examine witnesses and even to call witnesses to the stand.[330] "However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial."[331] The Michigan Court of Appeals has held that "[t]he test is whether the 'judge's questions and comments *may* well have unjustifiably aroused suspicion in the mind of the jury as to a witness'

328. *Id.* at 274–75, 833 N.W.2d at 317 (quoting Raffel v. United States, 271 U.S. 494, 499 (1926)).

329. *Id.* at 274–76, 833 N.W.2d at 317–18.

330. MICH. R. EVID. 614; FED. R. EVID. 614.

331. People v. Conyers, 194 Mich. App. 395, 405, 487 N.W.2d 787, 791 (1992) (citing People v. Sterling, 154 Mich. App. 223, 228, 397 N.W.2d 182 (1986)).

credibility, . . . and whether partiality *quite possibly could* have influenced the jury to the detriment of defendant's case."[332]

In *People v. McDonald*, a case I first discussed in Part VI.A.1, the defendant on appeal argued that the trial court slanted its questioning of witnesses towards the prosecution.[333] However, a unanimous panel of the Michigan Court of Appeals rejected McDonald's contention, concluding that "it is evident that the court was permissibly 'question[ing] witnesses in order to clarify testimony or elicit additional relevant information.'"[334] For these and other reasons, the court affirmed McDonald's conviction.[335]

VII. RULES 701–07: LAY AND EXPERT OPINION TESTIMONY

A. Opinion Testimony Generally

Opinion testimony, when admissible, is an exception to the default rule that a witness have "personal knowledge" of the facts to which he or she testifies, as the rules forbid speculation.[336] I devote Part VII of this Article to the two kinds of opinion testimony: "lay" opinion[337] and expert opinion.[338]

1. Lay Opinion

In Michigan, Rule 701 provides that opinion testimony by non-experts "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."[339] The corresponding federal rule is virtually identical.[340]

The Sixth Circuit has observed that "[s]uch lay opinion testimony is permitted under Rule 701 because it has the effect of describing something that the jurors could not otherwise experience for themselves

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332. *Id.* at 405, 487 N.W.2d at 791 (citations omitted) (quoting *Sterling*, 154 Mich. App. at 228).

333. People v. McDonald, 303 Mich. App. 424, 437, 844 N.W.2d 168, 176 (2013).

334. *Id.* (quoting *Conyers*, 194 Mich. App. at 404, 487 N.W.2d at 791).

335. *Id.* at 439–40, 844 N.W.2d at 177–78.

336. *See* MICH. R. EVID. 602; FED. R. EVID. 602. Some of the introductory material appearing in this section borrows from the previous year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1123, 1130–31.

337. MICH. R. EVID. 701; FED. R. EVID. 701.

338. MICH. R. EVID. 702; FED. R. EVID. 702.

339. *See* MICH. R. EVID. 701.

340. FED. R. EVID. 701.

by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event."[341]

2. Expert Opinion

Under Rule 702, an "expert witness" may render an opinion for the trier of fact "[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the witness has the relevant "knowledge, skill, experience, [and] training."[342] The testimony's proponent must establish: "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[343]

The Michigan rules and the federal rules differ in one important respect: whereas, under the Michigan rules the bases or data for the expert's testimony must be in evidence,[344] the federal rules explicitly provide that such data need *not* be in evidence.[345]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court held that trial courts must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[346] The *Daubert* Court further explained that the "reliability" determinations "entail a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[347] Factors the court can consider in determining whether to admit expert testimony are: "whether [a scientific] theory or technique" can be (and has been) tested,"[348] second, "whether the theory or technique has been subjected to peer review and publication,"[349] third,

341. United States v. Freeman, 730 F.3d 590, 595 (6th Cir. 2013) (quoting United States v. Jayyousi, 657 F.3d 1085, 1120 (11th Cir. 2011) (Barkett, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

342. *See* MICH. R. EVID. 702. The corresponding federal rule is virtually identical. *See* FED. R. EVID. 702.

343. MICH. R. EVID. 702.

344. MICH. R. EVID. 703.

345. FED. R. EVID. 703 (emphasis added) ("But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.").

346. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993).

347. *Id.* at 592–93.

348. *Id.* at 593.

349. *Id.*

"the known or potential rate of error,"[350] and finally, whether the relevant scientific community generally accepts the theory or technique.[351] Michigan has followed the U.S. Supreme Court's lead in adopting the *Daubert* standards.[352]

Importantly, courts have held that "the threshold inquiry [is] whether the proposed expert testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue,'" and that requirement is "not satisfied if the proffered testimony is not relevant or does not involve a matter that is beyond the common understanding of the average juror."[353]

3. Witnesses Testifying to Both Expert Opinion and Facts

There is no general prohibition on fact witnesses also testifying as to expert opinion, assuming they are qualified to give such opinion.[354] However, there must be "either a cautionary jury instruction regarding the witness's dual roles or a clear demarcation between the witness's fact testimony and expert-opinion testimony."[355] Failure to do either constitutes plain error.[356]

Absent such demarcation or instruction, a jury might evaluate the strength of the witness's opinion in the same manner as it evaluates the factual testimony he provides, or consider that his testimony as to facts bolsters his expert opinion.[357]

In *United States v. Willoughby*, a case whose facts I discussed in Part IV.B.3, a police detective first described at trial the items he and his colleagues seized from the defendant's residence pursuant to a search warrant, the contents of Willoughby's phone records, and his interview with SW.[358] He then testified about the "the methods that pimps use to control their victims—some of which, [Agent James] Hardie said,

350. *Id.* at 594.

351. *Id.* The court further explained that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community' may properly be viewed with skepticism." *Id.* (citation omitted).

352. *See* Gilbert v. DaimlerChrysler Corp., 470 Mich. 749, 781, 685 N.W.2d 391, 408 (2004).

353. People v. Kowalski, 492 Mich. 106, 121, 821 N.W.2d 14, 24–25.

354. *See* United States v. Willoughby, 742 F.3d 229, 239 (6th Cir. 2014).

355. *Id.* (citing United States v. Nixon, 694 F.3d 623, 629 (6th Cir. 2012)).

356. *Id.*

357. *See id.* (citing United States v. Lopez-Medina, 461 F.3d 724, 744–45 (6th Cir. 2006)).

358. *Id.* at 238.

Willoughby had used against SW."[359] These methods include "posing as their boyfriends, . . . giving them gifts, and . . . beating them when they disobey . . . ."[360] Here, a unanimous panel of the Sixth Circuit observed, the district court plainly erred in failing to instruct or bifurcate Hardie's testimony.[361]

Nevertheless, the evidence in the case was overwhelming, and Hardie's testimony about pimps bordered on the obvious, the panel concluded, such that "properly instructed or not, any sentient juror would have realized that Willoughby did these things not because he cared about SW, but to control her."[362] Accordingly, despite the district court's plain error, the panel affirmed the defendant's conviction and sentence, for this and other reasons.[363]

B. Law-Enforcement Officers' Opinions Interpreting Wiretap Recordings

In *United States v. Freeman*, the Sixth Circuit joined several other federal circuits in frowning upon law-enforcement officers' lay opinion in interpreting conversations they recorded.[364] It observed:

> [T]here is a risk when an agent "provides interpretations of recorded conversations based on his knowledge of the entire investigation . . . that he [is] testifying based upon information not before the jury, including hearsay, or at the least, that the jury [c]ould think he ha[s] knowledge beyond what [is] before them."[365]

In *United States v. Grinage*, a case to which the *Freeman* court looked for guidance, the Second Circuit emphasized the jury's function in determining guilt (or liability) as an important rationale for limiting agents' or officers' lay opinion interpreting phone recordings:

> Were [a more liberal view of Rule 701] to be accepted, there would be no need for the trial jury to review personally any evidence at all. The jurors could be "helped" by a summary witness for the Government, who could not only tell them what

359. *Id.* at 238.
360. *Id.* at 239.
361. *Id.*
362. *Id.*
363. *Id.* at 243.
364. *See* United States v. Freeman, 730 F.3d 590, 596 (6th Cir. 2013).
365. *Id.* (quoting United States v. Hampton, 718 F.3d 978, 982–83 (D.C. Cir. 2013); United States v. Grinage, 390 F.3d 746, 750 (2d Cir. 2004)).

> was in the evidence but tell them what inferences to draw from it. That is not the point of lay opinion evidence.[366]

Interestingly, in a case with which most readers will be at least somewhat familiar, former Detroit Mayor Kwame M. Kilpatrick is asking the Sixth Circuit to reverse his convictions for public corruption in light of law enforcement opinion testimony. In fact, Kilpatrick argued that agents, via improper opinion testimony, "'spoon fe[]d' the jury the prosecution theory of the case."[367]

In Michigan, courts are also trending in a direction that discourages officers' lay opinion interpreting key pieces of evidence. Opinion testimony, the Michigan Court of Appeals has held, cannot "invade the province of the jury,"[368] for example, by "express[ing] an opinion on the defendant's guilt or innocence of the charged offense."[369]

In *Freeman*, FBI personnel had initiated a wiretap on the cellular telephone of one Roy West during a drug investigation.[370] The wiretaps revealed that West, Marcus Freeman's co-defendant, looked to exact revenge upon Leonard Day, who had stolen over $350,000 worth of jewelry, cash, and other property from West.[371] West targeted and threatened Day's girlfriend, Kanisha Crawford, and her family in an attempt to learn Day's location.[372] For his part, Freeman had offered money to Day's family in a ruse to lure Day from hiding.[373] The Sixth Circuit panel observed:

> Freeman began to close in on Day. In one call with West, Freeman commented, "This shit should be any day now though fam for real. So I'm on it for sure 'cause I need that." On December 17, 2005, Freeman called West asking for a cross street for a Kilbourne Street address. West did not understand Freeman's question and asked for clarification. Freeman

366. *Grinage*, 390 F.3d at 750.

367. Robert Snell, *Court Agrees to Hear Kilpatrick, Ferguson Appeals*, DETROIT NEWS (Nov. 28, 2014, 6:05 PM), http://www.detroitnews.com/story/news/local/wayne-county/2014/11/28/judges-schedule-kilpatrick-corruption-appeal/19633261/.

368. People v. Fomby, 300 Mich. App. 46, 52–53, 831 N.W.2d 887, 891 (2013). See Meizlish, *supra* note 3, at 1123–30, for a discussion in the preceding year's *Survey* article on evidence.

369. *Fomby*, 300 Mich. App. at 53, 831 N.W.2d at 888 (quoting People v. Bragdon, 142 Mich. App. 197, 199, 369 N.W.2d 208, 209 (1985)) (internal quotation marks omitted).

370. United States v. Freeman, 730 F.3d 590, 592 (6th Cir. 2013).

371. *Id.*

372. *Id.* at 593.

373. *Id.*

> responded, "Dude just called it in, baby, sayin', shit, shit that the truck be in the driveway at night . . . . All the belongings be right in the drawer." Special Agent Peter Lucas, the FBI agent in charge of the investigation, believed that "the truck" was a reference to Day's truck and that Freeman had located Day.[374]

Three days after Freeman's call to West regarding the Kilbourne address, someone (whom the government later concluded was Freeman) shot Day as he exited a home on Kilbourne.[375] During that day, phone logs revealed that Freeman had been making many phone calls that routed through "the cellular tower nearest the house where Day was killed."[376] Five minutes after Freeman's last phone call, neighbors began telephoning 911 to report a shooting on Kilbourne, and three minutes after the first 911 call, the wiretap revealed the following conversation between Freeman and West:

> WEST: What's good?
>
> FREEMAN: Everything good, man. Except for, you know . . . you know what I'm talkin' about . . . just that one little thing. We ain't get the bonus, dog. But, you know what I'm sayin', the situation is over with.
>
> WEST: You bullshittin'.
>
> FREEMAN: Fam, it's over, we get rich baby, you know what I'm talkin' about, but man, we sorry about that other bonus, baby . . . .[377]

An FBI agent explained to the jury that, "We get rich, Ohio" (mentioned in a part of the conversation between West and Freeman not excerpted above) meant that Freeman expected a substantial bounty for murdering Day, and the "situation" that Freeman characterized as "over" "regard[ed] Leonard Day and his having stolen jewelry from Roy West, Roy West having put a hit on Leonard Day and Leonard Day ultimately being killed."[378]

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374. *Id.*
375. *Id.*
376. *Id.* at 593.
377. *Id.*
378. *Id.* at 593–94 (internal quotation marks omitted).

The government then presented evidence from wiretap recordings and logs that suggested Freeman and West were both in Akron, Ohio a day after the murder to exchange a payment (presumably for the contract killing).[379]

> Some days later Freeman was jailed after an arrest for an unrelated offense. Phone calls between Freeman and his girlfriend were recorded while he was incarcerated. On one call he told her, "Do not fuck that chip up. Dude name in the phone." He also told her that 'BUC' "still owe me some cheese." Agent Lucas testified that 'BUC' was a reference to West and that Freeman was telling his girlfriend that West still owed him money.[380]

A federal jury in Detroit found Freeman guilty of a murder-related conspiracy charge, and the district judge imposed a life sentence.[381]

The appellate panel—Judge R. Guy Cole Jr., writing for himself, Judge Deborah L. Cook, and U.S. District Judge David A. Katz[382]—criticized the trial court for allowing the prosecution to use the FBI agent to (essentially) argue its case, such as when the agent testified, "I believe he is referring to the fact that he needs the payment he expects from Roy West if he's successful in locating Leonard Day . . . for the purpose of recovering the jewelry and killing him."[383]

The panel cited, among other cases, *United States v. Blakely*, for the proposition that an officer's testimony is improper where it "substitute[s] [the agent's] interpretation of the conversations for the jury's interpretation."[384]

The court expressed significant concern about the foundational aspects of the agent's opinion:

> Agent Lucas repeatedly substantiated his responses and inferences with generic information and references to the investigation as a whole. For example, he made statements such as "We learned over our wiretaps" and "We were able to determine that from some the intercepted calls . . . ." He never specified *personal* experiences that led him to obtain his

379. *Id.* at 594.
380. *Id.*
381. *Id.*
382. *Id.* at 592.
383. *Id.* at 595 (internal quotation marks omitted).
384. *Id.* at 596 (quoting United States v. Blakely, 375 F. App'x 565, 570 (6th Cir. 2010)) (internal quotation marks omitted).

> information but, instead, repeatedly relied on the general knowledge of the FBI and the investigation as a whole. While the jury, left in the dark regarding the source of Agent Lucas's information, likely gave him the benefit of the doubt in this situation, "the fair inference is that he was expressing an opinion informed by all the evidence gleaned by various agents in the course of the investigation and not limiting himself to his own personal perceptions." In short, Agent Lucas was called by the government to testify to the meaning of numerous phone conversations irrespective of whether his testimony, at points, was mere speculation or relied on hearsay evidence. Indeed, at oral argument, the government conceded that Agent Lucas lacked the first-hand knowledge required to lay a sufficient foundation for his testimony under Rule 701(a).[385]

Here, the panel emphasized, there were over 23,000 calls and yet the jury heard only a small sampling of the calls.[386] Thus, "the jury had no way of verifying [Agent Lucas's] inferences or of independently assessing the logical steps he had taken."[387] Furthermore, "[h]is testimony consisted of many opinions and conclusions the jury was well equipped to draw on their own. He effectively spoon-fed his interpretations of the phone calls and the government's theory of the case to the jury, interpreting even ordinary English language."[388] Agent Lucas's interpreting the recordings for the jury, "with an aura of expertise and authority [of an FBI agent,]" raised a strong likelihood the jury would defer to the agent's judgment in contextualizing and interpreting the accused's words, rather than hold the government to its burden of proof.[389]

Accordingly, the panel concluded that the district court erred in admitting Lucas's interpretations as lay opinion.[390] As a fallback position, the government argued that error was harmless because the court could have qualified Lucas as an expert under Rule 702 and admitted his conclusions pursuant to that rule.[391]

Not so, the panel held, for two reasons. First, as was its conclusion in evaluating the testimony as lay opinion, Lucas was in no better position than the jury to interpret the meaning of words and phrases; thus the

385. *Id.* at 596–97 (citations omitted).
386. *Id.* at 597.
387. *Id.*
388. *Id.* (internal quotation marks omitted).
389. *Id.* at 599.
390. *Id.*
391. *Id.*

government failed to establish, in the words of Rule 702, that Lucas's testimony was "helpful" to the jury,[392] or in the exact words of Rule 702, that it "w[ould] help the trier of fact to understand the evidence or to determine a fact in issue."[393] Second, the panel explained, "it is not clear what expert methodology he relied on to form his opinions (outside of his expertise on street slang and drug terms, which had already been granted)," and thus the government failed to show that its testimony met Rule 702's requirement that it be "the product of reliable principles and methods . . . reliably applied . . . to the facts of the case."[394] Concluding that the district court's errors were not harmless, the Sixth Circuit vacated the defendant's conviction and sentence, and remanded the case for a new trial.[395]

C. Expert Opinion on the Presence of Gunshot Residue on a Subject's Hands

> The fact that [gunshot-residue] testing will not determine whether an individual fired a gun, was present when a gun was fired by someone else, or was merely in an environment in which [gunshot residue] existed" does not render expert testimony in this area inadmissible for purposes of a Rule 702 analysis, the Sixth Circuit recently held in *United States v. Stafford*.[396] Furthermore, whether the government uses proper evidence-gathering techniques in obtaining gunshot residue from a subject's hands "go[es] to the *weight* of [such] gunshot-residue evidence, not its admissibility . . . ."[397]

Joe Figula, an Elyria, Ohio police officer, was patrolling the area near one of the city's nightclubs in the early-morning hours of November 21, 2010, when he heard a gunshot.[398] "After stopping near the intersection of Kerstetter Way and Broad Street, Figula observed a man wearing jeans and a dark zip-up sweatshirt with white lettering on the back fire two more gunshots. One of these rounds was later found to have struck the passenger window of a bystander's automobile."[399]

After he saw the subject run down an alley, Figula drove his car to the parking lot of a McDonald's restaurant, where, as he expected, a man

392. *Id.* at 600.
393. FED. R. EVID. 702.
394. *Freeman*, 730 F.3d at 600 (citing FED. R. EVID. 702).
395. *Id.*
396. 721 F.3d 380, 393–94 (6th Cir. 2013).
397. *Id.* at 395 (emphasis added).
398. *Id.* at 387.
399. *Id.*

emerged.[400] The man was wearing the same clothing as the shooter he had seen shortly before, and "[a]s Figula attempted to follow [Akeem] Stafford in his car, Stafford looked back and made visual contact with Figula by looking 'right at' him."[401] Stafford then ran out of the McDonald's lot and in the direction of a nearby bank.[402] The officer drove in the bank's direction and briefly spoke with the passengers of the vehicle who believed someone had been shooting at them.[403]

Figula searched the area surrounding the bank and "found Stafford lying face down, wedged between the back of the building and a large green exterior power unit."[404] Backup officers assisted Figula in detaining the defendant, who was resistant.[405]

The Sixth Circuit panel then described the officers' actions in locating a weapon they attributed to Stafford:

> After removing Stafford from between the wall and the power unit, the officers noted that Stafford was not carrying a firearm. Figula organized a search for the weapon, retracing Stafford's movements backwards from behind First Merit Bank to the Tremont Street alley near Uncle Vic's nightclub. After the initial walkthrough yielded no results, Figula continued down the alley back towards Kerstetter Way and Uncle Vic's nightclub. Figula found two spent .45-caliber shell casings on the ground near the entrance of the alley from Kerstetter Way. On the arrival of the evidence technicians, a third shell casing was recovered and the search for the missing firearm resumed. The firearm, a .45-caliber semiautomatic handgun, was eventually recovered from under a staircase in the Tremont Street alley behind Moss' Steakhouse. Figula noted that the gun's magazine was partially ejected and a live round was visible in its barrel. A total of six live rounds of ammunition were recovered from the gun. Figula also noted that the gun was scuffed, indicating the gun may have been thrown and struck the cinder-block wall adjacent to where the gun was found.[406]

Subsequent police ballistic tests confirmed that the gun Elryia police discovered during their search was the same gun that fired the shell

400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.* at 387.
404. *Id.*
405. *Id.*
406. *Id.* at 387–88.

casings Figula located in the alley.[407] Other tests confirmed that it was the same gun that had fired a bullet that had broken the window of a bystander's vehicle during the time of the shooting.[408]

After his arrest, Elyria police swabbed the defendant's hands for gunshot residue, and "[s]ubsequent laboratory testing determined the presence of the elements of gunshot residue on Stafford's left hand."[409] A federal jury sitting in Cleveland found the defendant guilty of being a felon in possession of a firearm and ammunition.[410]

On appeal, Stafford argued that expert testimony by government witness Robert Lewis as to the discovery of gunshot residue was insufficiently reliable for the purpose of a Rule 702/*Daubert* analysis (he did not argue lack of foundation for the other Rule 702 requirements).[411]

Unfortunately, the Sixth Circuit's opinion is unclear as to precisely what Lewis's opinions and conclusions were. From the context, I surmise that Lewis testified that the presence of five residue particles on Stafford's hand was consistent with him having recently discharged a firearm.[412]

The Sixth Circuit panel—U.S. District Judge Jon P. McCalla, writing for himself and U.S. Circuit Judges Danny J. Boggs and Helene N. White[413]—dispensed with Stafford's argument that Lewis's testimony was unreliable, observing that "[t]o determine the testimony's reliability, the court does not 'determine whether [the opinion] is correct, but rather [determines] whether it rests upon a reliable foundation.'"[414] It concurred with the district court's conclusion that the defendant's objection to Lewis's testimony went to the weight of his conclusions, and not their admissibility, approvingly quoting the district judge's statement to Stafford's counsel during trial:

> I am allowing the government to put [the expert's testimony] in. But given that your own expert is going to say it is possible that he has got those two traces either because he was right near a shooter, [was] a shooter of a gun[,] or that he came into contact

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407. *Id.* at 388.
408. *Id.*
409. *Id.*
410. *Id.* at 389.
411. *Id.* at 393–94.
412. *See id.* at 394.
413. *Id.* at 386. McCalla, of the Western District of Tennessee, sat by designation on the Sixth Circuit panel. *Id.*
414. *Id.* at 393–94 (quoting *In re* Scrap Metal Antitrust Litig., 527 F.3d 517, 529–30 (6th Cir. 2008)).

> with residue, I am permitting the defense to point that out. The two go together.[415]

"Vigorous cross-examination[,]" the panel observed, "[is a] traditional and appropriate means of attacking shaky but admissible evidence."[416]

The second ground for Stafford's "reliability" objection was that "[t]here is no consensus in the discipline as to how many particles . . . must be identified in order to report an item of evidence as positive for [gunshot residue]."[417] The panel, rejecting this argument, observed that an FBI document Stafford cited in his appellate brief reported that "[m]ost experts felt that even one particle is enough for a 'positive' result."[418] It also noted that the defense did not object when the district judge stated that "the Defendant is not disputing he had gunshot residue on his hands."[419] In light of this apparent concession (which contradicted his position on appeal), and the defense's citation to authority that supported the government's position, the appellate panel concluded the district court did not abuse its discretion in admitting Lewis's testimony pursuant to Rule 702.[420]

The panel also overruled Stafford's argument that the likelihood of Stafford's hands becoming contaminated prior to the test mandated the court's exclusion of the test results. The court observed that:

> [t]he trial record indicates that the officers, in conducting Stafford's arrest: did not bag his hands; could have transferred gunshot residue to Stafford's hands from handling their own weapons, from the backseat of the police car, or from the booking area of the Elyria Police Department; and did not swab Stafford's hands until after he had been booked. These arguments, while potentially valid as to the accuracy of the test and the conclusions to be drawn from it, do not relate to the test's reliability or the reliability of the expert testimony.[421]

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415. *Id.*

416. *Id.* (internal quotation marks omitted) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993)).

417. *Id.* (internal quotation marks omitted).

418. *Id.* (internal quotation marks omitted).

419. *Id.*

420. *Id.* In any event, "general consensus" in the field is no longer a requirement of expert testimony. *See Daubert*, 509 U.S. at 595–96.

421. *Stafford*, 721 F.3d at 395.

As a fallback argument, the defendant argued that because Lewis's testimony was unreliable, whatever probative value it had did not outweigh its potential for unfair prejudice, such that Rule 403 mandated its exclusion.[422] The panel noted that "the defense cross-examined the Government's expert extensively on this very point—that there can be inadvertent transfer of gunshot residue resulting in 'contamination.'"[423] It repeated its conclusion that the defense's objection went to the testimony's weight and not its admissibility.[424] The presence of residue on Stafford's hands, from whatever source, was circumstantial evidence that he possessed a firearm, it observed, and "[t]he admission of such circumstantial evidence need not 'remove every hypothesis but guilt.'"[425] Accordingly, the panel affirmed the defendant's conviction and sentence, for this and other reasons.[426]

D. Expert Opinion in Medical-Malpractice Actions as to a Physician's Breach of a Duty of Care

In Michigan, the legislature has enacted statutory foundational requirements for experts testifying in medical-malpractice actions, beyond those of Rule 702 and *Daubert*.[427] The requirements differ depending on whether the defendant is a general practitioner or a specialist, and focus on the witness's own experience in the same health profession, the same specialty, and the amount of time the witness herself spends in practice and/or educational instruction.[428] In determining whether to qualify an expert witness in such cases, the trial court:

> shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.

422. *Id.* at 394–95.
423. *Id.*
424. *Id.* at 395.
425. *Id.* at 394 (quoting United States v. Ingrao, 844 F.2d 314, 315 (6th Cir. 1988)).
426. *Id.* at 403.
427. MICH. COMP. LAWS ANN. § 600.2169 (West 2015).
428. *Id.*

> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.[429]

In the *Survey*-period case of *Albro v. Drayer*, a unanimous panel of the Michigan Court of Appeals clarified that, when the opinion turns on the defendant's performance of a specific procedure, the experts need not "be[] exactly as knowledgeable as a defendant[.]"[430] Rather, the nature of the procedure should be "within the general ambit of defendant's experts' fields of expertise."[431]

In *Albro*, plaintiff Lisa Albro went to ankle-specialist Steven Drayer for ankle surgery.[432] The surgery was unsuccessful, and subsequent corrective surgeries failed to restore "full functionality."[433] Albro contended that the "Chrisman-Snook" procedure the defendant performed was inappropriate for her situation, and that Drayer performed the procedure improperly.[434]

> Plaintiff's subsequent primary treating physician opined that the performance of the Chrisman-Snook procedure had been inappropriate because plaintiff had not needed surgery in the first place and the Chrisman-Snook procedure was riskier and more invasive than the Broström procedure. However, he testified that other than placing a drill hole too low, defendant had technically performed the procedure correctly. Defendant presented several expert witnesses, all of whom stated that they would have performed a Broström procedure and that they each had little or no personal experience with the Chrisman-Snook procedure. However, they stated that they were familiar with the kinds of techniques used in both procedures and that they were familiar with the Chrisman-Snook procedure even if they did not personally perform it. Defendant's experts opined that defendant's surgery, presurgery workup, and postsurgery care

429. *Id.* § 600.2169(2).
430. Albro v. Drayer, 303 Mich. App. 758, 763, 846 N.W.2d 70, 73 (2014).
431. *Id.* at 763, 846 N.W.2d at 73 (citing Gilbert v. DaimlerChrysler Corp., 470 Mich. 749, 789, 685 N.W.2d 391, 413 (2004)).
432. *Id.* at 759, 846 N.W.2d at 71.
433. *Id.*
434. *Id.*

had not been inappropriate despite the fact that the surgery failed and plaintiff suffered a serious infection.[435]

At the conclusion of trial, an Ingham County jury returned a verdict of no cause of action for the plaintiff.[436] On appeal, the plaintiff contended that the trial court should not have qualified the defendant's experts, because they lacked familiarity with the "Chrisman-Snook" procedure.[437]

In commencing its analysis, a unanimous panel of the appellate court observed that, while "[a]n expert who lacks 'knowledge' in the field at issue cannot 'assist the trier of fact[,]'"[438] mere "[g]aps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, *not its admissibility*."[439]

In a per curiam opinion, the panel of William C. Whitbeck, Kurtis T. Wilder and Amy Ronayne Krause[440] observed:

> Clearly, none of defendant's experts were as familiar with the Chrisman-Snook procedure as was defendant. However, all of defendant's experts performed ankle reconstructions regularly and were experts in doing so. Significantly, though not performing it, all of them were familiar with the Chrisman-Snook procedure. All of them had, in addition, either authored at least one article or textbook or lectured on ankle reconstruction and had discussed the Chrisman-Snook procedure in the process. Ankle reconstructive surgeries of any sort were clearly within the general ambit of defendant's experts' fields of expertise. There was no evidence that the state of the art has changed significantly since any of the experts learned or last performed the Chrisman-Snook procedure, in contrast to the situation in *Swanek v Hutzel Hosp.*, 115 Mich. App. 254, 258; 320 N.W.2d 234 (1982). Admission of expert testimony simply does not depend on an expert's being exactly as knowledgeable as a defendant in a medical malpractice action. The trial court did not abuse its discretion by finding that defendant's experts were, at a

435. *Id.* at 760, 846 N.W.2d at 71–72.

436. *Id.* at 758–59, 846 N.W.2d at 70–71.

437. *Id.* at 761, 846 N.W.2d at 72.

438. *Id.* at 762, 846 N.W.2d at 73 (internal quotation marks omitted) (quoting Gilbert v. DiamlerChrysler Corp., 470 Mich. 749, 789, 685 N.W.2d 391, 413 (2004)).

439. *Id.* (emphasis added) (internal quotations marks omitted) (quoting Wischmeyer v. Schanz, 449 Mich. 469, 480, 536 N.W.2d 760 (1995); People v. Gambrell, 429 Mich. 401, 408, 415 N.W.2d 202, 205 (1987)).

440. *Id.* at 766, 846 N.W.2d at 74.

> minimum, sufficiently knowledgeable, trained, or educated to form an expert opinion under MRE 702. Likewise, none of the considerations under MCL 600.2169(2) demand that the experts be excluded.[441]

Accordingly, the appellate panel affirmed the jury's verdict, for this and other reasons.[442]

E. Appointment and Payment of Expert Witnesses for Indigent Criminal Defendants

Under Michigan law, indigent criminal defendants may petition the trial court to issue subpoenas, serve subpoenas, and pay witnesses whose testimony is "material" to their defense at trial.[443] In order to secure funds to pay *expert* witnesses, "[i]t is not enough for the [indigent] defendant to show a mere possibility of assistance from the requested expert[,]" rather he or she must show "that expert testimony would likely benefit the defense . . . ."[444]

In *McDonald*, a case I first discuss in Part VI.A.1, the defense petitioned the trial court for funds to pay a DNA expert who, the defense proffered, would testify that swabbing of the gun yielded a "major" DNA donor who was not the defendant.[445] The prosecution's own DNA expert, however, had already conceded (as the appellate panel noted) that there were at least three possible DNA donors, and she could neither include nor exclude McDonald from the list of sources.[446] Moreover, "it [wa]s worth noting that defendant asserted that his expert could only exclude defendant as the major donor in connection with the DNA found on the gun, thereby indicating that his own expert could not altogether exclude him as a donor."[447] Accordingly, Chief Judge William B. Murphy, writing for himself and Judges E. Thomas Fitzgerald and Stephen L. Borrello,[448] concluded the defendant failed to establish the expert would "likely benefit[]" his defense.[449] Even assuming the trial court erred, such error was harmless in light of "overwhelming direct and circumstantial

441. *Id.* at 762–63, 846 N.W.2d at 73 (citations omitted).
442. *Id.* at 766, 846 N.W.2d at 74.
443. MICH. COMP. LAWS ANN. § 775.15 (West 2015).
444. People v. McDonald, 303 Mich. App. 424, 435, 844 N.W.2d 168, 175 (2013) (quoting People v. Carnicom, 272 Mich. App. 614, 616, 727 N.W.2d 399, 401 (2006)).
445. *Id.* at 435, 844 N.W.2d at 175.
446. *Id.* at 435, 844 N.W.2d at 175–76.
447. *Id.* at 435, 844 N.W.2d at 175.
448. *Id.* at 425–26, 844 N.W.2d at 175.
449. *Id.* at 435, 844 N.W.2d at 175.

evidence of guilt."[450] The panel affirmed the defendant's conviction, for this and other reasons.[451]

VIII. RULES 801–07: HEARSAY, HEARSAY EXCEPTIONS AND CONFRONTATION CLAUSE (CRAWFORD) ISSUES

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted."[452] In plainer English, the hearsay rule bars testimony that something is a fact because some person made an out-of-court statement that it *is* a fact ("We know the sky was blue on Tuesday because declarant said it was blue."). The hearsay rule does not bar a party from offering an out-of-court statement for a purpose other than establishing the truth of the statement, as "[w]here a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay."[453] ("I know declarant was alive on Tuesday because I heard him say that the sky was blue.")

Key to the hearsay rule is that a statement is only hearsay if a party offers it "to prove the truth of the matter asserted."[454] In other words, the party's purpose in offering the statement is the critical factor in determining whether the statement is hearsay. I say this because there is usually no dispute that the statement is an out-of-court statement or that it is "offered in evidence"; rather, the dispute revolves around whether it is "to prove the truth of the matter asserted." (For some charts with examples of hearsay situations versus non-hearsay situations, see last year's *Survey* article on evidence.[455])

450. *Id.* at 436, 844 N.W.2d at 176.

451. *Id.* at 439–40, 844 N.W.2d at 177–78.

452. MICH. R. EVID. 801(c). The federal rules clarify that hearsay is an out-of-court statement "a party offers in evidence to prove the truth of the matter asserted *in the statement*." FED. R. EVID. 801(c)(2) (emphasis added). Much of the introductory material in this section is virtually identical, if not entirely identical, to the corresponding part of last year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1155–56.

453. People v. Harris, 201 Mich. App. 147, 151, 505 N.W.2d 889, 891 (1993) (citing People v. Sanford, 402 Mich. 460, 491, 265 N.W.2d 1, 13 (1978)).

454. MICH. R. EVID. 801(c).

455. Meizlish, *supra* note 3, at 1157–65.

A. Hearsay Situations Generally

1. Police Detectives' Out-of-Court Statements During Recorded Interviews with Criminal Defendants in Which the Detectives Comment on the Alleged Victims' Credibility

As I noted in Part VII.B, courts are increasingly discouraging witnesses from testifying as to matters that are within the jury's charge.[456] A witness, for example, may not "express an opinion on the defendant's guilt or innocence of the charged offense[.] Similarly, because determining witness credibility is the jury's responsibility,"[457] "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial."[458]

In many cases—criminal and civil—a party will often introduce its opponent's statements as evidence, pursuant to the hearsay exclusion for party-opponent admissions in Rule 801.[459] In criminal cases, these party-opponent statements may result from police officers' interviews of the accused—such as when the police make a statement to the defendant in order to elicit a response (e.g., "Eyewitnesses have identified you as the shooter."). Courts are struggling with the means by which to admit the defendant's inculpatory statements without the jury considering the police officers' out-of-court statements (during the interview) for their truth.[460] The officers' statements often include hearsay, but, on the other hand, when a party offers an out-of-court statement "to show the effect of the statement on the hearer," [461] and the "hearer" could arguably include the defendant-interviewee, "[the statement] does not constitute hearsay."[462]

The Michigan Supreme Court weighed in on the issue in *People v. Musser* by crafting a rule of law that encourages trial courts to redact police officers' out-of-court statements in recorded interviews in which

456. People v. Fomby, 300 Mich. App. 46, 48–51, 831 N.W.2d 887, 888–91 (2013).

457. *Id.* at 53, 831 N.W.2d at 891 (quoting People v. Bragdon, 142 Mich. App. 199, 369 N.W.2d 209 (1985)) (internal quotation marks omitted).

458. People v. Musser, 494 Mich. 337, 349, 835 N.W.2d 319, 327 (2013) (citing People v. Buckey, 424 Mich. 1, 17, 378 N.W.2d 432, 439 (1985)).

459. FED. R. EVID. 801(d)(2). The corresponding Michigan rule is substantially similar. *See* MICH. R. EVID. 801(d)(2).

460. *See infra* notes 461–64 and accompanying text.

461. People v. Eggleston, 148 Mich. App. 494, 502, 384 N.W.2d 811, 814 (1986) (citing People v. Lee, 391 Mich. 618, 642, 218 N.W.2d 655, 666 (1974)); *see also* Gover v. Perry, 698 F.3d 295, 306 (6th Cir. 2012) (recognizing effect-on-the-listener statements as non-hearsay).

462. *Eggleston*, 148 Mich. App. at 502, 384 N.W.2d at 814.

they comment on another witness's (and/or the victim's) credibility.[463] The court framed the issue as follows:

> [T]his case asks this Court to consider whether the rule precluding a witness from commenting on another person's credibility at trial is triggered by an interrogator's statements that are offered to provide context to a defendant's statements, rather than offered to prove the truth of the matter asserted, or whether the interrogator's statements that actually provide context to a defendant's statements have some probative value, unlike statements commenting on the credibility of another person that are offered for their truth.[464]

The supreme court, in a unanimous opinion by Justice Michael F. Cavanagh,[465] recognized a split of authority on this issue.[466] On the one hand, it noted, allowing the prosecution to introduce the officers' "vouching" statements on an audio/video recording would frustrate the policy underlying the prohibition of police testimony on the witness stand vouching for another witness's credibility.[467] "The logic behind this approach is that, in either case, the jury hears the police officer's opinion and 'clothing the opinion in the garb of an interviewing technique does not help.'"[468] The alternative view is that "because the [officers'] comments are an interrogation technique and are 'not made for the purpose of expressing an opinion as to [the] defendant's credibility or veracity at trial,' the statements are admissible but 'only . . . to the extent that they provide context to a relevant answer by the [defendant].'"[469]

Rejecting a bright-line rule, the high court appeared to adopt a modified form of the latter approach:

> [T]he interrogator's statements are only admissible to the extent that the proponent of the evidence establishes that the interrogator's statements are relevant to their proffered purpose.

