# EVIDENCE LAW

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The Michigan Rules of Evidence (MRE) remained unchanged during the *Survey* period. There were not any statutory enactments or amendments affecting the rules of evidence. Instead, all developments came through case law from the Michigan Court of Appeals and Michigan Supreme Court. And, perhaps unsurprisingly, all the major decisions on evidence law came in criminal cases, the sphere where evidence law issues are most often litigated. And while the *Survey* period did not see any decisions that could properly be deemed "landmarks," the appellate courts issued several important decisions clarifying and shoring up the law in contentious areas. Let us dive in.

## I. MRE 106: THE RULE OF COMPLETENESS

In *People v. Clark*, police officers arrested the defendant for murder.[1] He agreed to give a statement to police and incriminated himself.[2] The police recorded his statement, except for the first thirty to forty-five seconds.[3] The defendant argued that the trial court should have excluded

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1. People v. Clark, 330 Mich. App. 392, 399, 948 N.W.2d 604, 612 (2019), *appeal denied*, 948 N.W.2d 577 (Mich. 2020).

2. *Id*. at 401, 948 N.W.2d at 613.

3. *Id*.

the evidence because the entire statement was not recorded.[4] He relied on MRE 106, referred to as the "rule of completeness," which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[5]

The court of appeals disagreed. The court explained that "MRE 106 has no bearing on the admissibility of the underlying evidence; rather, it allows the adverse party to supplement the record to provide a complete picture."[6] The court concluded that "the rule of evidence would only be pertinent if [the] defendant sought, but was denied, permission to have a complete writing or recorded statement introduced."[7] Applied here, the court found that the police's failure to record the first thirty to forty-five seconds of the defendant's interview did not implicate Rule 106.[8] "The jury saw the complete recording that existed," the court observed, and "nothing prevented [the] defendant from eliciting testimony from the police officers to fill in the gaps created by the failure to record [the] defendant's entire interview."[9]

The court of appeals in *Clark* went on to reject the defendant's reliance on *State v. Steinle ex rel. Maricopa*[10] and *United States v. Yevakpor*[11].[12] "Both of those cases," the court explained, "involved situations where the recording had been modified and the original erased."[13] "Under those circumstances," the court continued, "the courts determined that it would be fundamentally unfair to allow the prosecutors to admit the altered videos."[14] Here, though, there was no allegation that the recording had been altered in any way.[15] Instead, the defendant complained only that the

4. *Id*. at 423, 948 N.W.2d at 624.

5. *See* MICH. R. EVID. 106. *See also Clark*, 330 Mich. App. at 421–22, 948 N.W.2d at 623–24.

6. *Clark*, 330 Mich. App. at 421–22, 948 N.W.2d at 623.

7. *Id*. at 422, 948 N.W.2d at 623 (quoting People v. McGuffey, 251 Mich. App. 155, 161, 649 N.W.2d 801, 806 (2002)).

8. *Id*.

9. *Id*., 948 N.W.2d at 623–24.

10. State v. Steinle *ex rel.* Maricopa, 354 P.3d 408 (Ariz. Ct. App. 2015), *vacated*, 372 P.3d 939 (Ariz. 2016).

11. United States v. Yevakpor, 419 F. Supp. 2d 242 (N.D.N.Y. 2006).

12. *Clark*, 330 Mich. App. at 422–423, 948 N.W.2d at 624.

13. *Id*.

14. *Id*. at 423, 948 N.W.2d at 624 (citing *Steinle*, 354 P.3d at 411; *Yevakpor*, 419 F. Supp. 2d at 251–52).

15. *Id*.

entire interview was not recorded.[16] Accordingly, *Steinle* and *Yevakpor* did not support the defendant's argument.[17]

So where a police interview is not recorded in its entirety, the defendant cannot argue for exclusion of the recording under Rule 106.[18] But if a recording has been altered in some way and the original destroyed, the defendant may have an argument for exclusion.[19]

## II. MRE 401 THROUGH 404: RELEVANCY AND ITS LIMITS

MRE 401 through 404 provide arguably our most foundational rules of evidence.[20] Rule 401 tells us that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[21] Rule 402, in turn, provides (with some provisos) that "[a]ll relevant evidence is admissible."[22] Next, Rule 403 gives some play in the joints, saying: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[23] Finally, Rule 404 adds a wrinkle (or a wrench, depending on your outlook), disallowing most character evidence while allowing certain "other act" evidence:

> (a) ***Character evidence generally.*** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> > (1) ***Character of accused.*** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of

16. *Id*.
17. *Id*.
18. *Id.*
19. *Id.*
20. *See* MICH. RS. EVID. 401–404.
21. MICH. R. EVID. 401.
22. MICH. R. EVID. 402.
23. MICH. R. EVID. 403.

> character for aggression of the accused offered by the prosecution;
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> (2) ***Character of alleged victim of homicide.*** When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor;
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> (3) ***Character of alleged victim of sexual conduct crime.*** In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;
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> (4) ***Character of witness***. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> (b) ***Other crimes, wrongs, or acts.***
>
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.[24]

While these may be our most foundational rules, this does not mean that litigants share a common understanding of them. As the *Survey* period showed, these rules are the locus of some of the most hotly contested issues in evidence law.

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24. MICH. R. EVID. 404.

But let us start with some easy ones. Born of a tortuous procedural history, *People v. Cowhy* demonstrated a fairly straightforward application of Rules 401 and 403.[25] The defendant in *Cowhy* pleaded guilty to several counts of criminal sexual conduct (CSC) and attendant crimes premised on his sexual abuse of minor family members.[26] He later tried to withdraw his pleas, submitting a self-signed affidavit attesting that he had been a juvenile at the time of the offenses.[27] The court of appeals subsequently allowed him to withdraw his pleas based on an unrelated ex post facto violation.[28] Afterward, the prosecution moved to admit the defendant's inculpatory affidavit, redacted to omit that the defendant had previously pleaded guilty.[29] The trial court denied the motion and the prosecution appealed.[30]

On appeal, the defendant argued that his affidavit admitting to juvenile sex offenses was irrelevant since he was charged with committing sex offenses as an adult.[31] Alternatively, he argued that the affidavit was more prejudicial than probative under Rule 403.[32] Quickly dispensing with the relevance argument, the court of appeals gave one terse sentence of analysis: "That evidence is relevant because it has a tendency to make a fact of consequence—Cowhy's guilt and the children's credibility—more probable than it would be without the evidence."[33] Turning to Rule 403, the court gave the well-worn explanation that evidence will be considered unfairly prejudicial under the rule where it preys on "the jury's bias, sympathy, anger, or shock."[34] "Here," according to the court, "the evidence contained in the affidavit, while damaging to Cowhy's case, is not unfairly prejudicial; rather, without going beyond the merits of the charges against Cowhy, it bears directly on his guilt and on the credibility of the children."[35]

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25. People v. Cowhy, 330 Mich. App. 452, 948 N.W.2d 632 (2019), *appeal denied*, 951 N.W.2d 902 (Mich. 2020).

26. *Id.* at 457, 948 N.W.2d at 634.

27. *Id*. at 458–59, 948 N.W.2d at 635.

28. *Id*. at 459–60.

29. *Id*. at 460 n.4, 948 N.W.2d at 635–36 n.4.

30. *Id*. at 460, 948 N.W.2d at 636.

31. *Id*. at 467, 948 N.W.2d at 639.

32. *Id.*

33. *Id*. The court also noted that the evidence would otherwise be admissible under MICH. COMP. LAWS § 768.27a (2006), which in prosecutions for child sex crimes, generally allows for evidence that the defendant previously committed a child sex crime. *Cowhy*, 330 Mich. App. 467 n.6, 948 N.W.2d at 639 n.6. *See generally* People v. Watkins, 491 Mich. 450; 818 N.W.2d 296 (2012).

34. *Cowhy*, 330 Mich. App. at 468, 948 N.W.2d at 640 (quoting People v. McGhee, 268 Mich. App. 600, 614, 709 N.W.2d 595, 607 (2005)).

35. *Id*.

In *People v. Rajput*, the Michigan Supreme Court tackled another relatively simple relevance issue.[36] The court ably summarized the somewhat convoluted facts in *Rajput* thus:

> On May 7, 2016, [the] defendant was driving his vehicle with another man known only as Haus. At the same time, the victim, Lakeisha Henry, was driving a red Malibu with her boyfriend, Dewayne Clay, as a passenger. The Malibu approached [the] defendant's vehicle, and two individuals in the Malibu fired gunshots at [the] defendant and Haus. No one was injured. Rather than immediately confront the Malibu after it drove off, [the] defendant and Haus first returned to [the] defendant's home. Soon after, however, they left and went in search of the Malibu. By the time they found it, the victim was the sole occupant. [The] [d]efendant and Haus chased the Malibu, eventually trapping it, and then approached the Malibu on foot. An argument ensued, and multiple gunshots were fired, resulting in the victim's death.[37]

At trial, the defendant maintained that Haus shot the victim in self-defense after the victim had reached for a gun in her car.[38] The defendant sought to introduce testimony from Pierre Carr, the brother of the victim's boyfriend.[39] According to Carr, he had heard his brother tell the victim over the phone to "shoot, shoot."[40] The trial court excluded the testimony, deeming it irrelevant.[41] The court of appeals agreed, saying that "even if [the boyfriend] told [the victim] to shoot at [the] defendant, that does not make it any more or less likely that [the victim] actually shot at [the] defendant."[42]

In a succinct per curium opinion, the Michigan Supreme Court corrected the lower courts' misapprehension.[43] Under Rule 401, the court explained, the threshold for relevance "is minimal: 'any' tendency is

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36. People v. Rajput, 505 Mich. 7, 949 N.W.2d 32 (2020).
37. *Id.* at 9, 949 N.W.2d at 33.
38. *Id*.
39. *Id*. at 10, 949 N.W.2d at 33.
40. *Id*.
41. *Id*.
42. *Id*. at 13, 949 N.W.2d at 35 (first alteration added). The court of appeals panel also found that the defendant could not claim self-defense because he and Haus were the initial aggressors, a finding that the Michigan Supreme Court deemed improper given the evidence. *Id*. at 12–14, 949 N.W.2d at 34–36.
43. *Id.* at 12–13, 949 N.W.2d at 35.

sufficient probative force."[44] From there, the court made short work of the relevance of Carr's testimony:

> Carr's testimony was relevant because it addressed a material issue—the issue of self-defense. In particular, it addressed whether the victim had reached for the gun found in her car as [the] defendant and Haus approached her. And Carr's testimony has probative value because it has some tendency—however minimal—to make it more likely that the victim reached for a gun when instructed by Clay to "shoot, shoot" and that Haus responded in self-defense.[45]

Importantly, the court expressed no view on the legitimacy of the defendant's self-defense claim, leaving that "for the jury to decide."[46]

The court of appeals answered a final straightforward relevance question in *People v. Burger*.[47] There, the defendant was convicted of arson under the theory that he had started a fire at the pawn shop he owned to collect on the insurance.[48] At trial, the court excluded testimony from the defendant's landlord, who would have testified "that [the] defendant was current on his rent, and thus [would have] further[ed] his theory that he had no financial motive to commit an arson."[49]

The court of appeals reversed. "Financial motive[,]" the court explained, "may be relevant evidence of arson."[50] So "it logically follows that a lack of financial motive is also relevant to whether a defendant committed arson."[51] Accordingly, the court concluded that the landlord's testimony was relevant and should have been admitted.[52] While *Burger* discussed a lack-of-motive theory of relevance in the context of an arson case, the principle undoubtedly would apply in other contexts.

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44. *Id*. at 13, 949 N.W.2d at 35 (quoting People v. Crawford, 458 Mich. 376, 390, 582 N.W.2d 785, 792 (1998)).

45. *Id*. at 14, 949 N.W.2d at 35–36.

46. *Id*. at 11, 949 N.W.2d at 34 (quoting People v. Hoskins, 403 Mich. 95, 100, 267 N.W.2d 417, 419 (1978)).

47. People v. Burger, 331 Mich. App. 504, 953 N.W.2d 424, *appeal denied*, 506 Mich. 914, 948 N.W.2d 441 (2020).

48. *Id.* at 509–10, 953 N.W.2d at 429.

49. *Id*. at 515, 953 N.W.2d at 431.

50. *Id*., 953 N.W.2d at 432 (citing People v. Carter, 250 Mich. App. 510, 521, 655 N.W.2d 236, 242 (2002)).

51. *Id*.

52. *Id*.