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463. *Musser*, 494 Mich. 337, 351–54, 835 N.W.2d 319, 328–30 (2013).

464. *Id.* at 351, 835 N.W.2d at 328–29.

465. *Id.* at 338, 835 N.W.2d at 322.

466. *Id.* at 351–52, 835 N.W.2d at 329.

467. *Id.* at 351–52, 835 N.W.2d at 329 (citing State v. Jones, 68 P.3d 1153, 1155 (Wash. Ct. App. 2003)).

468. *Id.* at 352, 835 N.W.2d at 329 (quoting *Jones*, 68 P.3d at 1155) (citing *State v. Demery*, 30 P.3d 1278, 1285–86 (Wash. 2001) (Alexander, C.J., concurring); State v. Elnicki, 105 P.3d 1222, 1229 (Kan. 2005)).

469. *Id.* at 352–53, 835 N.W.2d at 329 (quoting State v. Castaneda, 715 S.E.2d 290, 295 (N.C. Ct. App. 2011)).

> Even if relevant, the interrogator's statements may be excluded under MRE 403 and, upon request, must be restricted [via a limiting instruction] to their proper scope under MRE 105.[470]

The court added, "[T]rial courts 'must vigilantly weed out' otherwise inadmissible statements that are not necessary to accomplish their proffered purpose."[471] "To hold otherwise would allow interrogations laced with otherwise inadmissible content to be presented to the jury disguised as context."[472]

In *Musser*, the eleven-year-old complainant testified that, in the spring of 2009, she and her family were visiting the residence of John M. Musser and his family to watch a hockey game.[473] The victim left the main group and tried to fall asleep on a couch.[474] For most of the time, the only other person in the same room was a sleeping child.[475]

> The complainant testified that while she was feigning sleeping, defendant put his hands on her inner thighs and later touched her breasts while covering her with a blanket. The complainant also stated that defendant put his thumb under the waistband of her pants, which was near her underwear line. According to the complainant, after defendant left, she went downstairs and asked her parents if they could leave.[476]

The victim did not report the incident for about a year.[477] While the families continued to socialize, the victim's mother testified that her daughter subsequently lost interest in visiting the defendant's home.[478] In 2010, the victim revealed the incident to her mother, who took her daughter to the Kent County Sheriff's Department to report the incident.[479] Detectives interviewed the defendant the same day, where he gave the following version of events:

> [The] defendant denied any improper contact with the complainant, but remembered coming upstairs to get a drink

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470. *Id.* at 353–54, 835 N.W.2d at 330 (citations omitted).
471. *Id.* at 354, 835 N.W.2d at 330.
472. *Id.* (quoting People v. Crawford, 458 Mich. 376, 388, 582 N.W.2d 785 (1998)).
473. *Id.* at 340, 835 N.W.2d at 322–23.
474. *Id.* at 340, 835 N.W.2d at 323.
475. *Id.*
476. *Id.* at 340–41, 835 N.W.2d at 323.
477. *Id.* at 341, 835 N.W.2d at 323.
478. *Id.*
479. *Id.* at 341–42, 835 N.W.2d at 323.

while the complainant and her family were watching a hockey game. Defendant stated that he saw the complainant asleep, hugged her, and gave her a kiss on her cheek or forehead. Defendant acknowledged that he had been drinking that night, that the complainant seemed vulnerable because she appeared to be asleep, and that his hands accidentally touched the skin of the complainant's back when he put his arms around her. Defendant, however, explained that none of his actions were sexual, and he did not touch the complainant inappropriately or in the places that she claimed that she was touched. Defendant stated that he and the complainant had always been affectionate, and the complainant had often greeted defendant with a hug and a kiss when they saw each other.[480]

The exchange in question proceeded as follows:

DETECTIVE [Edward] KOLAKOWSKI: Kids have a hard time lying about this stuff because they don't even want to talk about it, let alone they don't even want to talk about it to a mere fucking stranger.

DETECTIVE [William] HEFFRON: Especially a 12 year old girl.

DETECTIVE KOLAKOWSKI: And she tells me what happened? And she tells our counselors what happened? And these are—and—and with these interviews, too, it's not just a interview of, "tell me what happened," . . . they're . . . done with . . . Michigan adopted, basically, a forensic interview protocol that there's a special way that kids have to be interviewed. They're not interviewed like I can interview you, all right? . . . [Y]ou know what? If you can't do it for yourself, do it for your own little girl . . . . Make sure she knows that men have to answer to the truth. And make sure that [the complainant] knows that, you know what? [Y]eah, someone fucked up . . . . She's having a devastating time. She loves you. She cares about you. She cares about your family. You want to know what her concern was? You want to know why she waited to tell? Do you want me to tell you?

[DEFENDANT]: Sure.

480. *Id.* at 341–42, 835 N.W.2d at 323–24.

DETECTIVE KOLAKOWSKI: I'll tell you . . . .

* * *

DETECTIVE HEFFRON: You know there's a big difference when we interview 4, 5, 6 year olds and when they get up around 10, 11, 12, 13. There's a big difference. Four, five, six year old kids, they're easy to manipulate by parents, aunts, uncles—they're easy to manipulate. They're terrible actors. They're terrible. When kids start getting a little bit older they're better actors. They're—they're older, they're seeing more. She's 12. The big issue here is if she wanted to get you in trouble—she's smart enough, and she's only—and she's 12—if, for whatever reason, she wanted to get you in trouble she would—she would—

[DEFENDANT]: That she would say that I fucked her?

DETECTIVE HEFFRON: Absolutely.

[DEFENDANT]: Yeah.

DETECTIVE HEFFRON: Absolutely. "He put his hand down my pants, his finger was in my vagina" all of this "his mouth was on my breast"—that's what they would do if they're gonna lie to get somebody in trouble, . . . an older kid like that. Little kids, they never've [sic] been exposed to that stuff. They don't know. But it's pretty credible when she tells us, "Hey, he touched . . . me here" and "he put his hand on my breasts" and . . . "his hand started going down my pants but he couldn't." That's pretty credible; that's pretty detailed. Again, if there's no reason for her to make this crap up, why would she say it? This is the last thing . . . she wanted to do was talk to a total stranger about something like this. Why? Why is she gonna put herself through that if it didn't happen? We can't find anything. Kids don't lie about this stuff. They lie about their homework being done; they lie about, "yep, I did the dishes" when they didn't . . . they lie about "yeah, we were in bed by 10:00." They don't lie about this stuff if maybe she's in trouble for something. This is not the kind of stuff that kids make up to try to get out of some trouble that they're in. That's why this is so disturbing. . . . And again, if she's talking about "his hand was on my breast," she's not gonna make that crap up. She just isn't. And this is your opportunity for

her to eventually see that you made a mistake, you're human, and you want to get this worked out so she has the least amount of stress/trauma, whatever, but that she gets the . . . feeling that "I love the man, the family. He made a mistake and someday as I'm older["]—because she's always gonna remember this—this didn't happen when she was 2 or 3 years old—they don't remember that stuff. She's always gonna remember this. At some point she will be able to accept, "Hey, this is what happened. We all make mistakes. He made a mistake." But you're gonna have to start by being upfront. And for you to sit here and say that "well, yep, she's telling the truth about this, but she's lying about that," . . . she's gonna have this report. She's gonna know exactly what you said, and whatever . . . message you want to send her that's . . . up to you. We can't force you. But if she's saying you touched her breasts—I wasn't there for the interview [of the complainant] but [Kolakowski, who has] done a lot of interviewing, said, "Bill, there's no question this happened and the stuff that I'm aware of he probably did"—we just need to know why. Was it alcohol? Was it—I don't know what your sex life has been at home, but all we want to know is why. Were you ever molested as a child?

[DEFENDANT]: No.

DETECTIVE HEFFRON: Help us out here.

[DEFENDANT]: You asked a lot of different questions right there. I don't know—I—I don't know what motivated me. I think I explained it, I was just trying to give her a peck. I don't know where this touching of the breast is coming from.[481]

Prior to the prosecution's presenting a recording of the above interview, the detective testified as to the forensic protocol for interviewing victims of child molestation.[482] The most important concern during such interviews, he explained, is that the child understands the difference between telling the truth and lying.[483] He had conducted "hundreds" of such interviews and had complied with the protocol in interviewing the victim in this case.[484]

481. *Id.* at 343–45, 835 N.W.2d 324–25 (alteration in original).
482. *Id.* at 345–46, 835 N.W.2d at 325–26.
483. *Id.* at 346, 835 N.W.2d at 325–26.
484. *Id.* at 346, 835 N.W.2d at 326.

The defense argued that the court should have redacted the interview to exclude most of the detectives' statements as they vouched for the victim's credibility.[485] The prosecution countered that it was not offering the detective's statements for a hearsay purpose (to prove the assertions therein—that the victim was probably telling the truth), but to establish the context of the defendant's incriminating response.[486] The defense responded that the detective's statements were not relevant to contextualizing the defendant's responses.[487]

The court observed that in many child molestation cases, witness credibility is often the critical factor in the fact-finder's determination, and a jury will "often [be] 'looking to 'hang its hat' on the testimony of witnesses it views as impartial.'"[488] Hence, the court was concerned with "vouching" statements used by detectives.[489] Applying the principles appearing above, the court concluded that most of the detectives' statements, save for the last statement by Heffron, were not necessary to contextualize the defendant's response.[490] The court remarked that Heffron's second set of statements should have appeared as follows:

> DETECTIVE HEFFRON: ~~You know there's a big difference when we interview 4, 5, 6 year olds and when they get up around 10, 11, 12, 13. There's a big difference. Four, five, six year old kids, they're easy to manipulate by parents, aunts, uncles they're easy to manipulate. They're terrible actors. They're terrible. When kids start getting a little bit older they're better actors. They're—they're older, they're seeing more. She's 12. The big issue here is if she wanted to get you in trouble she's smart enough, and she's only and she's 12~~—*if, for whatever reason, she wanted to get you in trouble she would—she would—*
>
> [DEFENDANT]: That she would say that I fucked her?[491]

The trial court should have redacted Heffron's final exchange directed at the defendant to read as follows:

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485. *Id.* at 350–51, 835 N.W.2d at 328.

486. *Id.* at 350, 835 N.W.2d at 328.

487. *Id.* at 351, 835 N.W.2d at 328.

488. *Id.* at 357–58, 835 N.W.2d at 332 (quoting People v. Peterson, 450 Mich. 349, 376, 537 N.W.2d 857, 868 (1995)).

489. *Id.* at 353, 835 N.W.2d at 329.

490. *Id.* at 359–60, 835 N.W.2d at 333.

491. *Id.* at 360 n.18, 835 N.W.2d at 333 n.18.

DETECTIVE HEFFRON: ~~Absolutely. "He put his hand down my pants, his finger was in my vagina" all of this "his mouth was on my breast" that's what they would do if they're gonna lie to get somebody in trouble, . . . an older kid like that. Little kids, they never've [sic] been exposed to that stuff. They don't know. But it's pretty credible when she tells us, "Hey, he touched . . . me here" and "he put his hand on my breasts" and . . . "his hand started going down my pants but he couldn't." That's pretty credible; that's pretty detailed. Again, if there's no reason for her to make this crap up, why would she say it? This is the last thing . . . she wanted to do was talk to a total stranger about something like this. Why? Why is she gonna put herself through that if it didn't happen? We can't find anything. Kids don't lie about this stuff. [T]hey lie about their homework being done; they lie about, "yep, I did the dishes" when they didn't . . . [T]hey lie about "yeah, we were in bed by 10:00." They don't lie about this stuff if maybe she's in trouble for something. This is not the kind of stuff that kids make up to try to get out of some trouble that they're in. That's why this is so disturbing. . . . And again, if she's talking about "his hand was on my breast," she's not gonna make that crap up. She just isn't. And this is your opportunity for her to eventually see that you made a mistake, you're human, and you want to get this worked out so she has the least amount of stress/trauma, whatever, but that she gets the . . . feeling that "I love the man, the family. He made a mistake and someday as I'm older" because she's always gonna remember this—this didn't happen when she was 2 or 3 years old—they don't remember that stuff. She's always gonna remember this. At some point she will be able to accept, "Hey, this is what happened. We all make mistakes. He made a mistake." But you're gonna have to start by being upfront. And for you to sit here and say that "well, yep, she's telling the truth about this, but she's lying about that," . . . she's gonna have this report. She's gonna know exactly what you said, and whatever . . . message you want to send her that's . . . up to you. We can't force you.~~ *But if she's saying you touched her breasts*—~~I wasn't there for the interview [of the complainant] but [Kolakowski, who has] done a lot of interviewing, said, "Bill, there's no question this happened and the stuff that I'm aware of he probably did"~~ *we just need to know why. Was it alcohol? Was it—I don't know what your sex life has been at home, but all we want to know is why. Were you ever molested as a child?*

[DEFENDANT]: No.

DETECTIVE HEFFRON: Help us out here.

[DEFENDANT]: You asked a lot of different questions right there. I don't know—I—I don't know what motivated me. I think I explained it, I was just trying to give her a peck. I don't know where this touching of the breast is coming from.[492]

Justice Cavanagh singled out various statements that were inadmissible, such as the following statement by Kolakowski: "Kids have a hard time lying about this stuff because they don't even want to talk about it, let alone they don't even want to talk about it to a mere fucking stranger."[493] Even if that and similar statements were relevant, Justice Cavanagh remarked, the danger of unfair prejudice they created substantially outweighed whatever probative value they had.[494] In conjunction with the jury hearing Kolakowski's testimony that a child of the victim's age knew the difference between the truth and a lie, and that he had conducted "hundreds" of forensic interviews with similarly situated children, Kolakowski's recorded out-of-court statements to the defendant commenting on the victim's credibility would heavily influence a jury's determination as to her credibility, enhancing the prejudicial effect of his "vouching" statements.[495]

The judge's limiting instructions were ineffective to focus the jury only on the recording's proper purpose, as "the jury viewed the recording with the unqualified instruction in mind that the recording was evidence only to later be informed that all of the recording's contents could not be considered as such."[496]

Accordingly, the trial court abused its discretion in admitting the unredacted statements.[497] Because the evidence against the defendant was not overwhelming (the high court noted the absence of physical evidence), and because the jury's determination of guilt hinged on credibility determinations,[498] the seven justices vacated the defendant's conviction and remanded the matter to Kent County for a new trial.[499]

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492. *Id.* at 361 n.19, 835 N.W.2d at 333 n.19.
493. *Id.* at 359 n.17, 835 N.W.2d at 333 n.17.
494. *Id.* at 362–63, 835 N.W.2d at 334.
495. *Id.* at 362–63, 835 N.W.2d at 334–35.
496. *Id.* at 365, 835 N.W.2d at 336.
497. *Id.*
498. *Id.* at 363–64, 835 N.W.2d at 335.
499. *Id.* at 365–66, 835 N.W.2d at 336.

2. Police Testimony as to the Contents of a 911 Tip to Establish the Basis for Officers' Actions

Both federal and state courts are discouraging prosecutors from eliciting testimony from police officers as to out-of-court statements from tipsters and informants because the statements usually trigger hearsay and Confrontation Clause[500] concerns. Remember that a statement is hearsay when "offered in evidence to prove the truth of the matter asserted."[501] In Michigan, "a statement offered to show why police officers acted as they did is not hearsay."[502] In other words, a party's *purpose* in offering the statement is crucial to resolving whether a statement is hearsay. When the courts conclude the proponent's real purpose in offering the statement is to establish its truth, the hearsay objection carries greater force.

The Ingham County prosecutor charged Randall Kevin Henry with four counts of armed robbery for four incidents that occurred in Lansing in mid-November and early December 2010.[503] The victim of the first robbery, a gas-station clerk, positively identified the defendant and explained that he remembered the defendant because he encountered Henry in the gas station "on at least five other occasions and [because he] wore a dark colored ice company uniform."[504] Upon entering the gas station, the defendant asked for a Black & Mild cigar, pulled a gun when the clerk briefly turned his back and then demanded money.[505] A manager with a local ice delivery company testified that his firm had previously employed the defendant and that employees wore navy-blue sweatshirts or T-shirts bearing the company's name.[506]

The victim of the second robbery, a clerk at the same gas station, also positively identified the defendant and described a similar ruse involving the defendant's request for a Black & Mild cigar, followed by the defendant brandishing a gun and demanding money.[507] This robbery occurred a day after the first.[508]

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500. *See* U.S. CONST. amend. VI.

501. MICH. R. EVID. 801(c); *see also* FED. R. EVID. 801(c)(2).

502. People v. Henry, 305 Mich. App. 127, 154, 854 N.W.2d 114, 132 (2014) (quoting People v. Chambers, 277 Mich. App. 1, 11, 742 N.W.2d 610, 616 (2007)) (internal quotation marks omitted).

503. *Id.* at 130–31, 854 N.W.2d at 120–21.

504. People v. Henry, Nos. 306449, 308963, 2013 Mich. App. LEXIS 1978, at *2 (Dec. 5, 2013).

505. *Id.*

506. *Id.* at *3.

507. *Id.* at *3–4.

508. *Id.* at *3.