In *People v. Brown*, the court of appeals addressed the admissibility of graphic photographs under Rule 403, a perennially litigated issue.[53] In *Brown*, the defendant was convicted of CSC based on the sexual abuse of his girlfriend's minor daughter.[54] At trial, the prosecution introduced four photographs from the defendant's phone depicting the sexual abuse, each of which showed the defendant's hand and the victim or the victim's vagina.[55] On appeal, the defendant argued that the photographs were more prejudicial than probative under Rule 403.[56]

The court of appeals first ruminated on the challenge facing trial courts when deciding whether evidence should be excluded under Rule 403:

> Trial courts have a duty, at times an unpleasant one, to resolve questions of the admissibility of evidence in cases that run the gamut of antisocial behavior. Doing so sometimes requires the consideration of evidence that a law-abiding member of society would find repulsive, indecent, or obscene, or rather not acknowledge exists. Were this Court to hold that evidence could be excluded for the mere reason that it was unpleasant to consider, evidence of the most probative value might then be excluded from the most heinous of cases.[57]

The court added that photographs are not inadmissible "merely because [they] bring[] vividly to the jurors the details of a gruesome or shocking accident or crime."[58]

Here, although the photographs were "shocking, indecent, and unsettling," the court found that they were "illustrative of not only the acts depicted, but of the propensities of the individual who took them, and they were not introduced merely to shock or inflame the jurors."[59] Also, the photographs corroborated (1) the victim's testimony that the defendant took the photographs and (2) the victim's testimony "in a more general sense" given that they were direct evidence of her allegations of sexual abuse.[60] "Therefore," the court held, "any prejudicial taint is more than

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53. People v. Brown, 326 Mich. App. 185, 926 N.W.2d 879 (2019), *amended*, No. 339318, 2019 WL 8165939 (Mich. Ct. App. June 18, 2019), *appeal denied*, 505 Mich. 870, 935 N.W.2d 326 (2019).

54. *Id.* at 187, 926 N.W.2d at 882.

55. *Id*. at 191–93, 926 N.W.2d at 883–84.

56. *Id*. at 191, 926 N.W.2d at 884.

57. *Id*. at 193, 926 N.W.2d at 884.

58. *Id*. (quoting People v. Howard, 226 Mich. App. 528, 549–50, 575 N.W.2d 16, 28 (1997)).

59. *Id*., 926 N.W.2d at 885.

60. *Id*. at 193–94, 926 N.W.2d at 885.

overcome by their probative value, regardless of how lurid and despicable the photographs themselves may be."[61]

Driving the point home, the *Brown* court "emphasize[d] that sexually explicit photographs used as evidence of a sexual assault of a minor *cannot be unfairly prejudicial per se*."[62] Likewise, "[a] decision on the admissibility of photographs in such cases cannot be based solely on the graphic nature of the photographs."[63] This and other language from *Brown* is destined to become boilerplate for prosecution briefs addressing Rule 403 objections to explicit photographs.

Finally, *People v. Caddell* involved a pedestrian application of Rule 404(b).[64] In *Caddell*, the defendant was convicted of first-degree murder and attendant crimes for his role in three murders for hire.[65] The prosecution theorized, in essence, that the defendant was a mercenary in a war between two feuding street gangs.[66] The prosecution introduced evidence of previous shootings and "hits" between the two gangs, as well as testimony from a witness who testified that the defendant had admitted to carrying out a previous murder for hire.[67] The court of appeals held that this evidence was probative of motive, i.e., that the defendant committed the murders because he was hired to do so.[68] The court also rejected a Rule 403 argument, briefly saying that the defendant had "not established any unfair prejudice because of the evidence's tendency to elicit bias, sympathy, anger, shock, or other considerations extraneous to the merits of the charged offenses, which substantially outweighed the probative value of the evidence."[69]

## III. MRE 410: PLEAS AND PLEA DISCUSSIONS

The *Survey* period saw two decisions on Rule 410. That rule generally bars evidence of pleas later withdrawn as well as statements made during plea negotiations:

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61. *Id*. at 194, 926 N.W.2d at 885. The court added that the trial court had not abused its discretion in admitting the photographs given certain limitations the trial court had imposed, which ultimately led to the exclusion of most of the photographs the prosecution sought to introduce. *Id*.

62. *Id*.

63. *Id*.

64. People v. Caddell, No. 343750, 2020 WL 1814307 (Mich. Ct. App. Apr. 9, 2020), *appeal denied sub nom.* People v. William-Salmon, 951 N.W.2d 683 (Mich. 2020).

65. *Id.* at *1.

66. *Id*. at *1, *13.

67. *Id*. at *13.

68. *Id*.

69. *Id*.

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) A plea of guilty which was later withdrawn;
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> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
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> (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
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> (4) Any statement 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.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.[70]

Although the rule is relatively straightforward and not often litigated, as the following two cases show, grey areas do exist.

Returning to *Caddell*, the case of the gangland murders for hire, Caddell's codefendant initially accepted a deal and pleaded guilty to second-degree murder.[71] As part of the deal, the codefendant agreed to testify truthfully against Caddell.[72] The codefendant testified at Caddell's first trial, which ended in a hung jury.[73] The prosecution successfully

70. MICH. R. EVID. 410.
71. *Caddell*, 2020 WL 1814307, at *2.
72. *Id*.
73. *Id*. at *13.

moved to vacate the codefendant's plea agreement, arguing that he had not provided truthful testimony.[74] Caddell and the codefendant were then tried together, and the prosecution admitted evidence of the codefendant's prior plea.[75]

On appeal, the codefendant argued that evidence of his plea should not have been admitted under Rule 410.[76] The court of appeals spilled little ink in rejecting that argument. The codefendant "did not *withdraw* his plea," the court explained.[77] Instead, the trial court *vacated* the codefendant's plea on the prosecution's motion.[78] Since the rule does not apply to vacated pleas, no error occurred.[79] Easy peasy.