Three days after the second robbery, a person the third clerk identified as the defendant entered the same gas station and remarked, "you know the deal. Give me the money. Hurry up, you have two seconds."[509] Henry did not appear to be carrying a gun, but the clerk noticed a pair of scissors up his sleeve as he exited the gas station.[510]

Then, in early December, the victim of the first robbery observed the defendant return to the same station and "laughingly said, 'you know what the f___[sic] deal is.' [Christopher] Selover testified that as he handed money to the man, the man reached into his waistline as if he was going to pull out a gun."[511] That same day, a robber visited a convenience store, walked behind the counter, held a long knife and demanded clerks open the cash register, and then ran off with the cash, promising to return.[512]

The detective in charge of the investigation testified before the jury that a confidential informant "came forward with the defendant's name."[513] The defense objected on hearsay grounds, and the prosecution withdrew the question.[514] The trial court did not provide a curative instruction.[515]

> [Detective Steven] McClean testified that after he formed an opinion regarding who was responsible for the first two L & L robberies, he prepared photographic lineups to present to the victims. The trial court allowed the testimony over defense counsel's hearsay objection on the ground that it was admissible to show how McClean proceeded with his investigation. During closing and rebuttal arguments, the prosecutor stated that there was significant identification evidence beyond that which the informant provided. Otherwise, the prosecutor did not refer to the informant.[516]

On appeal, the defendant argued that the detective's testimony violated his rights under the Confrontation Clause.[517] Considering the question, a panel of the Michigan Court of Appeals observed that not

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509. *Id.* at *4 (internal quotation marks omitted).
510. *Id.* at *4–5.
511. *Id.* at *5.
512. *Id.* at *6.
513. *Henry*, 305 Mich. App. at 151, 854 N.W.2d at 131 (internal quotation marks omitted).
514. *Id.*
515. *Id.*
516. *Id.* at 152, 854 N.W.2d at 131–32.
517. *Id.* at 151, 854 N.W.2d at 132; *see infra* Part VIII.F.

only did the detective disclose the informant's accusation that defendant was the responsible robber, but "that he came to believe that defendant was responsible for the November 16 and November 17 robberies on the basis of what the informant said . . . ."[518] Accordingly, the prosecution had offered the informant-declarant's statements for their truth—that the defendant was the robber because the declarant-informant reported that he was the robber.[519] The court concluded that the statement was inadmissible as hearsay in violation of the Confrontation Clause but did not reverse the defendant's conviction, because of the strength of the remaining evidence and because neither the prosecution nor defense emphasized the informant's information in their closing statements.[520] The hearsay/confrontation error, in the view of Judge Stephen L. Borrello, writing for himself and Judge Michael J. Kelly,[521] did not affect the trial's outcome.[522] Judge Mark L. Boonstra agreed with the analysis of this question but wrote separately to diverge from the majority on a separate issue.[523]

In the Sixth Circuit, police may testify to the contents of an out-of-court 911 tip to establish the reasons for their actions (e.g., in responding to a scene of a crime or stopping a motorist), but only if the basis for the officers' conduct is at issue at trial.[524] The court has acknowledged that "background information that explains how law enforcement came to be involved might not be hearsay because it is offered not for the truth of the matter asserted, but rather to show why the officers acted as they did."[525]

However, in the Tennessee federal case of *United States v. Nelson*, a unanimous appellate panel rejected the government's contention that it introduced the tip's contents into evidence for a non-hearsay purpose (to provide background for the police's activity), concluding that the prosecution used the tip to persuade the jury that the defendant was the person the tipster reported as carrying a gun (a hearsay purpose).[526]

In the early morning of June 15, 2009, Murfreesboro, Tennessee police officers responded to a 911 tip of "a black man wearing a blue shirt, with a 'poofy' afro, riding a bicycle, [who] was armed with a

518. *Henry*, 305 Mich. App. at 154, 854 N.W.2d at 132–33.
519. *Id.* at 154, 854 N.W.2d at 133.
520. *Id.* at 154–55, 854 N.W.2d at 133.
521. *Id.* at 163, 854 N.W.2d at 137.
522. *Id.* at 155, 162–63, 854 N.W.2d at 133, 137.
523. *Id.* at 163, 854 N.W.2d at 137 (Boonstra, J., concurring).
524. *See* United States v. Nelson, 725 F.3d 615, 619 (6th Cir. 2013).
525. *Id.* at 620 (citing United States v. Caver, 470 F.3d 220, 239 (6th Cir. 2006); United States v. Aguwa, 123 F.3d 418, 421 (6th Cir. 1997)).
526. *Id.* at 620–21 (emphasis added).

pistol."[527] The first officer to arrive identified a person, Jerry Nelson, who matched this description and began speaking with him from his patrol car.[528] As a second officer arrived, the first officer exited his vehicle to speak with the defendant, who shortly thereafter began bicycling away from the officers.[529]

> Officer [Joshua] Meredith [(the first officer)] shouted at Nelson to stop, but Nelson kept riding away. Officer [Tommy] Massey [(the second officer)] still in his squad car and following Nelson at a distance of between ten and twenty-five feet, observed Nelson reach into his waistband and throw a large, heavy object, which Officer Massey believed to be a gun, into nearby bushes. Officer Massey continued following Nelson across the street to a parking lot, where Nelson tried to abandon his bicycle and continue his flight on foot. By this point, additional responding officers had joined the pursuit, and Nelson was quickly stopped.[530]

A search incident to the defendant's arrest yielded ammunition in Nelson's pocket.[531] Officers then searched the bush where Massey had seen Nelson throw the "heavy object," and therein they located a gun.[532] At trial, the defendant unsuccessfully objected to the officers' testimony as to the contents of the 911 tip on hearsay grounds, and a jury found the defendant guilty of being a felon in possession of a firearm and ammunition.[533]

With minimal explanation as to its reasoning, a unanimous Sixth Circuit panel—Judge John M. Rogers, writing for himself, Judge Raymond M. Kethledge and U.S. District Judge Paul D. Borman,[534] observed that "[c]ontrary to the Government's position, the police officers' testimony about the 911 call, in the context of this case, was effectively offered to prove the truth of the statements made, rather than to show background."[535] The panel explained that:

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527. *Id.* at 618.
528. *Id.*
529. *Id.*
530. *Id.* at 618–19.
531. *Id.* at 619.
532. *Id.*
533. *Id.*
534. *Id.* at 618. Borman, of the U.S. District Court for the Eastern District of Michigan, sat by designation on the Sixth Circuit panel. *Id.*
535. *Id.* at 620. Curiously, the panel did not quote at all the prosecution's opening or closing statements, or the specific wording of its questioning, to support its conclusion

> [A] less-detailed statement indicating that the police received a 911 call, without detailing the caller's description, would have avoided the prejudice problem while still ensuring that the jury was given the minimal background information needed to understand why the officers behaved as they did. For example, the officers could have testified that they were responding to an anonymous complaint of illegal activity in the area, or that they were responding to a report of a suspicious individual believed to be dangerous.[536]

Thus, the panel held, the district court erred in permitting the officers to testify as to the tip's contents.[537] The error was not harmless, the panel explained, "because the officers' testimony went to the very heart of the sole disputed issue for the jury's resolution, namely whether Nelson possessed a gun."[538] The Sixth Circuit vacated the defendant's two convictions—for possession of a gun and ammunition—and remanded the case to the district court for a new trial.[539]

B. Party Opponents' Statements and Silence

The hearsay rule covers not only oral and written statements, but also "nonverbal conduct of a person, if it is intended by the person as an

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that the government's *purpose* in offering testimony about the 911 tip was to establish that the defendant was the person carrying the gun—a hearsay purpose.

The opinion also does not mention any attempt by the prosecution to offer the 911 recording into evidence. Nevertheless, it requires no leap of faith to assume that the tipster was describing an exciting situation that was occurring contemporaneous with the call. Almost certainly, then, the caller's tip would have fallen within two hearsay exceptions—as a present-sense impression, see FED. R. EVID. 803(1) ("[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it[]"), and as an excited utterance, see FED. R. EVID. 803(2) ("A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.").

Furthermore, even if, for whatever reason, the recording was no longer available, the officers' testimony as to the dispatcher's relaying of the caller's tip would have probably fallen within a hearsay exception for double hearsay—the first level (the dispatcher mentioning a recent tip from a third party) constituting a present-sense impression, the second level (the caller's tip), as I stated above, constituting either a present-sense impression or excited utterance, or both. *See* FED. R. EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."). In other words, even if the government had offered the contents of a tip for a hearsay purpose, this hearsay was probably admissible.

536. *Nelson*, 725 F.3d at 620.

537. *Id.*

538. *Id.* at 621–22.

539. *Id.* at 623.

assertion."[540] What does that mean for silence in response to a question or accusation? Many years ago, the Michigan Supreme Court held, in *People v. Bigge*, by way of a broad proposition, that a criminal defendant need not:

> cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt. There can be no such thing as confession of guilt by silence in or out of court. The unanswered allegation by another of the guilt of a defendant is no confession of guilt on the part of a defendant. Defendant, if he heard the statement, was not morally or legally called upon [to make the] denial or suffer his failure to do so to stand as evidence of his guilt.[541]

In *Bigge*, the silence occurred in the context of a conversation between defendant Charles G. Bigge, a friend, and a close relative regarding Bigge's theft of money.[542] Per the testimony, Bigge was silent after one of the attendants remarked that he was "guilty as hell."[543] For the reason appearing above, the court reversed the conviction and remanded the matter for a new trial.[544]

The *Bigge* court characterized the trial court's admission of post-accusation silence, and the prosecutor's comment on the silence, in the context of a constitutional violation implicating the defendant's right to due process.[545] There was no indication that Bigge was in police custody at the time, or that he ever invoked the Constitution in this informal setting.

Since *Bigge*, however, the U.S. Supreme Court has clarified that, with two exceptions, the accused must *invoke* the Fifth Amendment to obtain its protections.[546] Those two exceptions are: (1) at trial—a defendant has a right to remain silent at his trial without the prosecution using this silence against him,[547] and (2) after arrest—a person in custody subject to police questioning need not invoke his Fifth Amendment right to obtain its protection until after he has received his *Miranda*

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540. MICH. R. EVID. 801(a); *accord* FED. R. EVID. 801(a).

541. People v. Bigge, 288 Mich. 417, 420, 285 N.W. 5, 6 (1939).

542. *See id.* at 419, 285 N.W. at 6.

543. *Id.*

544. *Id.* at 421–22, 285 N.W. at 7.

545. *See id.* at 421, 285 N.W. at 7.

546. Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013) (citing Griffin v. California, 380 U.S. 609, 613–15 (1965)).

547. *Id.* at 2179, 2182 n.3 (citing Doyle v. Ohio, 426 U.S. 610, 617–18 (1976)).

warning.[548] In other words, since the *Bigge* court's ruling, the Supreme Court has required defendants to expressly invoke the Fifth Amendment's protection against self-incrimination unless they are either (a) at trial, or (b) in pre-*Mirandized* police interrogation.

Bigge, in contrast, appeared to carry a presumption that the defendant invokes the privilege regardless of the situation, whereas subsequent cases limited the presumption to trial and custodial settings.[549] Furthermore, in *Bigge*, the silence following accusation did not occur in the context of either pre- or post-arrest police interrogation.[550]

To put it simply, the U.S. Supreme Court has held that outside of the trial/custodial-interrogation exceptions, the defendant's "failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself."[551]

In *Salinas v. Texas*, a *Survey*-period case, the U.S. Supreme Court had occasion to consider whether *Miranda* and its progeny, the Fifth Amendment privilege against self-incrimination, and/or the Due Process clauses of the Fifth and Fourteenth amendments prohibit criminal prosecutors from introducing and commenting on defendants' silence during non-custodial police interviews.[552] The Supreme Court, in a five-to-four split, held that absent the defendant's affirmative invocation of the privilege, prosecutors may introduce and comment on the defendant's silence (unless, at the time of his silence, the defendant was either on trial or subject to custodial interrogation).[553]

Genovevo Salinas was a suspect in two 1992 Houston murders.[554] Shortly after the incident:

> Police visited [Salinas] at his home, where they saw a dark blue car in the driveway. He agreed to hand over his shotgun for ballistics testing and to accompany police to the station for questioning.
>
> Petitioner's interview with the police lasted approximately one hour. All agree that the interview was noncustodial, and the

548. *Id.* at 2180 (citing Miranda v. Arizona, 384 U.S. 436, 467–68, 468 n.37 (1966); Minnesota v. Murphy, 465 U.S. 420, 429–30 (1984)).

549. *See Bigge*, 288 Mich. at 417, 285 N.W. at 5.

550. *Id.* at 419, 285 N.W. at 5.

551. *Salinas*, 133 S. Ct. at 2181, 2181 n.2 (quoting United States v. Kordel, 397 U.S. 1, 10 n.18 (1970)).

552. *See id.*

553. *See id.* at 2174.

554. *Id.* at 2185.

> parties litigated this case on the assumption that he was not read *Miranda* warnings. For most of the interview, petitioner answered the officer's questions. But when asked whether his shotgun "would match the shells recovered at the scene of the murder," petitioner declined to answer. Instead, petitioner "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." After a few moments of silence, the officer asked additional questions, which petitioner answered.[555]

At trial in 2007 (the defendant had absconded shortly after the 1993 interview), the prosecution introduced the defendant's silence in the face of questioning against him, over his counsel's objection.[556] Texas's appellate courts affirmed the conviction, and the U.S. Supreme Court granted Salinas's petition for a writ of certiorari.[557]

In a plurality opinion by Justice Samuel A. Alito Jr. for himself, Chief Justice John G. Roberts Jr., and Justice Anthony M. Kennedy,[558] the high court did not address the question of whether a trial court's admission of non-custodial silence during police interviews violates the Due Process or Self-Incrimination clauses; rather, it concluded that a defendant forfeits the privilege by failing to assert it during a non-custodial interview.[559] The high court held that Salinas's interview was one of the circumstances in which an accused must *expressly* invoke his privilege against self-incrimination to obtain the benefit of the privilege.[560] The accused's burden of invoking his privilege "ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating . . . or cure any potential self-incrimination through a grant of immunity . . . ."[561]

The traditional requirement, Justice Alito observed, prevents individuals from gaming the system by "employ[ing] the privilege to avoid giving testimony that he simply would prefer not to give . . . ."[562]

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555. *Id.* at 2178 (emphasis added) (citation omitted).

556. *Id.* at 2178–79.

557. *See id.* (citing Salinas v. State, 368 S.W.3d 550 (Tex. App. Houston 14th Dist. 2011)); *see also* Salinas v. State, 369 S.W.3d 176 (Tex. Crim. App. 2012); Salinas v. Texas, 133 S. Ct. 928 (2013)).

558. *Id.* at 2177.

559. *Id.* at 2179–80.

560. *Id.* at 2180.

561. *Id.* at 2179 (citing Hoffman v. United States, 341 U.S. 479, 486 (1951); Kastigar v. United States, 406 U.S. 441, 448 (1972)).

562. *Id.* (quoting Roberts v. United States, 445 U.S. 552, 560 n.7 (1980)).

Without Violating the Fifth Amendment, May the Prosecution Use a Defendant's Silence Against Him or Her?	
At trial?	No. The prosecution may not comment on a defendant's failure to take the stand at trial, whether he invokes the Fifth Amendment or not.[563] But, in a *retrial*, the prosecution may cross-examine a defendant who *does* testify at the later trial about his choice not to testify at an earlier trial, and the prosecution may comment about his silence at the earlier trial.[564] (See the discussion in Part VI.A.3.a.)
Before arrest?	Yes. Under *Salinas*, the prosecution may introduce and comment on the defendant's pre-arrest and pre-*Miranda* silence (even if the statements occur during an interview at the police station), unless he expressly invokes his privilege against self-incrimination.[565]
After arrest?	Post-*Miranda*? No. The prosecution may not comment on a defendant's silence after he receives *Miranda* warnings, nor may it cross-examine him on this silence, regardless of whether he expressly invokes the Fifth Amendment or not.[566] But, the prosecution may cross-examine a *testifying* defendant

563. *Id.* at 2179, 2182 n.3 (citing Doyle v. Ohio, 426 U.S. 610, 617–18 (1976)).

564. People v. Clary, 494 Mich. 260, 272, 833 N.W.2d 308, 315 (2013).

565. *See Salinas*, 133 S. Ct. at 2180.

566. *Id.* at 2180 (citing Miranda v. Arizona, 384 U.S. 436, 467–68, 468 n.37 (1966); Minnesota v. Murphy, 465 U.S. 420, 429–30 (1984)).

	about (pre-arrest or post-arrest) silence that occurs before the defendant receives *Miranda* warnings.[567]
Where invoking the right itself would incriminate the person (e.g., by invoking the privilege on tax forms, a person would be admitting to committing tax evasion)?	No. The prosecution may not comment on a defendant's silence in such circumstances, even if the defendant did not expressly invoke his Fifth Amendment privilege.[568]
Where invoking the right would jeopardize one's government contract or employment, or holding public office?	No. The prosecution may not comment on a defendant's silence in such circumstances, even if the defendant did not expressly invoke her Fifth Amendment privilege.[569]
Where the defendant is not speaking with a police agent, or where the defendant is unaware that the other conversant is a police agent?	The prosecution may comment on the defendant's silence, as there is no *Miranda* requirement.[570]

As explained by Justice Alito, "A witness does not expressly invoke the privilege by standing mute."[571] The court's plurality rejected Salinas's position that most citizens, even children, are familiar with the general nature and purpose of *Miranda* warnings, and that punishing silence deriving from "popular misconceptions" of a general "right to remain silent would be unfair to . . . a suspect unschooled in the particulars of legal doctrine."[572] Accordingly, the plurality held, "[s]o long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation."[573] Thus,

567. People v. Sutton, 436 Mich. 575, 598, 464 N.W.2d 276, 286 (1990).

568. *Salinas*, 133 S. Ct. at 2180 (citing Leary v. United States, 395 U.S. 6, 28–29 (1969); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 77–79 (1965)).

569. *See id.* (citing Garrity v. New Jersey, 385 U.S. 493, 497 (1967); Lefkowitz v. Cunningham, 431 U.S. 801, 802–04 (1977); Lefkowitz v. Turley, 414 U.S. 70, 84–85 (1973)).

570. *See* Illinois v. Perkins, 496 U.S. 292, 298 (1990) (citing Hoffa v. United States, 385 U.S. 293 (1966)).

571. *Salinas*, 133 S. Ct. at 2181.

572. *Id.* at 2182.

573. *Id.* at 2184.

the U.S. Supreme Court affirmed the Texas courts that upheld Salinas's conviction.[574]

The reader should note that while Justice Alito's plurality opinion bore the signatures of only three justices, his concurring colleagues, Justices Clarence Thomas and Antonin G. Scalia, would have ventured much further.[575] They would have overruled *Griffin v. California* so as to allow the prosecution to comment on silence in the face of an accusation, even the defendant's silence at trial.[576]

<table>
<tr><th colspan="5">The Majority Position on the U.S. Supreme Court Toward Non-Custodial Silence with Police Officers</th></tr>
<tr><th colspan="3">The Salinas Plurality</th><th colspan="2">The Concurring Justices</th></tr>
<tr><td>Alito</td><td>Roberts</td><td>Kennedy</td><td>Thomas</td><td>Scalia</td></tr>
<tr><td colspan="3">Absent the defendant expressly invoking his privilege against self-incrimination, the prosecution may introduce and comment on a defendant's silence in non-custodial settings without violating the Constitution.[577] ▼</td><td colspan="2">The prosecution should be able to comment on any silence.[578] ▼</td></tr>
<tr><td colspan="5">The lowest common denominator: Five of nine justices support, at the very least, the plurality position that the prosecution's introduction of a defendant's silence in non-custodial settings is constitutional, absent the defendant expressly invoking his privilege against self-incrimination.</td></tr>
</table>

This returns us to *Bigge*. Inasmuch as the *Bigge* court predicated its ruling on a theory of due process, a subsequent case before the Michigan Supreme Court, *People v. McReavy*, which was subsequent to *Miranda*, held that *Bigge*'s broad proscription against the prosecution's use of post-accusation silence is merely "evidentiary in nature," implicating the rules of evidence but not constitutional provisions.[579] The *McReavy* court held that once "constitutional obligations are fulfilled, use of a party

574. *See id.*

575. *Id.*

576. *See id.* (Thomas, J., concurring) (citing Griffin v. California, 380 U.S. 609, 609 (1965)).

577. *Id.* at 2177–84 (plurality opinion).

578. *Id.* at 2184–85 (Thomas, J., concurring).

579. People v. McReavy, 436 Mich. 197, 213, 462 N.W.2d 1, 8 (1990).

opponent's statements and conduct are to be evaluated pursuant to MRE 801."[580]

Prior to *Salinas*, Justice Stephen J. Markman observed that since *Miranda*, neither the state nor federal supreme courts have considered whether the use of pre-arrest/pre-*Miranda* silence is admissible as substantive evidence of guilt, but the Michigan Court of Appeals has, and has "found no constitutional barriers to the admission of such evidence for this purpose."[581] The U.S. Supreme Court has held that pre-arrest/pre-*Miranda* silence is admissible to impeach a witness.[582] Now that *Salinas* has held that admitting such silence does not violate a defendant's constitutional rights (at least absent the defendant invoking the constitution),[583] is an outright overruling of *Bigge* on the horizon? Time will tell.

C. Hearsay Exceptions

The Michigan Supreme Court has explained that "[e]xceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy."[584] The words "inherently trustworthy," the Michigan Supreme Court has explained, refer to "the totality of the circumstances surrounding the actual making of the statement, not evidence corroborating the statement."[585] I discuss some of those exceptions below.

1. Where the Declarant May or May Not Be Unavailable at Trial

Some hearsay statements can be admissible regardless of whether the declarant is unavailable for trial.[586]

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580. *Id.* at 222, 462 N.W.2d at 12; *see also* MICH. R. EVID. 801.

581. People v. Redd, 486 Mich. 966, 967, 783 N.W.2d 93, 94 (2010) (Markman, J., concurring) (citing People v. Schollaert, 194 Mich. App. 158, 166–67, 486 N.W.2d 312, 316–17 (1992); People v. Solmonson, 261 Mich. App. 657, 665, 683 N.W.2d 761, 767 (2004)).

582. *Id.* at 967, 783 N.W.2d at 94 (citing Jenkins v. Anderson, 447 U.S. 231, 240 (1980)).

583. *See* Salinas v. Texas, 133 S. Ct. 2184 (2013).

584. People v. Meeboer, 439 Mich. 310, 321, 484 N.W.2d 621, 626 (1992) (citing Solomon v. Shuell, 435 Mich. 104, 119, 457 N.W.2d 669, 675 (1990)). The introductory material in this section borrows heavily, if not entirely, from the previous year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1167–68.

585. *Meeboer*, 439 Mich. at 323 n.17, 484 N.W.2d at 627 n.17 (emphasis added) (citing State v. Larson, 472 N.W.2d 120, 125 (Minn. 1991)).

586. *See* MICH. R. EVID. 803; *see also* FED. R. EVID. 803.

a. Present-Sense Impressions

One of the more common hearsay exceptions is that appearing in MRE 803(1)—the present-sense impression, which the Michigan rules define as "[a] statement describing or explaining an event or condition, made while the declarant was perceiving the event or condition, or immediately thereafter."[587] To establish that a hearsay statement falls within the exception: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must have personally perceived the event, and (3) the explanation or description must have been made at a time 'substantially contemporaneous' with the event."[588] However, "in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable."[589]

In *People v. Chelmicki*, prosecutors charged Eric M. Chelmicki with the felony of unlawful imprisonment and the misdemeanor of domestic violence.[590] Chelmicki and his girlfriend were living together in Macomb County and an argument ensued over an eviction notice.[591] The defendant's temper rose, prompting the victim to attempt to leave their apartment via the fire escape.[592] While she was on the fire escape, the defendant "grabbed her by her coat and dragged her back into the apartment. The victim recalled that she had broken blood vessels in her wrists after the assault."[593]

Neighbors observed part of the incident and reported that "the victim told them that defendant had turned the apartment stove's gas burners on and was attempting to 'blow up' the apartment complex."[594] While the defendant had already left the apartment by the time police arrived, officers found the victim, "who was visibly upset and crying, [and who] told the officers that defendant had put a gun to her head."[595] The officers had the victim write a statement while they were investigating the incident.[596] The jury convicted the defendant at the trial's conclusion, and

587. MICH. R. EVID. 803(1). The federal rule is virtually identical. *See* FED. R. EVID. 803(1).

588. People v. Chelmicki, 305 Mich. App. 58, 63, 850 N.W.2d 612, 616 (2014) (quoting People v. Hendrickson, 459 Mich. 229, 236, 586 N.W.2d 906, 908–09 (1998)).

589. *Id.* (quoting *Hendrickson*, 459 Mich. at 236, 586 N.W.2d at 909).

590. *Id.* at 60–61, 850 N.W.2d at 614–15.

591. *Id.* at 61, 850 N.W.2d at 615.

592. *Id.*

593. *Id.*

594. *Id.*

595. *Id.*

596. *Id.*

on appeal he argued that the trial court erred in admitting the victim's statement to the police in violation of the hearsay rule.[597]

However, a unanimous panel of the Michigan Court of Appeals concluded that the statement fell within two hearsay exceptions, including the present-sense impression.[598]

> The statement provided a description of the events that took place inside the apartment and the victim perceived the event personally. Lastly, the statement was made at a time "substantially contemporaneous" with the event, as the evidence showed, at most, a lapse of 15 minutes between the time police entered the apartment and the time the victim wrote the statement.[599]

Accordingly, the panel of Chief Judge William B. Murphy and Judges Michael J. Kelly and Amy Ronayne Krause, in a per curiam opinion, affirmed the defendant's conviction and sentence, for this and other reasons.[600]

b. Past Recollection Recorded

At times during his or her testimony, a witness may be unable to remember some or all aspects of the circumstances to which he or she testifies.[601] "It not infrequently happens that a witness, under the embarrassment of an examination, forgets, or omits to state, facts within his knowledge, or is disinclined to disclose fully and definitely what he knows."[602]Accordingly, courts allow a party to attempt to refresh the witness's memory with a document or some other item, even if the witness was not the author or creator of the document or item.[603]

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597. *Id.* at 60–62, 850 N.W.2d at 614–15.

598. *Id.* at 63, 850 N.W.2d at 616.

599. *Id.* It does not appear that the trial court or the Michigan Court of Appeals considered whether the victim's statements were admissible pursuant to the statutory hearsay exception for domestic violence victims' statements to police officers. *See* MICH. COMP. LAWS ANN. § 767.27c (West 2015); Meizlish, *supra* note 23, at 871–74.

600. *Chelmicki*, 305 Mich. App. at 71, 850 N.W.2d at 620.

601. Hileman v. Indreica, 385 Mich. 1, 7–8, 187 N.W.2d 411, 412 (1971). This introductory material to the past-recollection recorded exception borrows heavily, if not entirely, from the 2012 *Survey* article on evidence. *See* Meizlish, *supra* note 23, at 864–65.

602. *Hileman*, 385 Mich. at 7–8, 187 N.W.2d at 412.

603. *See* People v. Hill, 282 Mich. App. 538, 547, 766 N.W.2d 17, 25 (2009), *aff'd in part, vacated in part*, 485 Mich. 912, 733 N.W.2d 257 (2009); *see also* United States v. Marrero, 651 F.3d 453, 471–72 (6th Cir. 2011) (quoting Rush v. Ill. Cent. R.R. Co., 399

If this document fails to refresh the witness's memory, the proponent of his testimony, through the hearsay exception in Rule 803(5), may then have the witness read the contents of a document he or she authored as evidence of his prior recollection ("Recorded Recollection").[604] To do so, the proponent must establish that the record was "made or adopted by the witness when the matter was fresh in the witness' memory . . . ."[605]

In *People v. Chelmicki*, a case I first discussed in Part VIII.C.1.a, the victim had difficulty remembering the events of a domestic violence incident with specificity.[606] Her statement to the police refreshed her memory, but only in part.[607]

> In response, the prosecution read several statements made by the victim into the record, including (1) that defendant "turned the gas on in the kitchen to kill us both. He had me by the throat when he had the BB gun. He told me the cops could kill him, he didn't care"; (2) that defendant "broke my blood vessels in my wrists, put a . . . BB gun to my head and told me to call the cops"; (3) that defendant "grabbed me by my coat, drug me across the kitchen floor, he broke a blood vessel in my wrist. He put his BB gun to my head and told me to call the cops"; (4) that defendant "pinned me down to the bed and would not let me open the door for the police"; and (5) that defendant "had me by the throat when he had the BB gun, he told me the cops could kill him, he didn't care."[608]

F.3d 705, 716 (6th Cir. 2005) ("The propriety of permitting a witness to refresh his memory from a writing prepared by another largely lies within the sound discretion of the trial court."). *But see* MICH. R. EVID. 612(b) ("[When] the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying."). The corresponding federal rule provides that:

> Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

FED. R. EVID. 612(b).

604. MICH. R. EVID. 803(5).

605. *Id.*

606. *Chelmicki*, 305 Mich. App. at 61–62, 850 NW.2d at 615.

607. *Id.*

608. *Id.* at 62, 850 N.W.2d at 615 (alteration in original).

The prosecution, the appellate panel concluded, laid the proper foundation for a past recollection recorded.[609] "The police statement pertained to a matter about which the declarant had sufficient personal knowledge, she demonstrated an inability to sufficiently recall those matters at trial, and the police statement was made by the victim while the matter was still fresh in her memory."[610] Accordingly, there was no error in the trial court admitting the statements, the panel held.[611]

c. Ancient Documents

While the word "ancient" conjures up images of Eyptian pharoahs and Greek philosophers from thousands of years ago, to the rules drafters it could mean a couple decades ago.[612] Federal Rule of Evidence 803(16), in fact, contains an exception to the hearsay rule for "[s]tatements in [a]ncient [d]ocuments [—] a statement in a document that is at least 20 years old and whose authenticity is established."[613] Michigan's rule is virtually identical.[614] In *Brumley v. Albert E. Brumley & Sons, Inc.*, a unanimous panel of the Sixth Circuit held that there is no requirement that the ancient document's author have personal knowledge as to the truth of his or her assertions in the article.[615]

In 1975, gospel songwriter Albert E. Brumley purported to transfer his ownership rights in various compositions to two of his children, William and Robert Brumley.[616] In 2006, A.E. Brumley's four other children filed a notice of termination, which, presumably, would allow them to share in the profits of their father's copyrights.[617] At issue before the U.S. District Court for the Middle District of Tennessee was whether, for copyright-law purposes, A.E. Brumley was the "statutory author" of the songs, or if the songs were "work[s] made for hire."[618] (The songwriter had a business relationship in the late 1920s and early 1930s with the Hartford Music Co., which was the original copyright holder of his first hit.[619] Brumley's firm purchased Hartford in the late 1940s.[620])

609. *Id.* at 64, 850 N.W.2d at 616.
610. *Id.*
611. *Id.*
612. *See* FED. R. EVID. 803(16).
613. FED. R. EVID. 803(16).
614. MICH. R. EVID. 803(16).
615. Brumley v. Albert E. Brumley & Sons, Inc., 727 F.3d 574, 579–80 (6th Cir. 2013).
616. *Id.* at 576.
617. *Id.*
618. *Id.*
619. *Id.*
620. *Id.*

The plaintiff children sought to prove that their late father was the statutory author of the works because federal copyright law provides that there are no termination rights for works made for hire.[621] Conversely, Robert Brumley sought to show that his siblings had no termination rights, as the songs were works made for hire.[622]

Prior to trial, Robert's siblings convinced the district court to grant their motion in limine to exclude two articles from music publications, one from 1977, the other from 1986, which "provided statements that Brumley, Sr. was a salaried employee of Hartford during the time that he wrote the Song."[623] After other evidentiary rulings, a jury trial resulted in a verdict in the plaintiff's favor that the songs were not work made for hire, triggering the heirs' termination rights.[624] Following the trial, the district judge concluded that the heirs' termination notice was valid.[625] Robert filed an interlocutory appeal, challenging this decision as well as the evidentiary rulings leading to the jury verdict in favor of his opponents.[626]

On appeal, the Sixth Circuit panel observed that Robert's siblings did not dispute the authenticity of the articles, satisfying the second requirement of FRE 803(16).[627] Nor was there a dispute that the articles were at least 20 years old, satisfying the first requirement.[628] The district court, the appellate panel observed, remained on the right track as it opined that "'the content of the document is a matter of evidentiary weight left to the sole discretion of the trier of fact,' and, therefore, the factual accuracy of the statement is not pertinent when considering whether the hearsay exception applies."[629]

The judge erred, however, when she reached outside Federal Rule 803 and excluded the articles pursuant to Rule 403 because "[t]here is no clear indication in these articles as to how the authors acquired the information that they used to make representations regarding Brumley's employment status at the relevant time."[630] As I noted above, the Sixth Circuit held that there is no foundational requirement that the authors of

621. *Id.* (citing 17 U.S.C.A. § 304(c) (West 2014)).
622. *Id.*
623. *Id.* at 577.
624. *Id.*
625. *Id.*
626. *Id.*
627. *Id.* at 579; *see also* FED. R. EVID. 803(16).
628. *Brumley*, 727 F.3d at 579.
629. *Id.* (citing United States v. Kalymon, 541 F.3d 624, 633 (6th Cir. 2008)).
630. *Id.*

ancient documents have personal knowledge of the truth of their assertions.[631]

Second, the panel—Judge Boyce F. Martin Jr., writing for himself and Judges Damon J. Keith and R. Guy Cole Jr.,[632]—noted that the articles were well sourced from persons who presumably did have personal knowledge.[633] "It is apparent from the context of the Stubblefield article that Stubblefield interviewed Brumley, Sr., and the notes section at the conclusion of Malone's article lists all of Malone's sources, which include Brumley, Sr. and Eugene M. Bartlett, former President of Hartford."[634] Accordingly, the panel reversed the district court's evidentiary ruling, which excluded the ancient documents from trial.[635]

d. The State-of-Mind Exception

Federal Rule of Evidence 803(3) carves out another hearsay exception for:

> [a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.[636]

The Michigan rule is virtually identical.[637] The Sixth Circuit concluded in *United States v. Reichert* that a federal district court's application of this rule, although possibly erroneous, did not violate a defendant's constitutional rights to present a defense.[638]

The federal government charged Jeffrey J. Reichert with violating the Digital Millennium Copyright Act (DMCA) by selling technology and assisting others in modifying video game consoles so that the devices would play pirated video games.[639] In *Reichert*, an undercover

631. *Id.*
632. *Id.* at 574–75.
633. *Id.* at 579.
634. *Id.*
635. *Id.* at 580.
636. FED. R. EVID. 803(3).
637. *See* MICH. R. EVID. 803(3).
638. *See* United States v. Reichart, 747 F.3d 445, 453–54 (6th Cir. 2014) (citing U.S. CONST. amends. VI, XIV).
639. *Id.* at 448 (citing 17 U.S.C.A § 1201(a)(2)(A) (West 2014)).

officer contacted the defendant and asked for assistance in modifying a Nintendo Wii: "Reichert responded to the agent's requests, purchased a Wii, installed a modification chip, and sold the modified Wii to the agent for a $50 profit. When the Wii was tested, it was able to play both legitimate video games and pirated ones."[640] At trial, the government introduced evidence that the defendant involved himself in online forums that discussed the process of modifying consoles in such a manner and that once, he even boasted online that, "I meant that no one cares if people are doing installs. We aren't technically supposed to do it."[641] At other times, Reichert told users of the online forum where they could buy pirated games and conceal their console modifications from the manufacturers.[642] When an agent interviewed the defendant while his colleagues searched Reichert's home, Reichert "never stated to me that it was illegal . . . he knew the mod chips were in a gray area."[643]

At trial, the government bore the burden of establishing that the defendant *willfully* violated DMCA—"that the defendant acted with knowledge that his conduct was unlawful."[644] To negate the "knowledge" element, the defense presented a friend of Reichert, Kevin Belcik, who testified that he and the defendant learned how to modify computers from a vocational program in high school.[645] Had the district court not sustained the government's objection, he would have also testified that Reichert believed his game console modifications were similar to computer modifications and that "Reichert indicated that he believed that modifying the hardware was legal but selling the copyrighted games was illegal."[646]

At the conclusion of the trial, the jury found the defendant guilty.[647] The district court imposed a sentence of one year and one day in prison.[648]

On appeal, the defendant argued that the district judge's exclusion of his friend's testimony violated his constitutional right to present a defense.[649] The Sixth Circuit acknowledged that the statement might have been admissible under the state-of-mind exception in Rule 803(3),

640. *Id.*
641. *Id.* at 449.
642. *Id.*
643. *Id.* (internal quotations omitted).
644. *Id.* at 451 (quoting United States v. Roth, 628 F.3d 827, 834 (6th Cir. 2011)) (internal quotation marks omitted).
645. *Id.* at 448–49.
646. *Id.* at 449 (internal quotations omitted).
647. *Id.* at 450.
648. *Id.*
649. *Id.* at 454.

but noted first "that Belcik admitted that he was in the Navy between 2004 and 2008 and that he was 'away' in 2007 at the time of Reichert's sale of the modified console and the search of his residence," and second, that Belcik never testified that Reichert made the statements contemporaneous with the 2007 event that was the subject of the indictment.[650] (Again, the exception only covers "a statement of the declarant's *then-existing* state of mind . . . ."[651])

Addressing the defendant's constitutional argument, the panel observed that "a defendant 'does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence,'"[652] and that "the Constitution permits judges to exclude evidence that is repetitive, only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues."[653]

Judge Richard A. Griffin, writing for a two-person majority of himself and Judge John M. Rogers,[654] concluded that there was no constitutional violation because the friend's testimony was only "marginal[ly]" probative of Reichert's state of mind in 2007 and because "Reichert had at least one other avenue of putting his own statements and beliefs into evidence: by taking the stand himself."[655] Accordingly, the panel affirmed the defendant's conviction and sentence, for this and other reasons.[656] Dissenting, Judge Bernice B. Donald would have reversed the conviction on the ground that the district court did not properly instruct the jury.[657]

e. The New 'Notice-and-Demand' Provision in the Federal Rules' Public Records Exception

Both the federal and state rules contain various hearsay exceptions for the records of government, business, and religious organizations.[658] For example, the exception in Federal Rule of Evidence 803(8) provides an exception for:

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650. *See id.*; *see also* FED. R. EVID. 803(3).

651. FED. R. EVID. 803(3) (emphasis added).

652. *Reichert*, 747 F.3d at 453 (quoting United States v. Blackwell, 459 F.3d 739, 753 (6th Cir. 2006)).

653. *Id.* (quoting Holmes v. South Carolina, 547 U.S. 319, 326–27 (2006)) (internal quotation marks omitted).

654. *Id.* at 446.

655. *Id.* at 454.

656. *Id.* at 455.

657. *Id.* at 463–64 (Donald, J., dissenting).

658. *See* MICH. R. EVID. 803; *see also* FED. R. EVID. 803.

Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.[659]

The Michigan rules contain a public-records exception that is substantially similar.[660]

Rather than introducing a public record, what if a litigant seeks to show the fact finder that a relevant public record *does not exist*? Suppose, for example, a defendant alleges that on January 15, he transmitted his tax filing to the Internal Revenue Service. The plaintiff seeks to show the jury that the IRS has no record of such a filing.

Under Federal Rule of Evidence 803(10), the plaintiff may present testimony from a qualified person with access to those records that no record of such filing exists.[661] In civil cases, in both federal and state courts, in lieu of the live testimony of a records keeper, a party may present the sworn statement of a records custodian that the record does not exist or that the custodian was unable to locate it, so long as the certification complies with the self-authentication provisions in Federal Rule of Evidence 902.[662]

A recent amendment to the federal version of Rule 803(10), however, applies in criminal cases only and requires the government to serve notice on the defense of its intent to introduce a self-authenticating certification (with no live testimony) that no relevant public record exists.[663] The government must provide such notice no less than 14 days

659. FED. R. EVID. 803(8).

660. *Compare* FED. R. EVID. 803(8), *with* MICH. R. EVID. 803(8).