*Cowhy*—where the defendant admitted to sexually abusing family members but claimed he had been a juvenile—makes a second appearance as well, necessitating a further exploration of the above-referenced tortuous procedural history. After his initial plea, but before sentencing, the defendant and the prosecution stipulated that the defendant "would submit to 'a risk assessment/evaluation . . . for the purposes of sentencing.'"[80] The evaluation was performed by Leo Niffeler, a licensed social worker.[81] During the evaluation, the defendant admitted to sexually abusing the victims.[82] At sentencing, the defendant accepted responsibility for his offenses and told the trial court he would seek treatment.[83] But the court, apparently unmoved, dropped the hammer, sentencing the defendant to a minimum of almost nineteen years in prison.[84]

After the defendant moved to withdraw his pleas and the case was pending on appeal, he sued his former trial attorney for malpractice.[85] In his answer to the complaint, the attorney "asserted that Cowhy 'admitted the truth of the allegations made against him' to [the attorney] and that Cowhy admitted he 'had sexually molested all five of the children consistent with the victims' versions of the incidents.'"[86] The attorney also

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74. *Id*. at *15.
75. *Id*. at *2, *15.
76. *Id*. at *15.
77. *Id*. at *16.
78. *Id*.
79. *Id*.
80. People v. Cowhy, 330 Mich. App. 452, 458, 948 N.W.2d 632, 634 (2019), *appeal denied*, 951 N.W.2d 902 (Mich. 2020).
81. *Id*. at 457–58, 948 N.W.2d at 634.
82. *Id*. at 458, 948 N.W.2d at 634.
83. *Id*., 948 N.W.2d at 635.
84. *Id*.
85. *Id*. at 459, 948 N.W.2d at 635. I note here, in the interest of full disclosure, that I have worked, on occasion, with Cowhy's former attorney, William Hackett. But I did not work with him on *Cowhy*, nor have we ever discussed the case.
86. *Id*.

said that the defendant admitted that he had continued sexually abusing the family members until he was twenty years old.[87]

After the defendant withdrew his plea, he moved to prevent the attorney and Niffeler from testifying at trial under Rule 410.[88] The trial court granted the motion and the prosecution appealed.[89]

On appeal, the court of appeals sided with the prosecution.[90] First, the court held that the defendant's statements to Niffeler were not made in the course of plea discussions since "the plea agreement had already been entered and Cowhy had pleaded guilty pursuant to it."[91] Instead, the defendant's "expectation at the time he made the statements was to receive a more lenient sentence, not to receive a better plea agreement with the prosecution."[92] Therefore, Rule 410 did not apply.[93]

Rule 410, likewise, did not apply to the defendant's statements to his attorney.[94] The statements were made before the defendant entered the plea and were elicited to inform the attorney's advice on whether to accept the plea offer.[95] "Therefore," the court concluded, "the statements were not made in the course of plea negotiations with a lawyer for the prosecuting authority or at the direction of a lawyer for the prosecuting authority."[96]

## IV. MRE 614: INTERROGATION OF WITNESSES BY COURT

Under Rule 614(b), a trial court "may interrogate witnesses, whether called by itself or by a party."[97] But this right is not unbounded. In 2015, the Michigan Supreme Court issued *People v. Stevens*, a landmark opinion addressing judicial conduct that appears to convey bias, including the court's questioning of witnesses.[98] While recognizing that judicial questioning is generally appropriate, the court explained that "the central

87. *Id*.
88. *Id*. at 460, 948 N.W.2d at 636.
89. *Id*.
90. *Id.* at 467, 948 N.W.2d at 639.
91. *Id*. at 465, 948 N.W.2d at 638.
92. *Id*. at 466, 948 N.W.2d at 639.
93. *Id*. The court went on to hold, however, that Niffeler's testimony was otherwise barred by the psychologist-patient privilege. *Id*. at 472, 948 N.W.2d at 642.
94. *Id.* at 467, 948 N.W.2d at 639.
95. *Id*.
96. *Id*. As with Niffeler, the court went on to hold that the attorney's testimony was otherwise barred by the attorney-client privilege. *Id*. at 474, 948 N.W.2d at 643.
97. MICH. R. EVID. 614(b).
98. People v. Stevens, 498 Mich. 162, 869 N.W.2d 233 (2015).

object of judicial questioning should be to clarify."[99] So, for example, it may be appropriate for the court "to question witnesses to produce fuller and more exact testimony or elicit additional relevant information."[100] Trial courts must avoid, however, questioning that telegraphs disbelief of a witness.[101] And where the questioning crosses the line and "pierces the veil of judicial impartiality," the defendant would be deprived of his constitutional right to a fair trial.[102] Therefore, this would appear to be a rare situation where a violation of a rule of evidence would, in most cases, also be a constitutional violation.[103] Importantly, too, the court in *Stevens* held that such an error is structural, requiring automatic reversal regardless of the strength of the evidence against the defendant.[104]

The *Stevens* court gave five factors for determining whether the judge pierced the veil.[105] First, the nature of the conduct must be identified.[106] As the court explained, "Judicial misconduct may come in myriad forms, including belittling of counsel, *inappropriate questioning of witnesses*, providing improper strategic advice to a particular side, biased commentary in front of the jury, or a variety of other inappropriate actions."[107] Second, "a reviewing court should consider the tone and demeanor" of the trial court judge.[108] The *Stevens* court recognized that jurors are wont to follow the smallest hint of bias emanating from the judge.[109] Sometimes, "the very nature of the words used by the judge can exhibit hostility, bias, or incredulity."[110] Otherwise, that a comment drew an objection may reveal the judge's tone and demeanor.[111] Third, a reviewing court should assess "the scope of judicial intervention within the context of the length and complexity of the trial . . . ."[112] For example,

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99. *Id.* at 173, 869 N.W.2d at 243 (citing People v. Young, 364 Mich. 554, 558, 111 N.W.2d 870, 872 (1961); Simpson v. Burton, 328 Mich. 557, 564, 44 N.W.2d 178, 181 (1950)).

100. *Id*.

101. *Id*. at 174, 869 N.W.2d at 243–44.

102. *Id*. at 170, 869 N.W.2d at 242 (citing People v. Wilson, 21 Mich. App. 36, 37–38, 174 N.W.2d 914, 915 (1970); People v. Bedsole, 15 Mich. App. 459, 462, 166 N.W.2d 642, 644 (1969)).

103. *See infra* p. 22.

104. *Stevens*, 498 Mich. at 178–80, 869 N.W.2d at 246–47.

105. *Id.* at 172–78, 869 N.W.2d at 243–46.

106. *Id*. at 172, 869 N.W.2d at 243.

107. *Id*. at 172–73, 869 N.W.2d at 243 (emphasis added).

108. *Id*. at 174, 869 N.W.2d at 244.

109. *Id*. (citing *In re* Parkside Hous. Project, Detroit v.Vandenbroker 290 Mich. 582, 600, 287 N.W. 571, 578 (1939)).

110. *Id*. at 176, 869 N.W.2d at 245 (citing People v. Cole, 349 Mich. 175, 197–200, 84 N.W.2d 711, 718–20 (1957)).

111. *Id*.

112. *Id*.

in a lengthy trial that deals with complex scientific evidence, it may be appropriate for the judge to intervene more often to clarify certain points that might otherwise confuse the jurors.[113] Fourth, combined with the third factor, the reviewing court should determine whether the judge's conduct was aimed at one side more than the other.[114] A judge may display partiality when the frequency and manner of his interventions are one-sided.[115] Fifth, a reviewing court should consider whether a curative instruction was given.[116] Curative instructions will reduce the effect of minor or brief instances of inappropriate conduct.[117] And a contemporaneous instruction is more effective than the standard instruction given at the end of the trial.[118] But some conduct may be so egregious that no instruction can cure it.[119]

In *Stevens*, the defendant's infant son died, and the prosecution claimed that the defendant had inflicted abusive head trauma.[120] At trial, the defense presented an expert witness who testified that the son could have died from a short fall.[121] The trial court judge questioned the expert extensively, unsubtly intimating his disbelief of the witness.[122] Considering the five factors, the Michigan Supreme Court held that the trial court judge had pierced the veil of impartiality and that a new trial was required.[123]

During the *Survey* period, the Michigan Supreme Court addressed another case of improper judicial questioning. In *People v. Swilley*, the victim was killed in an apparent gang shooting, and the defendant was charged with first-degree murder and attendant crimes.[124] The defendant raised an alibi defense.[125] He claimed that, during the shooting, he had been with his sister, grandmother, and his grandmother's fiancé, Philip Taylor, at city hall.[126] They had been there so Taylor could transfer title to a piece of property to the defendant and his sister.[127] A quitclaim deed

113. *Id*.
114. *Id*. at 176–77, 869 N.W.2d at 245.
115. *Id*. at 177, 869 N.W.2d at 245.
116. *Id*.
117. *Id*.
118. *Id*.
119. *Id*. at 177–78, 869 N.W.2d at 245–46.
120. *Id*. at 165, 869 N.W.2d at 239.
121. *Id*. at 166, 869 N.W.2d at 239–40.
122. *Id*. 180–85, 869 N.W.2d at 247–49.
123. *Id*. at 180–91, 869 N.W.2d at 247–52.
124. People v. Swilley, 504 Mich. 350, 356–57, 934 N.W.2d 771, 778 (2019).
125. *Id*. at 358, 934 N.W.2d at 779.
126. *Id*.
127. *Id*. at 360–61, 934 N.W.2d at 780.

memorializing the transfer—stamped the same date as the shooting—was admitted into evidence.[128]

At trial, the defense called Taylor as a witness.[129] After the parties concluded their questioning, the trial court launched into extended questioning of its own.[130] The court plumbed nonexistent inconsistencies and otherwise expressed incredulity at Taylor's testimony.[131] All along, defense counsel objected, at one point even saying that the court was being "very prosecutorial."[132] The court said that it was "entitled to ask questions."[133]

For the Michigan Supreme Court, the case presented a straightforward application of *Stevens*. Considering the five factors, the trial court had blatantly pierced the veil of judicial impartiality.[134] Accordingly, the court reversed the defendant's convictions and ordered a new trial.[135]

Justice Zahra concurred in the result but disagreed with the court's reasoning.[136] He would have avoided deciding the case on constitutional grounds and instead held that the trial court violated Rule 614(b), with that violation alone requiring a new trial.[137] Justice Markman concurred with Justice Zahra but also wrote separately to emphasize two points.[138] First, "that the goal of judicial questioning is to assist the jury in its truth-seeking function without compromising the jury's ability to independently render a verdict."[139] Second, Justice Markman feared that the majority opinion unnecessarily discouraged judicial questioning, which "when used appropriately, provides an indispensable aid to juries in their fundamental task of uncovering the truth . . . ."[140] Justice Zahra joined Justice Markman's concurrence.[141]

Justice Zahra's concurrence casts some doubt on the idea that a violation of Rule 614(b) is synonymous with a constitutional violation.[142]

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128. *Id*. at 361, 934 N.W.2d at 780.
129. *Id*. at 360–61, 934 N.W.2d at 780.
130. *Id*. at 362, 934 N.W.2d at 781.
131. *Id*. at 362–66, 934 N.W.2d at 781–83.
132. *Id*. at 364, 934 N.W.2d at 782.
133. *Id*. The Michigan Supreme Court also took issue with the trial court's questioning of two other witnesses, but it ultimately rested its decision on the trial court's questioning of Taylor. *Id*. at 392 n.17, 934 N.W.2d at 796 n.17.
134. *Id*. at 370–93, 934 N.W.2d at 785–97.
135. *Id*. at 392–93, 934 N.W.2d at 796–97.
136. *Id.* at 404, 934 N.W.2d at 803 (Zahra, J., concurring).
137. *Id*. at 404–09, 934 N.W.2d at 803–05.
138. *Id.* at 393 (Markman, J., concurring).
139. *Id*. at 393–94, 934 N.W.2d at 797.
140. *Id*. at 394, 934 N.W.2d at 797–98.
141. *Id*. at 404, 934 N.W.2d at 803.
142. *Id.* at 405, 934 N.W.2d at 803 (Zahra, J., concurring).

But the majority did not comment on Justice Zahra's concurrence, and caution should always be exercised when trying to glean the law from concurring or dissenting opinions.

## V. MRE 701, 702, AND 704: OPINION TESTIMONY, EXPERT AND OTHERWISE

Rules 701, 702, and 704 of the Michigan Rules of Evidence generally limit opinion testimony by witnesses.[143] Still, opinion testimony will often be admissible. First, Rule 701 permits certain opinion testimony from lay witnesses:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences 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.[144]

So, for example, without being qualified as an expert, a lay witness may be able to give her opinion on how fast a car was travelling.[145] Such a matter is within the ken of the average person. But lay opinion testimony cannot be based on specialized knowledge or experience that a layperson would not possess.[146] Such opinion testimony can only be given by an expert under Rule 702:

> If 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, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (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

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143. *See* MICH. RS. EVID. 701, 702, 704. *See also* ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE ch. 3 § 10 (8th ed. 2020) (specifying that "the law prefers that a witness testify to facts, based on personal knowledge, rather than opinions inferred from such facts").

144. MICH. R. EVID. 701.

145. *See, e.g.*, Mitchell v. Steward Oldford & Sons, Inc., 163 Mich. App. 622, 629–30, 415 N.W.2d 224, 227–28 (1987).