661. FED. R. EVID. 803(10).

662. *See id.* (citing FED. R. EVID. 902); *see also* MICH. R. EVID. 803(10) (citing MICH. R. EVID. 902).

663. FED. R. EVID. 803(10).

before trial.[664] If the defense fails to object within seven days of receiving the notice, the court may admit the certification without the custodian's live testimony.[665]

This "notice-and-demand" provision is similar to Michigan's notice-and-demand provision in MCR 6.202 that allows prosecutors to introduce forensic laboratory reports in criminal cases without the technician or record keeper's live testimony, provided the prosecution serves timely notice on the defense, and provided the defense does not object in a timely manner.[666] (I discussed this new provision in the previous year's *Survey* article.[667]) As I discussed last year with respect to the laboratory-report notice-and-demand provisions, these provisions take their cue from *Melendez-Diaz v. Massachusetts*, where the U.S. Supreme Court explained that notice-and-demand provisions do not violate a defendant's Sixth Amendment right to confront the witnesses against him:

> In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so. *States are free to adopt procedural rules governing objections.*[668]

The recent rule amendment was a response to various federal circuits' holdings that certifications of records custodians (absent live testimony) that pertinent records did not exist violated the Confrontation Clause.[669] The new notice-and-demand provision would seem to

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664. *Id.*

665. *Id.*

666. MICH. CT. R. 6.202(C).

667. Meizlish, *supra* note 3, at 1153–55.

668. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 326–27 (2009) (emphasis added) (citations omitted).

669. *New Amendment: FRE 803(10) 'Notice And Demand' Requirements Effective December 1, 2013*, FED. EVIDENCE REV. (Dec. 2, 2013), http://federalevidence.com/blog/2013/november/fre-80310-notice-and-demand-amendment-takes-effect-december-1-2013 (citing United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010); United States v. Orozco-Acosta, 607 F.3d 1156 (9th Cir. 2010)).

eliminate the possible confrontation issue. Michigan has yet to follow suit.

f. The Limited Statutory Hearsay Exception for Documents in Michigan Criminal Cases at the Preliminary-Examination Stage

Michigan criminal felony cases usually begin before a district judge, to whom the prosecution must establish probable cause that the defendant is guilty of a felony, and only upon doing so may the prosecution file an information (equivalent to an indictment) in circuit court.[670]

The rules of evidence apply at these preliminary examinations,[671] with a few exceptions.[672] Public Act 123 of 2014, now section 766.11b of the Code of Criminal Procedure, establishes additional exceptions to the hearsay rule and, in some cases, to the rules of authentication; however, again, only at the preliminary examination and not at trial:[673]

> [T]he following are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication:
>
> (a) A report of the results of properly performed drug analysis field testing to establish that the substance tested is a controlled substance.
>
> (b) A certified copy of any written or electronic order, judgment, decree, docket entry, register of actions, or other record of any court or governmental agency of this state.
>
> (c) A report other than a law enforcement report that is made or kept in the ordinary course of business.
>
> (d) Except for the police investigative report, a report prepared by a law enforcement officer or other public agency. Reports permitted under this subdivision

670. MICH. COMP. LAWS ANN. § 767.42 (West 2015); MICH. CT. R. 6.110(E). There is no preliminary examination in most misdemeanor cases. *See* MICH. COMP. LAWS ANN. § 600.8311(d).

671. MICH. CT. R. 6.110(C).

672. *See, e.g.*, MICH. R. EVID. 1101(b)(8).

673. MICH. COMP. LAWS ANN. § 766.11b (emphasis added).

> include, but are not limited to, a report of the findings of a technician of the division of the department of state police concerned with forensic science, a laboratory report, a medical report, a report of an arson investigator, and an autopsy report.[674]

While subsection (a) carried over from section 11b prior to Public Act 123, and subsection (b) functionally mirrors the hearsay exception for public records in Rule 803(8), subsection (c) bestows on the parties at preliminary examination great leeway to introduce such documents as bank-account records and hospital records.[675] This broad exception allows the court to admit "business documents," not only in spite of the hearsay rule, but also in spite of the rules of authentication; the rule negates the need for a live witness, such as a records custodian to authenticate the document[676] or even a custodian's certification or a public seal.[677]

Subsection (d) broadens the hearsay and authentication exception rule for forensic laboratory reports at exam.[678] The previous statute[679] only granted an exception to forensic-science reports from the Michigan State Police's laboratory, not reports from other crime laboratories in Michigan, arson reports, coroner's reports, or other medical reports.[680]

2. Where the Declarant is Unavailable at Trial

a. Unavailability Generally

Contrary to those I discussed in Part VIII.C.1, some statements falling within hearsay exceptions are admissible *only* when the proponent establishes that the declarant is "unavailable" at trial.[681] When the declarant is "unavailable," a court, pursuant to Rule 804, may admit some hearsay statements such as prior testimony or dying declarations.[682]

In Michigan, "unavailable" can refer to:

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674. *Id.*
675. MICH. R. EVID. 803(8).
676. *See* MICH R. EVID. 901.
677. MICH. COMP. LAWS ANN. § 766.11b(c); *see* MICH. R. EVID. 902.
678. *See* MICH. COMP. LAWS ANN. § 766.11(d).
679. *Id.* § 600.2167, *repealed by* 2014 Mich. Pub. Acts 124, § 1.
680. *Id.*
681. *See* MICH. R. EVID. 804; *see also* FED. R. EVID. 804.
682. MICH. R. EVID. 804; FED. R. EVID. 804.

- a witness who cannot testify due to a matter because it is privileged;
- a witness who refuses to testify despite a court order to the contrary;
- a witness who cannot remember the subject matter; or
- a declarant whose live testimony a proponent has made good-faith efforts to secure, but failed to bring to court.[683]

"Unavailability" also incorporates a witness who "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity . . . ."[684]

People v. Duncan, a Michigan Supreme Court case in the *Survey* period, clarified that a child witness can be "mentally infirm" due to his or her age, for the rule's purpose, thus laying part of the foundation to admit his or her prior hearsay statements.[685] Furthermore, the *Duncan* court explained, the words "then existing physical or mental illness or infirmity" in Rule 804 mean that the "illness or infirmity" need not be permanent.[686]

Chief Justice Robert P. Young Jr., writing for himself and Justices Mary Beth Kelly, Bridget M. McCormack, Brian K. Zahra, and David F. Viviano,[687] held that "when a child attempts to testify but, because of her youth, is unable to do so because she lacks the mental ability to overcome her distress, the child has a 'then existing . . . mental . . . infirmity' within the meaning of MRE 804(a)(4) and is therefore unavailable as a witness."[688] Macomb County prosecuting officials charged husband and wife Stanley and Vita Duncan with multiple counts of felony criminal sexual conduct.[689] When the case commenced, "RS," a three-year-old, was the only victim of Vita and one of Stanley's three victims.[690]

RS initially testified against the Duncans at separate preliminary examinations in late 2011.[691] At Stanley's preliminary examination, RS correctly answered the trial court's questions about her age, her birthday, and her dog's name, among others. The judge then asked RS if she knew

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683. MICH. R. EVID. 804(a). The corresponding federal rule is very similar, but not identical. *See* FED. R. EVID. 804(a).

684. MICH. R. EVID. 804(a)(4).

685. People v. Duncan, 494 Mich. 713, 726, 835 N.W.2d 399, 406 (2013).

686. *Id.*

687. *Id.* at 730, 835 N.W.2d at 408.

688. *Id.* at 717, 835 N.W.2d at 401.

689. *Id.* at 717–18, 835 N.W.2d at 401.

690. *Id.* at 718, 835 N.W.2d at 401.

691. *Id.*

the difference between telling the truth and not telling the truth, to which she responded, "Yes." She also affirmed that she would honestly answer the questions of the attorneys.[692]

The district court qualified RS as a witness after this voir dire.[693] RS testified that, on at least three occasions, Stanley Duncan touched her "private," indicating her vaginal area, and "blew raspberries" on her vaginal area while her pants and underwear were off. The raspberries hurt "a little bit," and his touching "really hurted." She testified that the acts occurred in the bathroom of defendants' home, where RS attended daycare.[694]

The district court similarly voir dired RS prior to her testimony at Vita's preliminary examination and found her qualified to testify.[695] RS repeated substantially the same answers that she previously gave regarding Stanley Duncan, and also stated that she told Vita more than once that Stanley had touched her. RS also testified that, on at least one occasion while Stanley was touching her, Vita was just outside the bathroom and that RS could see Vita.[696]

The district court bound over both defendants to the circuit court, which scheduled a joint trial.[697] At trial, almost a year later,[698]

> RS was called to the stand and was first questioned by the court. When asked whether she knew the difference between the truth and a lie, RS responded, "No," and was unable to explain what a promise means. After RS struggled to answer questions similar to those answered at the preliminary examinations, the trial court excused the jury, and met with counsel, RS, and RS's parents in chambers. Afterward, RS was again put on the stand, and again answered, "No" to the questions regarding whether she knew what the truth is, what a lie is, and what a promise is. RS was clearly agitated. Throughout the court's questioning, RS had tears in her eyes and was wringing her hands. RS began crying in earnest just before the court excused her. The court ruled that she was not competent to testify pursuant to MRE 601.[699]

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692. *Id.* at 718, 835 N.W.2d at 401.
693. *Id.*
694. *Id.*
695. *Id.* at 718–19, 835 N.W.2d at 401–02.
696. *Id.* at 719, 835 N.W.2d at 402.
697. *Id.*
698. *Id.*
699. *Id.*

The trial court denied the prosecution's request to declare RS unavailable pursuant to Rule 804, which would have allowed the prosecution to admit RS's testimony at the preliminary examination in lieu of her live testimony.[700] Nevertheless, the court stayed the proceedings, which allowed the prosecution to file an emergency interlocutory appeal.[701] The Michigan Court of Appeals affirmed, concluding, in the Supreme Court's words, that RS "was not mentally ill or infirm even though she may have lacked the mental capacity to qualify as competent."[702]

Chief Justice Young commenced his analysis by examining the meaning of the words "infirm" and "infirmity," the former of which means "'feeble or weak in body or health, [especially] because of age.'"[703] He emphasized that, "[o]f note, age is specifically designated as a factor that may give rise to an infirmity."[704] The appearance of the word "mental" in Rule 804 has the effect of modifying the word infirmity, "[t]hus, read together, the phrase 'mental infirmity' as used in MRE 804(a)(4) encompasses weakness or feebleness of the mind—one cause of which may be an individual's age."[705]

The fact that RS was previously able to testify did not affect the analysis of whether she was available, because by the plain meaning of Rule 804, "the only relevant inquiry [to determine whether she is 'unavailable'] is her condition at the time she was called to testify."[706] Buttressing the court's conclusion, the chief justice noted that "children lack the same level of mental maturity as that exhibited by and expected of most adults," and "[a]s a result of these limitations, young children are less mentally equipped to cope with severe emotional distress."[707] Accordingly, "an emotional breakdown may eliminate any possibility of securing testimony from the young child."[708]

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700. *Id.* at 719–20, 835 N.W.2d at 402–03.

701. *Id.* at 720–21, 835 N.W.2d at 403.

702. *Id.* at 721–22, 835 N.W.2d at 403–04; *see* People v. Duncan, Nos. 312637, 312638, 2012 Mich. App. LEXIS 2412, at *15–17 (Nov. 29, 2012).

703. *Duncan*, 494 Mich. at 725, 835 N.W.2d at 406 (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 1995)).

704. *Id.*

705. *Id.* at 726, 835 N.W.2d at 406.

706. *Id.* (emphasis added).

707. *Id.* at 726–27, 835 N.W.2d at 406–07 (citing John Phillipe Schuman, Nicholas Bala & Kong Lee, *Developmentally Appropriate Questions for Child Witnesses*, 25 QUEEN'S L.J. 251, 255, 297 (1999); William Patton, *Viewing Child Witnesses Through a Child and Adolescent Psychiatric Lens: How Attorneys' Ethical Duties Exacerbate Children's Psychopathology*, 16 WIDENER L. REV. 369 (2010)).

708. *Id.*

The "severity" of RS's distress rendered her "unavailable" within the meaning of Rule 804 because her age did not allow her to overcome her distress so as to allow her to testify, the majority concluded.[709] Applying the holding of the case to the facts, the majority explained:

> RS was four years old at the time she was called to testify at trial. She demonstrated an inability to overcome her distress when she was unable to answer the trial court's questions. When asked whether she knew the difference between the truth and a lie, RS responded, "No," and was unable to explain what a promise means. Furthermore, she answered, "No" to whether she knew what the truth is, what a lie is, and what a promise is. Importantly, throughout her examination RS had tears in her eyes, was wringing her hands, and ultimately began to cry, rendering her unable to answer counsels' questions. While an older youth or an adult may have been able to suppress the unease of testifying in open court, RS, as a young child, was susceptible to particular challenges that must be taken into consideration when determining whether a witness is mentally infirm under MRE 804(a)(4). As could be expected from a young child, especially in the context of alleged criminal sexual conduct, RS simply did not have the mental maturity to overcome her debilitating emotions while on the stand.[710]

Accordingly, the supreme court reversed the court of appeals and remanded the matter to the trial court to determine whether: (1) in light of RS being "unavailable" at trial, her preliminary examination testimony was admissible as "former testimony" pursuant to Rule 804(b)(1); and (2) admitting RS's prior testimony would violate the accused's rights to confront the witnesses pursuant to the Confrontation Clause of the Sixth Amendment.[711]

Justice Stephen J. Markman, however, determined that the majority reached the right result—concluding RS was "unavailable"—but for the

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709. *Id.* at 728–29, 835 N.W.2d at 407.

710. *Id.* at 727–28, 835 N.W.2d at 407.

711. *Id.* Similarly, it is hard to consider how introducing former testimony would violate the Duncans' confrontation rights when they previously *confronted* the witness at the preliminary examination. In fact, in *Crawford v. Washington*, the U.S. Supreme Court held that the Sixth Amendment "condition[s] admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 54 (2004). Here, clearly, the Duncans had a "prior opportunity" at the preliminary examination, and she was unavailable, thus there is no *Crawford* issue.

wrong reason—by concluding she was "mentally infirm."[712] Citing various dictionary definitions, Justice Markman concluded that "a reasonable person would [not] characterize a perfectly healthy and developmentally sound four-year-old child as mentally infirm, or as suffering from the infirmities of age."[713]

Instead, he opined that there is a "general principle of unavailability" in Rule 804(a), and emphasized the rule's wording—"'[u]navailability as a witness' *includes* [the five situations listed in MRE 804(a)(1)–(5)]."[714] He explained, "[u]se of the word 'includes,' of course, indicates that the list of five situations is not exhaustive or all-encompassing."[715] While RS was not "mentally infirm" in his view, she was "unavailable" for the purposes of the rule.[716] Justice Markman observed that prior published cases established that a witness can be "unavailable" without falling within the examples appearing in Rule 804(a)(1)–(5), such as in *People v. Meredith*, where a witness refused to testify on Fifth Amendment grounds,[717] and *People v. Adams*, where a witness "abruptly left the courthouse before testifying."[718] Both the *Meredith* and *Adams* courts held that the witnesses' decisions not to testify was of the "same character as the other situations outlined in the subrule."[719] To Justice Markman, RS's situation was of the "same character" as the situations in *Meredith* and *Adams*.

Justice McCormack concurred in the majority's reasoning but wrote separately to emphasize that "there is a doctrinal foundation supporting the proposition that the criminal law should recognize that children are qualitatively different from adults . . . ."[720] The justice cited three cases—*Roper v. Simmons*, in which the court invalidated the death penalty for defendants less than eighteen years of age at the time of the offense; *Graham v. Florida*, which invalidated life sentences for juveniles who commit offenses other than homicide; and *Miller v. Alabama*, which invalidated mandatory sentences of life without the

712. *Duncan*, 494 Mich. at 730–31, 835 N.W.2d at 408–09 (Markman, J., concurring).

713. *Id.* at 732–33, 835 N.W.2d at 409–410.

714. *Id.* (quoting MICH. R. EVID. 804(a)).

715. *Id.* at 733, 835 N.W.2d at 410.

716. *Id.* at 736, 835 N.W.2d at 411.

717. *Id.* at 733–34, 835 N.W.2d at 410 (citing People v. Meredith, 459 Mich. 62, 65–66, 586 N.W.2d 538, 539–40 (1998)).

718. *Id.* (citing People v. Adams, 233 Mich. App. 652, 658, 592 N.W.2d 794, 797 (1999)).

719. *Meredith*, 459 Mich. at 65–66, 586 N.W.2d at 539–40; *see also Adams*, 233 Mich. App. at 658, 592 N.W.2d at 794.

720. *Duncan*, 494 Mich. at 736, 835 N.W.2d at 411 (McCormack, J., concurring).

possibility of parole for juveniles.[721] "In my view, the Supreme Court's acknowledgement that the criminal law must recognize that children are different from adults underscores the majority's holding in this case."[722]

Justice Michael F. Cavanagh, the lone dissenter, agreed with Justice Markman that RS was not "mentally infirm" but disagreed with the notion that RS was nevertheless "unavailable" for the purpose of Rule 804.[723] The senior Democratic-nominated justice suggested that the court rework Rule 804's definition of unavailability because "more rigorous attempts than were made in this case should occur before declaring a child witness unavailable."[724] He observed that "our legal system makes public testimony in front of the fact finder an important element of the truth-seeking process . . . ."[725] The importance of both ensuring a fair trial for the accused and protecting vulnerable children from predators required reworking the rule.[726]

b. Statements Against Interest

If the court determines a witness is unavailable, it may admit the witness's "statements against interest."[727] In Michigan, Rule 804(b)(3) defines a statement against interest as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.[728]

The federal rule is very similar, but not identical.[729] In *Desai v. Booker*, a habeas case before the Sixth Circuit, the petitioner presented

721. *Id.* at 737, 835 N.W.2d at 411–12 (citing Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012)).

722. *Id.* at 739, 835 N.W.2d at 413.

723. *Id.* (Cavanagh, J., dissenting).

724. *Id.*

725. *Id.* (quoting People v. Johnson, 517 N.E.2d 1070, 1074 (Ill. 1987)) (internal quotation marks omitted).

726. *Id.* at 739–40, 835 N.W.2d at 413.