146. *See* People v. Petri, 279 Mich. App. 407, 416, 760 N.W.2d 882, 888, *appeal denied*, 482 Mich. 1186, 758 N.W.2d 562 (2008), *reconsideration denied*, 483 Mich. 917, 762 N.W.2d 519 (2009). *See also* People v. McLaughlin, 258 Mich. App. 635, 657–58; 672 N.W.2d 860, 874, (2003), *appeal denied*, 469 Mich. 1045, 679 N.W.2d 70 (2004).

> has applied the principles and methods reliably to the facts of the case.[147]

Finally, as pertinent here, Rule 704 explicitly does not preclude opinion testimony on "ultimate issues" in a case, providing that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[148] For example, expert opinion on causation in car accident cases will commonly be admitted even though such testimony embraces the ultimate issue in the case.[149]

The *Survey* period saw some important developments on opinion testimony. In *People v. Thorpe*, the Michigan Supreme Court addressed the scope of expert testimony in CSC cases.[150] *Thorpe* was consolidated with *People v. Harbison*.[151] The facts and holdings in each case will be addressed in turn.

In *Thorpe*, the complainant accused the defendant, her mother's ex-boyfriend, of sexually assaulting her.[152] At trial, the prosecution presented an expert on "child sexual abuse and disclosure."[153] On cross-examination, the defense elicited testimony from the expert that children can lie and manipulate.[154] On redirect, the prosecution asked the expert for "the percentage of children who actually do lie" about sexual abuse.[155] Defense counsel objected.[156] The trial court overruled the objection, "concluding that defense counsel had brought up the issue of children lying on cross-examination and, thus, opened the door to the prosecutor's line of questioning on redirect."[157] The expert went on to testify that in his experience, two to four percent of children lie about sexual abuse.[158] And when kids do lie, according to the expert, "they lie with a purpose."[159] He explained, "They are usually trying to get something positive to happen to them or escape some kind of pain . . . ."[160] The expert also noted two distinct instances where children often lie about being sexually abused:

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147. MICH. R. EVID. 702.
148. MICH. R. EVID. 704.
149. *See* Freed v. Salas, 286 Mich. App. 300, 338, 780 N.W.2d 844, 867 (2009).
150. People v. Thorpe, 504 Mich. 230, 934 N.W.2d 693 (2019).
151. *Id.* at 235, 934 N.W.2d at 695.
152. *Id.* at 236–39, 934 N.W.2d at 696–98.
153. *Id*. at 239, 934 N.W.2d at 698.
154. *Id*.
155. *Id*.
156. *Id*. at 240, 934 N.W.2d at 698.
157. *Id*.
158. *Id*.
159. *Id*.
160. *Id*.

> (1) when there is an abused sibling and the other child wants to be a part of whatever the sibling is doing, including therapy, and (2) when there is domestic violence against the other parent and the child lies about sexual abuse in order to bring attention to that situation.[161]

On appeal, the defendant argued that the expert's testimony was improper.[162]

The Michigan Supreme Court in *Thorpe* first debunked the trial court's open-door rationale for admitting the expert's testimony on redirect. As the court put it, "Opening the door is one thing. But what comes through the door is another."[163] The court explained that rebuttal evidence must be "properly responsive to evidence introduced or a theory developed by the defendant."[164] Here, the court found that by eliciting mundane, uncontroversial testimony that children sometimes lie and manipulate, defense counsel had not opened the door to testimony on the percentage of children who lie about sexual abuse.[165] As the court explained, "[c]ounsel did not ask [the expert] about the frequency with which children lie, whether children make false allegations of sexual abuse, or whether he has had any experience with false accusations in his own practice."[166]

Next, addressing the substantive admissibility of percentage-of-children-who-lie-about-sexual-abuse testimony, the court looked to *People v. Peterson*,[167] the foundational case in Michigan addressing expert testimony in CSC cases.[168] In *Peterson*, the Michigan Supreme Court held that an expert had improperly vouched for the complainant's credibility by testifying "that children lie about sexual abuse at a rate of about two percent."[169] The testimony in *Thorpe* was "nearly identical[,]" and therefore, the trial court erred by admitting it.[170] Additionally, by giving "only two specific scenarios in his experience when children might lie, neither of which applie[d] in th[at] case[,]" a reasonable juror could have

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161. *Id*.

162. *Id*. at 242, 934 N.W.2d at 699.

163. *Id*. at 253–54, 934 N.W.2d at 705–06 (quoting United States v. Winston, 447 F.2d 1236, 1240 (D.C. Cir. 1971)).

164. *Id*. at 254, 934 N.W.2d at 706 (quoting People v. Figgures, 451 Mich. 390, 399, 547 N.W.2d 673, 678 (1996)).

165. *Id.*

166. *Id*.

167. People v. Peterson, 450 Mich. 349, 537 N.W.2d 847, *opinion amended on denial of reh'g*, 450 Mich. 1212, 548 N.W.2d 625 (1995).

168. *Thorpe*, 504 Mich. at 258, 934 N.W.2d at 708.

169. *Id*. (quoting *Peterson*, 450 Mich. at 375–76, 537 N.W.2d at 869).

170. *Id*. at 259–60, 934 N.W.2d at 708–09.

concluded from the expert's testimony "that there was a zero percent chance [the complainant] had lied about sexual abuse."[171] This exacerbated the vouching error.[172]

Although, in retrospect, the result in *Thorpe* seems obvious, it represents a significant shoring up of the twenty-five-year-old decision in *Peterson*.[173] As evidenced by the trial court's ruling in *Thorpe*, *Peterson* had fallen into disuse in some courts throughout the state. *Thorpe* refreshed it.[174]

In *Harbison*, *Thorpe*'s companion case, the complainant alleged that the defendant, her uncle, had sexually abused her.[175] At trial, a pediatrician testified that she had diagnosed the complainant with "probable pediatric sexual abuse."[176] The pediatrician testified that her examination uncovered no physical evidence to corroborate the complainant's allegations of sexual abuse.[177] Instead, the pediatrician based her diagnosis on the complainant's report being "clear, consistent, detailed and descriptive."[178] The Michigan Supreme Court granted leave to consider the propriety of this diagnosis testimony.[179]

The Michigan Supreme Court looked to *People v. Smith*.[180] There, the Michigan Supreme Court (while acknowledging Rule 704) held that a physician cannot opine on whether the complainant had been sexually assaulted where the "conclusion [is] nothing more than the doctor's opinion that the victim had told the truth."[181] At bottom, such an opinion is a comment on the veracity of the complainant, a matter the jury is tasked with deciding.[182] That said, under *Smith*, a physician can opine on whether the complainant had been sexually assaulted where "the opinion is based on physical findings *and* the complainant's medical history."[183]

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171. *Id*. at 259, 934 N.W.2d at 709.

172. *Id*. at 259–60, 934 N.W.2d at 709.

173. *Peterson*, 450 Mich. 349, 537 N.W.2d 847.

174. It is also worth noting that at least three Michigan Supreme Court justices appear ready to more expansively examine the propriety of expert testimony in child sexual abuse cases. *See* People v. Mejia, 505 Mich. 963, 937 N.W.2d 121 (2020).

175. *Thorpe*, 504 Mich. at 242–43, 934 N.W.2d at 699–700.

176. *Id*. at 243–44, 934 N.W.2d at 700.

177. *Id*. at 245, 934 N.W.2d at 701.

178. *Id*. at 247–48, 934 N.W.2d at 702.

179. *Id*. at 250, 934 N.W.2d at 704.

180. *See id*. at 254–55, 934 N.W.2d at 706. *See also* People v. Smith, 425 Mich. 98, 387 N.W.2d 814 (1986).

181. *Thorpe*, 504 Mich. at 255, 934 N.W.2d at 706 (quoting *Smith*, 425 Mich. at 109, 387 N.W.2d at 818) (alteration in original).

182. *Id*.

183. *Id*. (emphasis in original).

The Michigan Supreme Court in *Harbison* held that the pediatrician's diagnosis testimony was clearly inadmissible under *Smith*.[184] The diagnosis was based on the pediatrician's opinion of the complainant's credibility without any physical findings, contra *Smith*.[185] The court disagreed with the distinction, drawn by the court of appeals, between a physician giving a definitive opinion (e.g., "I believe the complainant was sexually abused") versus a physician "diagnosing" a complainant with "probable sexual abuse."[186] As the Michigan Supreme Court explained, "Regardless of whether 'probable pediatric sexual abuse' is a term of art that can be used as a diagnosis with or without physical findings, we conclude that [the pediatrician's] testimony had the clear impact of improperly vouching for [the complainant's] credibility."[187]

*Harbison* was likely the most significant evidence-law decision of the *Survey* period. Like its companion case, *Thorpe*, *Harbison* reinforced a rule from a decades-old case that had fallen into disrepair in the trial courts. "Diagnosis" testimony, like that in *Harbison*, had been a well-traveled back door for prosecutors to vouch for complainants' credibility.[188] *Harbison* closed that door.

Then, in *People v. Del Cid*, the court of appeals locked that door.[189] In *Del-Cid*, the complainant, the daughter of the defendant's girlfriend, accused the defendant of sexually abusing her.[190] At trial, a pediatrician (in fact, the same one from *Harbison*) testified that she had examined the complainant and diagnosed her with "possible pediatric sexual abuse."[191] The pediatrician's diagnosis was not based on any physical findings, but rather, it was based on the complainant's self-reported "history."[192]

Relying on *Harbison*, the court of appeals held that the pediatrician's diagnosis testimony was improper since no physical findings supported it.[193] As in *Harbison*, the pediatrician's "diagnosis" was simply a comment on the complainant's credibility, and "[t]he [Michigan] Supreme Court [in *Harbison*] could not have been clearer that such testimony is inadmissible because it invades the jury's province to determine witness credibility."[194]

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184. *Id*. at 261–62, 934 N.W.2d at 709–10.
185. *Id*. at 262, 934 N.W.2d at 710.
186. *Id*. at 264, 934 N.W.2d at 711.
187. *Id*.
188. *See id*. at 262 n.61, 934 N.W.2d at 710 n.61 (listing several Michigan Court of Appeals cases that considered "probable sexual abuse" diagnosis testimony).
189. People v. Del Cid, 331 Mich. App. 532, 953 N.W.2d 440 (2020).
190. *Id.* at 534–35, 953 N.W.2d at 441–42.
191. *Id*. at 535, 953 N.W.2d at 442.
192. *Id*. at 537–38, 953 N.W.2d at 443.
193. *Id*. at 542, 953 N.W.2d at 445–46.
194. *Id*. at 547, 953 N.W.2d at 448.

The court found that the pediatrician's use of "possible" rather than "probable" was "a distinction without a meaningful difference."[195] The court explained:

> "Possible pediatric sexual abuse" is not significantly different from "probable pediatric sexual abuse" in terms of the physician's endorsement of the accusation. In both instances, the examining physician speaks about the likelihood of abuse in the absence of any physical evidence and couches it in terms of a medical diagnosis. This necessarily leads the jury to believe that the expert witness finds the complainant's account credible.[196]

The court also held that a "possible sexual abuse" diagnosis would be excluded by Rule 403. "Testimony that the 'diagnosis' is merely 'possible,'" the court reasoned, "has very little probative value while, for the reasons discussed in *Harbison*, such testimony is highly prejudicial."[197]

Next, *Brown*—where the Michigan Court of Appeals held that photographic depictions of child sexual abuse cannot be unfairly prejudicial per se under Rule 403—makes another appearance here.[198] After the victim in *Brown* reported the sexual abuse, she underwent a physical examination by a sexual assault nurse examiner (SANE).[199] At trial, when asked about her qualifications, the nurse testified that she held an associate's degree in nursing as well as a nursing license.[200] She had received online training in sex assault examinations, and she had performed roughly thirty examinations.[201] But she had not been formally certified as a sexual assault nurse examiner because she had been unavailable to take the test.[202] She testified that genital injuries are not sustained in the majority of sexual assault cases.[203] She also testified that during her examination of the victim, the victim was "shielding herself."[204]

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195. *Id.*
196. *Id*. at 547–48, 953 N.W.2d at 448–49.
197. *Id*. at 548, 953 N.W.2d at 449.
198. People v. Brown, 326 Mich. App. 185, 926 N.W.2d 879 (2019), *amended*, No. 339318, 2019 WL 8165939 (Mich. Ct. App. June 18, 2019), *appeal denied*, 505 Mich. 870, 935 N.W.2d 326 (2019).
199. *Id*. at 191, 926 N.W.2d at 883.
200. *Id.* at 196, 926 N.W.2d at 886.
201. *Id*.
202. *Id*.
203. *Id*. at 197, 926 N.W.2d at 886.
204. *Id*.