727. MICH. R. EVID. 804(b)(3); FED. R. EVID. 804(b)(3).

728. Mich. R. EVID. 804(b)(3).

729. The federal rule provides that, in criminal cases, where the statement's proponent seeks to inculpate the declarant via the statement, there must be "corroborating circumstances [that] clearly indicate the trustworthiness of the statement . . . ." FED. R.

the novel argument that a court's admission of allegedly unreliable non-testimonial hearsay[730] violated his rights under the due process clauses.[731] The Sixth Circuit rejected Jasubhai Desai's contention that a trial court's admission of a statement against interest implicated his due process rights.[732]

Police found Anna Marie Turetzky dead due to strangulation in a motel parking lot in 1983.[733] Turetzky and the petitioner had jointly operated medical clinics, but their relationship soured and even produced physical fights.[734]

> The police investigated but initially did not find enough evidence to indict anyone for the crime. The prosecution eventually learned of Lawrence Gorski's 1984 testimony before a federal grand jury, which implicated Desai in Turetzky's murder. Gorski and his friend, Stephen Adams, had both worked at Desai's clinic. Gorski testified that, before the murder, Adams had told him more than once that Desai wanted Turetzky killed. After the murder, Adams confessed to Gorski that he had killed Turetzky for a few thousand dollars. Adams later visited Gorski in Chicago and told Gorski he was on his way to Arizona because Desai wanted him to leave Michigan.[735]

A Wayne County jury found Desai guilty of first-degree murder in 2001.[736] After exhausting his appellate remedies in state court, Desai proceeded to the U.S. District Court in Detroit, which granted Desai's petition for relief.[737] The state appealed to the Sixth Circuit.[738]The sole issue before the Sixth Circuit in this instance[739] was whether Gorski's testimony as to Adams's statement against interest (his confession) was so unreliable as to render the trial court's admission of this hearsay as

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EVID. 804(b)(3). The Michigan rule requires "corroborating circumstances" only in criminal cases, and only when the statement both inculpates the declarant *and* exculpates the accused. *See* MICH. R. EVID. 804(b)(3).

730. For the distinction between testimonial and non-testimonial hearsay, see the discussion on the Confrontation Clause in Part VIII.F.

731. Desai v. Booker, 732 F.3d 628, 630 (6th Cir. 2013).

732. *Id.* at 628–29.

733. *Id.* at 629.

734. *Id.*

735. *Id.*

736. *Id.* at 630.

737. *Id.*

738. *Id.*

739. *Id.* The case had a long and tortured history in the Michigan and federal courts, dating to 1995. *Id.* at 629–30.

violative of Desai's due process rights.[740] The Sixth Circuit panel conceded that the U.S. Supreme Court "h[e]ld out the possibility that 'the introduction' of 'evidence' in general could be 'so extremely unfair that its admission violates fundamental conceptions of justice.'"[741] However, the Supreme Court provided no definition of "extremely unfair" or "fundamental conceptions of justice."[742] Rather, the panel observed, it is the adversarial system, including the right to counsel, confrontation, and a jury, along with the local rules of evidence, that generally protect an individual against an unfair trial.[743] Here, Judge Jeffrey S. Sutton, writing for himself, Judge Deobrah L. Cook, and U.S. District Judge Thomas M. Rose,[744] saw no reason to conclude that Gorski's testimony as to Adams's confession rendered the trial so unfair as to violate Desai's constitutional rights.[745]

First, inherent in the statements-against-interest exception is a well-established theory that such statements are reliable because "individuals do not lightly admit to committing murder."[746] Second, Adams's statements were voluntary and to a friend to whom he had previously confessed crimes.[747] Third, the petitioner "challenged Gorski's credibility through cross-examination and, in closing, squarely put[] the issue of credibility in front of the jury and alleviat[ed] the risk of unfair prejudice from the statements."[748] Fourth, "ample evidence" corroborated the statement, including Desai's solicitation of another person to commit murder, his motive to murder her, his visit to the crime scene, and statements he made contemporaneous with the murder.[749] Accordingly, the unanimous panel reversed the federal district court's ruling that granted Desai's petition for a writ of habeas corpus.[750]

c. Forfeiture by Wrongdoing

Both the Michigan and federal rules follow the doctrine that a party can forfeit a hearsay objection if it encouraged or engaged in wrongdoing

740. *Id.* at 630.
741. *Id.* at 631 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).
742. *Id.*
743. *Id.*
744. *Id.* at 628–29. Rose, of the Southern District of Ohio, sat on the Sixth Circuit panel by designation. *Id.*
745. *Id.* at 631.
746. *Id.* (citing People v. Desai, No. 294827, 2010 Mich. App. LEXIS 1605, at *20–23 (Aug. 24, 2010); MICH. R. EVID. 804(b)(3)).
747. *Id.* (citing *Desai*, 2010 Mich. App. LEXIS 1605, at *34).
748. *Id.* (citing *Desai*, 2010 Mich. App. LEXIS 1605, at *36).
749. *Id.* (citing *Desai*, 2010 Mich. App. LEXIS 1605, at *32–36).
750. *Id.* at 632–33.

that rendered the declarant unavailable.[751] Because the forfeiture-by-wrongdoing principles in Rule 804 are essentially the same as the forfeiture-by-wrongdoing exception to the Confrontation Clause of the Sixth Amendment, I discuss forfeiture by wrongdoing in a subsequent subsection of this Article.[752]

D. The Residual Exception

Brumley v. Albert E. Brumley & Sons, Inc.,[753] a case I first discussed in Part VIII.C.1.c, also provided the Sixth Circuit with a rare opportunity to interpret a generally unsettled area of evidentiary law: the residual exception to the hearsay rule. When an out-of-court statement does not fall within one of the traditional hearsay exceptions in Rules 803 and 804, on rare occasions it might fall within the catch-all "residual exception."[754] The federal exception appearing in Rule 807 allows the court to admit hearsay statements if:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.[755]

The Michigan exception appearing in Rule 803(24) is virtually identical.[756] In *Brumley*, the key question was whether a recorded conversation between A.E. Brumley and his son, Albert E. Brumley Jr., fell within the residual exception.[757] A transcript of the recording reads as follows:

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751. MICH. R. EVID. 804(b)(6); FED. R. EVID. 804(b)(6).

752. *See* Part VII.F.1.

753. Brumley v. Albert E. Brumley & Sons, Inc., 727 F.3d 574, 579–80 (6th Cir. 2013).

754. *See* FED. R. EVID. 807(a); MICH. R. EVID. 803(24).

755. FED. R. EVID. 807(a).

756. MICH. R. EVID. 803(24).

757. *Brumley*, 727 F.3d at 578.

> Brumley, Sr.: That's where I got started in the Hartford—that's where I got started in the Hartford Musical Institute, which is defunct now.
>
> Albert, Jr.: And which you own now, the old Hartford copyrights?
>
> Brumley, Sr.: Yea, I sold some of the songs including 'I'll Fly Away' and two others for three dollars.[758]

The district court concluded that the recording fell within the residual exception and admitted the recording, denying Robert Brumley's motion in limine to exclude it.[759] As the panel commenced its analysis, it rejected the movant's suggestion that in order for the evidence to fall within the residual exception, the evidence's proponent need establish that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility . . . ."[760] Applying the rule to the recording, the panel observed:

> First, the statements should be considered more reliable than not given that Brumley, Sr. and Brumley, Jr. are father and son and not strangers. Second, there is no indication that Brumley, Sr. lacked capacity at the time that he gave the statement. One may argue that Brumley, Sr.'s memory might have been impaired due to the lapse of time between the Song's publication and the statement, but it is just as reasonable to assume that Brumley, Sr. would have accurately recalled the circumstances surrounding the creation of his most successful song despite the lapse of time. Third, Robert has not alleged that Brumley, Sr. was an untruthful person. Fourth, the statement is clear and unambiguous. Finally, the fact that Brumley, Jr. recorded the conversation adds an

758. *Id.* at 577.

759. *Id.*

760. *Id.* at 578 (quoting Idaho v. Wright, 497 U.S. 805, 820 (1990)) (internal quotation marks omitted). In *Wright*, the test determined whether statements were admissible as not violative of the defendant's rights under the Confrontation Clause of the Sixth Amendment. *Wright*, 497 U.S. at 815. The reader should note that, for Confrontation Clause purposes, *Wright* is no longer good law, as it is progeny of *Ohio v. Roberts*, 448 U.S. 56 (1980), which the Supreme Court has overruled. Crawford v. Washington, 541 U.S. 36, 68 (2004).

> element of formality, which suggests that Brumley, Sr. may have given his statements added consideration.[761]

Accordingly, the Sixth Circuit found no abuse of discretion in the district's decision to admit the recording and transcript prior to trial.[762]

As *Brumley* was an interlocutory appeal, the Sixth Circuit's order merely summarized the court's holdings as to the evidentiary decisions and did not analyze the validity of the heirs' termination notice.[763] The appellate court remanded the matter to the district court.[764] The wording of the opinion appears to give Robert an opening to file a motion for a new trial—and relitigate whether the songs were works made for hire—in light of the Sixth Circuit's reversal of the district court's decision to exclude the newspaper articles that supported Robert's position.[765]

E. Hearsay in Summary Judgment Analysis

Before a civil case proceeds to trial, one or more of the parties may seek to resolve the case (or part of the case) prior to trial by suggesting to the court that there is no relevant factual dispute, and that the absence of such a factual dispute entitles it to judgment as a matter of law.[766] Under federal law, the existence of any factual dispute militates against summary judgment, as the trial court "must view all the facts and the inferences drawn therefrom in the light most favorable to the nonmoving party."[767]

To establish that a factual dispute exists, however, the non-movant must show that there is evidence in support of its factual position and that the evidence is in admissible form.[768] In both federal and Michigan state courts, evidence in hearsay form is insufficient to establish a genuine issue of fact.[769]

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761. *Brumley*, 727 F.3d at 578.

762. *Id.* at 578–79.

763. *Id.* at 580.

764. *Id.*

765. *Id.* ("The evidentiary weight to be given to the challenged content in the articles *should have been left to the discretion of the jury* . . . ." (emphasis added)).

766. *See* FED. R. CIV. P. 56(a); MICH. CT. R. 2.116(C)(10).

767. Shazor v. Prof'l Transit Mgmt., 744 F.3d 948, 955 (6th Cir. 2014) (quoting Birch v. Cuyahoga Cnty. Probate Ct., 392 F.3d 151, 157 (6th Cir. 2004)) (internal quotation marks omitted).

768. *Id.* at 960 (citing Alpert v. United States, 481 F.3d 404, 409 (6th Cir. 2007)).

769. Back v. Nestle USA, Inc., 694 F.3d 571, 578 (6th Cir. 2012) (citing FED. R. EVID. 805); McCallum v. Dep't of Corrs., 197 Mich. App. 589, 603, 396 N.W.2d 361, 368

Shazor v. Professional Transit Management concerned a government contractor's firing of its chief executive officer (CEO), and the ex-CEO's claim that her employer fired her because she is a black woman—alleging both race and gender discrimination.[770] The employer, Professional Transit Management (PTM), contracted with the Cincinnati area's regional transit authority to provide management of the agency.[771] Marilyn Shazor, the plaintiff, was the general manager that PTM designated to oversee the day-to-day operations of the Cincinatti agency.[772] Shortly after assuming her responsibilities, PTM officials and Shazor came into conflict.[773]

The plaintiff, according to PTM's executives, failed to participate in educational/training programming, and her general recalcitrance suggested she was trying to cut PTM out of the loop of the transit agency's management.[774] PTM faulted her for not being a "team player" and for requiring her subordinates to obtain her permission before they communicated with PTM personnel.[775] Internally, at least one of the defendant's executives referred to the plaintiff as a "bitch."[776]

Matters came to a head when a local labor union began efforts to organize some of the agency's employees.[777] A member of the agency's board suggested the board retain a PTM official, Thomas P. Hock (a co-defendant with PTM), to consult with the agency on labor issues, but Shazor replied that Hock was too busy working on other projects.[778]

This statement was a lie, the defendant contended, as the employee was available and interested in consulting on labor relations with the Cincinnati agency.[779] Believing it had caught the plaintiff lying on this and one other occasion, PTM fired Shazor.[780] The plaintiff filed suit under both federal and state civil rights law and common law in the U.S. District Court for the Southern District of Ohio.[781] While Shazor argued there was both direct and circumstantial evidence of discrimination to

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(1992) (citing Amorello v. Monsanto Corp., 186 Mich. App. 324, 329, 463 N.W.2d 487, 490 (1990); Pauley v. Hall, 124 Mich. App. 255, 262, 355 N.W.2d 197, 200–01 (1983)).

770. *Shazor*, 744 F.3d at 954.

771. *Id.* at 950.

772. *Id.*

773. *Id.* at 951.

774. *Id.*

775. *Id.* at 952–53.

776. *Id.* at 953.

777. *Id.*

778. *Id.* at 953–54.

779. *Id.*

780. *Id.* at 954.

781. *Id.* at 948, 954.

survive summary judgment, the district court found neither and granted the defendant's motion for summary judgment.[782]

On appeal, a Sixth Circuit panel of Judge Eric L. Clay, writing for himself, Judge R. Guy Cole Jr., and U.S. District Judge William O. Bertelsman,[783] sidestepped whether there was direct evidence of discrimination but resolved the appeal by considering whether there was sufficient *circumstantial* evidence of discrimination to survive summary judgment.[784]

To survive summary judgment on a circumstantial case of discrimination, federal case law requires that the plaintiff make an initial showing that she was a member of a protected class who her employer treated differently than members outside of the protected class.[785] The panel concluded that the plaintiff made this prima facie case.[786]

The burden then shifted to the defendants to advance "a legitimate, nondiscriminatory justification for her termination."[787] The employer met this burden with some evidence that Shazor had lied about a PTM official being unable to consult on labor relations, and in denying that she was involved in selecting a firm other than PTM to consult on the same issues.[788]

The burden then reverted to the plaintiff to show "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [her termination], or (3) that they were insufficient to motivate discharge."[789] The Sixth Circuit then observed that the plaintiff had testified that her employer's official had told her he was unavailable to consult, and that she was not involved in the decision to hire an entity other than PTM for that purpose.[790]

The defendants advanced Hock's testimony that the transit agency's general counsel told him that Shazor, in fact, was involved in the decision to hire an outside consultant.[791] The appellate panel, however, observed that Hock's testimony as to what the general counsel told him

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782. *Id.* at 954–59.

783. Bertelsman, of the Eastern District of Kentucky, sat by designation on the Sixth Circuit panel. *Id.* at 949.

784. *Id.* at 956–57.

785. *Id.* at 957 (citing Griffin v. Finkbeiner, 689 F.3d 584, 592 (6th Cir. 2012)).

786. *Id.* at 957–59.

787. *Id.* at 959 (alteration in original) (emphasis omitted) (citing Davis v. Cintas Corp., 717 F.3d 476, 491 (6th Cir. 2013)).

788. *Id.*

789. *Id.* (quoting Chattman v. Toho Tenax Am., Inc., 686 F.3d 339, 349 (6th Cir. 2012)).

790. *Id.* at 959–60.

791. *Id.* at 960.

was hearsay to establish that the plaintiff actually lied.[792] "Defendants cannot use these statements for their truth in a motion for summary judgment any more than they could use them at trial."[793] The Sixth Circuit found that a genuine factual dispute existed as to the reason for Shazor's termination; the Sixth Circuit reversed the district court's grant of summary judgment and remanded the matter.[794]

F. Testimonial Hearsay and the Confrontation Clause

Even if a statement is admissible pursuant to federal or state hearsay exceptions, the Confrontation Clauses of the Sixth Amendment and the Michigan Constitution still may render it inadmissible in criminal cases.[795] In the 2004 case of *Crawford v. Washington*,[796] the U.S.

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792. *Id.*

793. *Id.* (citing Sutherland v. Mich. Dep't of Treasury, 344 F.3d 603, 619–20 (6th Cir. 2003)). With or without Hock's hearsay testimony, there still appears to be a factual dispute as to the employer's motivations for firing Shazor—a textbook credibility dispute for a jury to resolve. Accordingly, in my view, it was unnecessary for the panel to consider whether Hock's testimony constituted hearsay.

794. *Id.* at 960–61.

795. The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added). Similarly, the Michigan Constitution provides:

> In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; *to be confronted with the witnesses against him or her*; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

MICH. CONST. art. I, § 20 (emphasis added). The legislature has also codified a statutory confrontation right in the Code of Criminal Procedure, which provides:

> On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and *meet the witnesses who are produced against him face to face.*

MICH. COMP. LAWS ANN. § 763.1 (West 2014) (emphasis added). This introductory material to the Confrontation Clause borrows heavily, if not entirely, from the previous year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1170–71.

Supreme Court discarded years of precedent[797] and held that "*testimonial* statements of witnesses absent from trial [shall be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[798]

It necessarily follows that the limitation only applies to "testimonial statements."[799] In the next major Confrontation Clause case, *Davis v. Washington*, Justice Antonin G. Scalia explained the difference between testimonial and nontestimonial statements:

> 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.[800]

The *Crawford* Court also explained that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[801] In other words, a proponent of certain testimony only has a confrontation problem if testimony constitutes hearsay, because testimonial non-hearsay does not trigger a confrontation problem.[802]

In *People v. Henry*, the armed-robbery case whose facts I discussed in Part VIII.A.2, the court of appeals concluded that a detective's testimony as to a confidential informant's identification of the defendant as the perpetrator was for a hearsay purpose—to establish the truth of the informant's statement to the detective that defendant was the actual

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796. Crawford v. Washington, 541 U.S. 36, 36 (2004).

797. Prior to *Crawford*, the Supreme Court held that the Confrontation Clause would not bar the court's admission of a statement from a nontestifying witness in a criminal case if a court was satisfied that "the statement bears 'adequate indicia of reliability.'" *Id.* at 40 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

798. *Id.* at 59 (emphasis added).

799. Davis v. Washington, 547 U.S. 813, 821 (2006) (quoting *Crawford*, 541 U.S. at 53–54).

800. *Id.* at 822.

801. *Crawford*, 541 U.S. at 59 n.9 (emphasis added) (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

802. Note, however, that an objection on hearsay grounds generally will not preserve for appellate purposes an objection on Confrontation Clause grounds. *See, e.g.*, United States v. Dukagjini, 326 F.3d 45, 60 (2d Cir. 2002); Greer v. Mitchell, 264 F.3d 663, 689 (6th Cir. 2001).

robber.[803] The panel explained that "the testimony necessarily implied that the informant accused defendant of the first two robberies and that McClean considered the informant credible. The primary purpose of these statements was to 'establish[] or prov[e] past events potentially relevant to later criminal prosecution,' and as such, they were testimonial in nature."[804] Accordingly, because the statement was (a) testimonial, (b) out of court, and (c) to establish the truth of the matter asserted, the jury's hearing the statement violated the defendant's Sixth Amendment right to confront the witnesses against him.[805] The panel further noted that the trial court failed to give the jury a curative instruction, which usually removes the taint of improper testimony.[806]

1. Forfeiture by Wrongdoing as a Hearsay Exception, and as an Exception to the Confrontation Clause

The U.S. Supreme Court has recognized only one exception to the Sixth Amendment's prohibition on testimonial hearsay absent an opportunity to cross-examine the declarant: the forfeiture-by-wrongdoing doctrine.[807] "[F]orfeiture by wrongdoing has its roots in the common law, and is based on the maxim that 'no one should be permitted to take advantage of his wrong.'"[808] In *People v. Burns*, the Michigan Supreme Court held that the forfeiture doctrine—as both an exception to the Confrontation Clause, and an exception to the non-constitutional hearsay rule—incorporates an element of specific intent that "the defendant must have had 'in mind the particular purpose of making the witness unavailable.'"[809] A unanimous court, emphasizing the wording of Rule 804 and tying the rule's requirements to the constitutional exception, explained, "For the [forfeiture exception] to apply, a defendant must have 'engaged in or encouraged wrongdoing that was *intended to, and did, procure* the unavailability of the declarant as a witness.'"[810]

That the Michigan Supreme Court incorporated the constitutional requirements of *Giles* into Rule 804(b)(6) means that the specific-intent

803. People v. Henry, 305 Mich. App. 127, 154–55, 854 N.W.2d 114, 132–33 (2014).

804. *Id.* at 154, 854 N.W.2d at 133 (alteration in original).

805. *Id.* at 154–55, 854 N.W.2d at 133.

806. *Id.* (citing People v. Crawford, 458 Mich. 376, 399, 582 N.W.2d 785, 796–97 (1998)).

807. People v. Burns, 494 Mich. 104, 113–14, 832 N.W.2d 738, 744–745 (2013) (citing Giles v. California, 554 U.S. 353, 359, 366 (2008)).

808. *Id.* at 111, 832 N.W.2d at 742 (quoting *Giles*, 554 U.S. at 359, 366 (citing Reynolds v. United States, 98 U.S. 145, 159 (1879))).

809. *Id.* at 112, 832 N.W.2d at 743 (quoting *Giles*, 554 U.S. at 367).

810. *Id.* at 113, 832 N.W.2d at 743 (alteration in original) (quoting MICH. R. EVID. 804(b)(6)).

requirement applies to *all* hearsay (testimonial *and* non-testimonial, in criminal *and* civil cases).[811] This is important, of course, because the Confrontation Clause only applies to testimonial hearsay, and only in criminal cases.[812] In other words, if the federal or state rule drafters chose to eliminate the specific-intent requirement for forfeiture by wrongdoing in all civil cases, and for non-testimonial statements in criminal cases, they can do so without amending the Constitution.[813] Absent a constitutional amendment (which is highly unlikely) or the U.S. Supreme Court reinterpreting the *Giles* decision, however, the forfeiture by wrongdoing doctrine would still require a showing of specific intent to admit testimonial hearsay in criminal cases.

Provisions Applicable to Hearsay Statements		
	Criminal Cases	**Civil Cases**
Testimonial Statements	• Federal or state hearsay rule of evidence • ***Confrontation Clause***	• Federal or state hearsay rule of evidence
Non-Testimonial Statements	• Federal or state hearsay rule of evidence	• Federal or state hearsay rule of evidence

Justice Bridget M. McCormack, writing on behalf of a unanimous court, explained the elements of the forfeiture-by-wrongdoing doctrine: "[T]he prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the declarant's unavailability; and (3) the wrongdoing did procure the unavailability."[814]

a. People v. Burns

Discouraging a person from reporting a crime is not the kind of "wrongdoing" that will trigger application of the forfeiture-by-wrongdoing exception.[815] In *Burns*, four-year-old "CB" made statements to her bible-school teacher, a forensic sexual assault interviewer and a

811. *Id.* at 114, 832 N.W.2d at 744–45.
812. *Id.* at n.34, 832 N.W.2d at n.34.
813. *Id.*
814. *Id.* at 115, 832 N.W.2d at 745 (citing People v. Jones, 270 Mich. App. 208, 217, 714 N.W.2d 362, 368 (2006)).
815. *Id.* at 116–17, 832 N.W.2d at 745–46.

sexual assault nurse examiner that her father, the defendant, had had sexual contact with her.[816] At trial, the teacher, Gonzales (whose first name does not appear in the opinion) "testified that CB had told her that 'Dave Junior' hurt her by licking and digitally penetrating her 'butt.'"[817] However, despite multiple attempts to facilitate her testimony, "CB left the witness chair, hid under the podium, refused to answer questions asked by the prosecutor, indicated that she would *not* tell the truth, stated that she was fearful of the jury, and expressed a desire to leave the courtroom."[818] The trial court admitted the statements to Gonzalez, the forensic interviewer, and the nurse, pursuant to the forfeiture-by-wrongdoing hearsay exception (as Gonzalez was not in law-enforcement, the statements did not appear to have implicated the Confrontation Clause).[819]

The trial court had found the defendant responsible for wrongdoing and that he forfeited his hearsay objection, after reviewing a recording of CB's statements with the forensic interviewer.[820] "When asked if defendant had said anything during the alleged abuse, CB stated that defendant told her 'not to tell,' and that '[defendant] didn't want me to tell nobody' or else she would 'get in trouble.'"[821]

Burns took the stand in his own defense and denied committing any abuse.[822] Without any evidence substantiating the abuse other than the victim's hearsay statements, a Bay County jury convicted the defendant of first-degree criminal sexual conduct, an offense for which the maximum potential punishment is life.[823] The court of appeals vacated the conviction on evidentiary grounds, the primary basis for its decision being that that the prosecution failed to lay a proper foundation to apply the forfeiture-by-wrongdoing doctrine.[824] The prosecution appealed to the Michigan Supreme Court.[825]

For the purposes of the opinion, Justice McCormack did not dispute that the prosecution established the first prong of the forfeiture doctrine, "that defendant did, in fact, engage in wrongdoing."[826] The prosecution,

816. *Id.* at 107, 832 N.W.2d at 740.

817. *Id.* at 107, 832 N.W.2d at 741.

818. *Id.* at 108, 832 N.W.2d at 741.

819. *Id.* at 108–09, 832 N.W.2d at 741–43.

820. *Id.* Burns did not dispute on appeal the trial court's finding that CB was "unavailable" for purpose of Rule 804 and the Confrontation Clause. *Id.* at 109 n.7.

821. *Id.* at 108, 832 N.W.2d at 741.

822. *Id.* at 109, 832 N.W.2d at 741.

823. *Id.* (citing MICH. COMP. LAWS ANN. § 750.520b (West 2015)).

824. People v. Burns, No. 304403, 2012 Mich. App. LEXIS 1126, at *2–6 (June 14, 2012).

825. *Burns*, 494 Mich. at 109, 832 N.W.2d at 741–42.

826. *Id.* at 115, 832 N.W.2d at 745.

however, failed to establish the second prong, that "defendant 'intended to . . . procure the unavailability of [CB] as a witness.'"[827] The majority noted that the threats were "contemporaneous" with the assaultive contact, before the police investigation.[828]

> Defendant immediately left the family home after Gonzales reported the suspected abuse. He had no contact with CB whatsoever once the conduct was reported, and nobody else attempted on his behalf to influence CB not to testify. There is no evidence or allegation that defendant attempted to influence CB directly or indirectly apart from the contemporaneous statements at issue.[829]

Merely discouraging a witness from reporting a crime is insufficient to establish the specific-intent prong, the majority held.[830]

> We interpret the specific intent requirement of MRE 804(b)(6)—to procure the unavailability of the declarant as a witness—as requiring the prosecution to show that defendant acted with, at least in part, the particular purpose to cause CB's unavailability, rather than mere knowledge that the wrongdoing may cause the witness's unavailability.[831]

Finally, the supreme court observed, two facts cut against a finding in favor of the prosecution as to the third prong. First, the defendant's behavior caused CB's unavailability.[832] "As the trial court recognized in declaring CB unavailable, her inability to testify was based on her 'infirmity, her youth,' and her fear of testifying in open court."[833] Second, while Burns had allegedly told CB not to tell anyone, that did not stop her from reporting the incident to multiple persons.[834] Accordingly, the high court vacated the conviction and remanded the matter for a new trial.[835]

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827. *Id.* (alteration in original) (quoting MICH. R. EVID. 804(b)(6)).

828. *Id.*

829. *Id.* at 115–16, 832 N.W. 2d at 745–46.

830. *Id.* at 116–17, 832 N.W.2d at 745–46.

831. *Id.* at 117, 832 N.W.2d at 746. Justice McCormack recommended that trial courts make specific findings of fact as to each of the prongs of the forfeiture-by-wrongdoing doctrine. *Id.* at 118 n.42, N.W.2d at 746 n.42.

832. *Id.* at 118–19, 832 N.W.2d at 747.

833. *Id.* at 119, 832 N.W.2d at 747.

834. *Id.* at 118–19, 832 N.W.2d at 747.

835. *Id.* at 120, 832 N.W.2d at 747–48.

b. People v. Roscoe

A Michigan Court of Appeals panel applied *Burns* to a new set of facts in *People v. Roscoe*, which involved a murder at an Ann Arbor car dealership.[836] I discussed the facts of the case in Part IV.B.1. The victim identified defendant in hearsay statements on August 20, 23, and 26, 2006, but Roscoe challenged only the August 23, 2006 statement.[837]

The appellate panel, citing *Burns*, concluded that the prosecution failed to establish that the murder resulted from the defendant's *intent* to render the victim unable to testify.[838] "[D]efendant's action [sic] were as consistent with the inference that his intention was that the breaking and entering he was committing go undiscovered as they were with an inference that he specifically intended to prevent the victim from testifying."[839] Accordingly, a unanimous panel of Judges Donald S. Owens, Stephen L. Borrello, and Elizabeth L. Gleicher,[840] in a per curiam opinion, held that the trial court erred in admitting the August 23 statement pursuant to the forfeiture-by-wrongdoing hearsay/confrontation exception.[841] The court, however, did not reverse Roscoe's conviction, because the error was not outcome determinative given the strength of the prosecution's case.[842]

IX. RULES 901–03: AUTHENTICATION

The only significant change to the rules of authentication is a statutory exception for certain documents in preliminary examinations in felony criminal cases.[843] I discuss this exception in Part VIII.C.1.f.

X. RULES 1001–08: THE BEST-EVIDENCE RULE, DUPLICATES, AND SUMMARIES

There were no significant cases during the *Survey* period that discussed the best-evidence rule or the related provisions in Rules 1001 through 1008.

836. People v. Roscoe, 303 Mich. App. 633, 638–39, 846 N.W.2d 402, 406–07 (2014).
837. *Id.* at 640, 846 N.W.2d at 407.
838. *Id.* at 641–42, 846 N.W.2d at 408.
839. *Id.* at 641, 846 N.W.2d at 408 (citing *Burns*, 494 Mich. at 116–17, 832 N.W.2d at 756 (2013)).
840. *Id.* at 637–38, 846 N.W.2d at 406.
841. *Id.* at 642, 846 N.W.2d at 408.
842. *Id.* at 642–43, 846 N.W.2d at 408–09.
843. MICH. COMP. LAWS ANN. § 766.11b (West 2015).

XI. RULES 1101–03: APPLICABILITY OF THE RULES OF EVIDENCE

Once a defendant stands convicted of a crime, a trial court must often determine the amount of restitution the defendant owes the victim(s). To that end, both Michigan and Sixth Circuit law is clear that the rules of evidence do not apply at restitution hearings.[844]

Rule 1101 of the Michigan Rules of Evidence specifically provides that they do not apply at "[p]roceedings for . . . sentencing . . . ."[845] In *People v. Matzke*, the Michigan Court of Appeals observed that, pursuant to statute, a trial court has a duty to impose restitution at sentencing.[846] Accordingly, because restitution is a part of the sentencing process (where the rules are inapplicable), the rules of evidence do not apply in restitution proceedings.[847] A unanimous panel of Judge Michael J. Riordan, writing for himself and Judges Patrick M. Meter and Deborah A. Servitto,[848] rejected the defendant's contention that "a sentencing hearing [is] merely a perfunctory proceeding where the trial court enters a judgment, supposedly unlike a restitution hearing where a trial court considers evidence."[849]

A Saginaw County jury convicted Dennis Lee Matzke of one felony count of larceny, $1,000 to $20,000, for his theft of a gas-oil separator.[850] Although the victim recovered the separator and testified at trial that it:

> worked before the crime, . . . after defendant's actions, it was "tore up" and bent. The victim's grandson, who arrived at the property shortly after the victim discovered defendant driving away with the separator, testified that there were no holes in the separator and that it was unbent before defendant's actions.[851]

At the restitution hearing, Matzke's probation officer testified that the victim received a $4,580 estimate from a company that could repair

844. People v. Matzke, 303 Mich. App. 281, 284–85, 842 N.W.2d 557, 559–60 (2013); United States v. Ogden, 685 F.3d 600, 606 (6th Cir. 2012). I previously discussed *Ogden* in the preceding *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 1190.

845. *Matzke*, 303 Mich. App. at 284–85, 842 N.W.2d at 559–60 (citing MICH. R. EVID. 1101(b)(3)).

846. *Id.* (citing MICH. COMP. LAWS ANN. § 780.766(2)).

847. *Id.*

848. *Id.* at 282, 287, 842 N.W.2d at 558, 561.

849. *Id.* at 284 n.1, 842 N.W.2d at 560 n.1.

850. *Id.* at 282–83, 842 N.W.2d at 558–59.

851. *Id.* at 283, 842 N.W.2d at 559.

the separator.[852] The court ordered restitution in that amount, and the defendant appealed.[853]

The appellate panel reviewed the trial court's decision for clear error[854] and concluded that a preponderance of evidence supported the trial court's order.[855] Accordingly, the court affirmed the trial judge's restitution order.[856]

XII. REBUTTAL EVIDENCE

As they sometimes do with impeachment evidence, Michigan courts relax the rules of evidence when applying them to rebuttal evidence, after a party has "opened the door" to a discussion of an issue by introducing the issue himself.[857] The Michigan Supreme Court explained in *People v. Figgures* that "[r]ebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'"[858] However, "contradictory evidence is admissible only when it directly tends to disprove a witness' exact testimony."[859]

The recent U.S. Supreme Court case of *Kansas v. Cheever*[860] nicely outlines the principle behind rebuttal evidence. While a federal murder prosecution was pending against him, the district court ordered Scott D. Cheever to undergo a forensic psychiatric examination to assess his proposed defense of voluntary intoxication—Cheever contended his ingestion of methamphetamine affected his ability to premeditate the murder of a county sheriff.[861] The federal court dismissed the case before trial (for reasons that are unimportant to this Article), and the state charged Cheever with capital murder.[862]

At trial, Cheever's counsel presented to the jury the dean of Auburn University's pharmacy school, Roswell Lee Evans, who testified that the

852. *Id.*

853. *Id.*

854. *Id.* at 283–84, 842 N.W.2d at 559 (citing People v. Allen, 295 Mich. App. 277, 281, 813 N.W.2d 806, 208 (2011)).

855. *Id.* at 286–87, 842 N.W.2d at 560–61.

856. *Id.* at 286–87, 842 N.W.2d at 561.

857. People v. Figgures, 451 Mich. 390, 398–400, 547 N.W.2d 673, 677–78 (1996).

858. *Id.* at 399, 547 N.W.2d at 677 (citations omitted) (quoting People v. De Lano, 318 Mich. 557, 570, 28 N.W.2d 909, 914 (1947)).

859. City of Westland v. Okopski, 208 Mich. App. 66, 72, 527 N.W.2d 780, 785 (1994) (citing People v. McGillen, 392 Mich. 251, 267–68, 220 N.W.2d 677, 684 (1974)).

860. 134 S. Ct. 596 (2013).

861. *Id.* at 599.

862. *Id.*

accused's use of methamphetamine had "damaged his brain" and rendered him, in the Supreme Court's characterization of the testimony, "acutely intoxicated."[863] As rebuttal evidence, the government introduced, over the defense's objection, the testimony of Michael Welner, who had examined Cheever pursuant to the federal court's order when the case was pending there.[864] After Welner's testimony, the jury found Cheever guilty of murder and attempted murder and the court imposed a death sentence.[865] The Kansas Supreme Court vacated the defendant's conviction on the ground that the state's introduction of Welner's testimony violated Cheever's Fifth Amendment privilege against self-incrimination.[866]

Normally, the Self-Incrimination Clause of the Fifth Amendment does prohibit the prosecution from introducing in its case-in-chief the results of a *court-ordered* psychiatric examination of the defendant.[867] However, the Supreme Court, in a unanimous opinion by Justice Sonia M. Sotomayor,[868] reaffirmed its prior holding in *Buchanan v. Kentucky* that "a State may introduce the results of a court-ordered mental examination for the limited purpose of rebutting a mental-status defense.[869] Justice Sotomayor explained that "[a]ny other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime."[870] In sum, the Court held, "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him."[871] Accordingly, the Supreme Court vacated the Kansas court's judgment and reinstated Cheever's conviction.[872]

XIII. CONCLUSION

Beginning this decade, the Michigan Supreme Court has seen significant changes in its makeup. New to the seven-member court since

863. *Id.*
864. *Id.* at 599–600.
865. *Id.*
866. *Id.* at 600 (citing State v. Cheever, 284 P.3d 1007, 1019–20 (Kan. 2012)).
867. *Id.* at 600–01 (citing Estelle v. Smith, 451 U.S. 454, 468 (1981)).
868. *Id.* at 598.
869. *Id.* at 600 (quoting Buchanan v. Kentucky, 483 U.S. 402, 423–424 (1987)).
870. *Id.* at 601.
871. *Id.*
872. *Id.* at 603.

the elections of 2010 and 2012 are four members—Justices Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, and David F. Viviano.[873] (A fifth, Richard H. Bernstein, joined the court in January 2015.[874]) Over the last few years, both court members and outside observers note a great degree of unanimity and collegiality that was lacking in prior years.[875]

Contemporaneously, readers probably have noticed that both the Michigan Supreme Court and Michigan Court of Appeals have resolved evidentiary disputes with zero acrimony and that unanimous opinions are more the rule than the exception. The same is true in the Sixth Circuit.

However, one clear takeaway is that appellate courts are increasingly instructing the lower courts to be more proactive in restricting parties from introducing hearsay at trial and are less likely to conclude that a statement's proponent was offering the statements for a non-hearsay purpose. Similarly, courts are less likely to admit other-acts evidence absent a clear showing that the proponent's purpose is not to establish a person's character to commit those kinds of acts. Nevertheless, even when they find error, the courts do not hesitate to affirm the result of a case when the evidence is overwhelming. The lesson for practitioners is, be mindful of the rules, lest your trial become the less-than-overwhelming victory that does not survive appeal.

Having said that, thank you for reading this Article, and again, do not hesitate to send feedback my way.

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873. *Justices*, MICH. CTS.: ONE CT. OF JUST., http://courts.mi.gov/courts/michigansupremecourt/justices/pages/default.aspx (last visited Mar. 4, 2015).

874. Carol Hopkins, *Bernstein Ready to Take on Role as Nation's First Blind Justice*, DAILY TRIB. (Nov. 7, 2014, 1:31 PM), http://www.dailytribune.com/general-news/20141107/bernstein-ready-to-take-on-role-as-nations-first-blind-justice.

875. Tim Skubick, *Michigan Supreme Court Gets Warm and Fuzzy*, MICH. LIVE (Sept. 13, 2013, 8:11 AM), http://www.mlive.com/politics/index.ssf/2013/09/tim_skubick_michigan_supreme_c.html; Jonathan Keim, *An Era of Unanimity on the Michigan Supreme Court?*, NAT'L REV. (Aug. 12, 2014, 2:31 PM), http://www.nationalreview.com/bench-memos/385208/era-unanimity-michigan-supreme-court-jonathan-keim.