On appeal, the defendant argued that the nurse's testimony had been erroneously admitted for three reasons.[205] First, the defendant argued that the nurse should not have been qualified as an expert because she had not yet been certified.[206] The court of appeals disagreed.[207] "MRE 702[,]" the court explained, "does not require that an expert be certified by the state in the particular area in which the expert is qualified."[208] Instead, the rule provides that an expert can be qualified by, among other things, training and experience.[209] Here, according to the court, the nurse was licensed and "[t]he fact that she had yet to receive her SANE certification [did] not render her incompetent as a medical professional."[210] The court added that "[t]o require some form of certification in a specific subfield of a larger profession in order to serve as an expert witness would cause not only absurd results, but mandate the creation of new certifications any time a novel or rare issue were before a trial court."[211]

Second, the defendant argued that the nurse's testimony on the typicality of a lack of genital injuries improperly bolstered the victim's credibility.[212] Again, the court of appeals disagreed, explaining that "this testimony was properly admitted because it was based on [the nurse's] specialized knowledge and assisted the jury in understanding the evidence in this case."[213] The court added that "[t]he lack of the appearance of injury in sexual-assault cases is not a new or novel theory."[214]

Third, the defendant similarly argued that the nurse's testimony on the victim shielding herself improperly enhanced her credibility.[215] Once more, the court of appeals disagreed.[216] The court reasoned that the testimony was not based on any "specialized knowledge" but rather on the nurse's perception of the victim at the time of the examination.[217] Accordingly, the testimony was admissible as lay opinion under Rule 701.[218]

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205. *Id.* at 195–98, 926 N.W.2d at 885–87.
206. *Id*. at 196–97, 926 N.W.2d at 886.
207. *Id.*
208. *Id*. at 196, 926 N.W.2d at 886.
209. *Id*.
210. *Id*.
211. *Id*. at 196–97, 926 N.W.2d at 886. This analysis was somewhat overblown. Certainly, there will be fields where the lack of a particular certification should preclude a witness from being qualified as an expert.
212. *Id*. at 197, 926 N.W.2d at 886.
213. *Id*., 926 N.W.2d at 887.
214. *Id*.
215. *Id*., 926 N.W.2d at 886–87.
216. *Id.*, 926 N.W.2d at 887.
217. *Id*.
218. *Id*. at 198, 926 N.W.2d at 887.

Finally, in *People v. Allen*, the defendant assaulted his wife, leading to her hospitalization.[219] She did not immediately report the assault.[220] When she later reported it, the defendant was charged with felonious assault and assault with intent to commit great bodily harm less than murder.[221]

At trial, two police officers testified about crime victim behavior patterns.[222] The first officer gave the following explanation for why a victim may not immediately report a crime:

> [V]ictims in this situation, they have a number of responses, but the two main [responses are] either fight or flight and sometimes freeze, and [that is] a little less prevalent . . . . But, it tells you that in an instance your body just does whatever it needs to survive. So to her, maybe calling the police or running away would have been her death sentence and she did not want to die that night.[223]

The officer also indicated that the victim's failure to report certain details of the assault was attributable to fight, flight, or freeze "memory recalls."[224] A second officer testified that based on his training on "interviewing victims of trauma . . . the way [the victim] presented in her statements to [him] . . . was typical of victims of crime such as this."[225]

On appeal, the defendant argued that his trial counsel had rendered ineffective assistance of counsel by failing to object to this testimony, which had vouched for the victim's credibility.[226] The Michigan Court of Appeals, though, held that the officers' testimony was properly admissible as lay opinion under Rule 701.[227] As the court reasoned:

> [The officers'] opinions were based on their observations and training. Review of the record establishes that their testimony was rationally based on their perceptions of victims of trauma and was presumably helpful to provide the jury with a clear understanding of the victim's conduct. Additionally, their testimony was not a "technical or scientific" analysis. Rather, their understanding of

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219. People v. Allen, 331 Mich. App. 587, 953 N.W.2d 460 (2020), *appeal denied, judgment vacated*, 953 N.W.2d 197 (Mich. 2021).
220. *Id*. at 590–91, 953 N.W.2d at 464–65.
221. *Id*. at 591 n.2, 953 N.W.2d at 465 n.2.
222. *Id*. at 607–09, 953 N.W.2d at 473–74.
223. *Id*. at 607, 953 N.W.2d at 473.
224. *Id*. at 608, 953 N.W.2d at 474.
225. *Id*. at 609, 953 N.W.2d at 474.
226. *Id*. at 594, 953 N.W.2d at 466.
227. *Id*. at 609, 953 N.W.2d at 474.

> trauma and crime victims was acquired through training and experience.[228]

Accordingly, because the testimony was admissible, trial counsel had not been ineffective for neglecting to object.[229]

## VI. MRE 801 THROUGH 804: HEARSAY

What would a survey Article on evidence law be without a section on hearsay? Walk (or Zoom) into a trial in any Michigan court, and it will not be long before you hear, "Objection, hearsay!" The rules for and against hearsay are among the most litigated in our courts. Yet the *Survey* period was stingy with significant appellate decisions in this area.

We first return to *Caddell* (the saga of the gang hitmen) for a third time.[230] A witness told police that the defendant admitted to performing a previous hit, and the witness was prepared to testify at trial.[231] Before trial, though, the witness was apparently transported to court handcuffed to the defendant (gasp!).[232] Afterward, the witness refused to testify against Caddell and was held in contempt of court.[233] There had also been "other attempts to pressure [the witness], including: (1) visits from Caddell's relatives, (2) shooting the windows of [the witness's] home, and (3) assaults and intimidation of [the witness] in jail at the direction of Caddell and [his codefendant]."[234] Additionally, there were recorded jail calls from the defendant and codefendant evincing their efforts to prevent the witness

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228. *Id*. (citations omitted).

229. *Id*. I have largely bitten my tongue and not expressed my views on any of the cases discussed above, but the wrongheadedness of *Allen* demands reprover. The police officers in *Allen* were giving their opinions based on their specialized training and experience, which the average layperson lacks. Accordingly, their testimony was within the realm of expert opinion, not lay opinion. *See* People v. Petri, 279 Mich. App. 407, 416, 760 N.W.2d 882, 888 (2008); People v. McLaughlin, 258 Mich. App. 635, 657–58, 672 N.W.2d 860, 874 (2003). As the court in *Brown* (discussed above) explained, a witness can be qualified as an expert based on training and experience. *See* People v. Brown, 326 Mich. App. 185, 926 N.W.2d 879 (2019), *amended*, No. 339318, 2019 WL 8165939 (Mich. Ct. App. June 18, 2019), *appeal denied*, 505 Mich. 870, 935 N.W.2d 326 (2019). Additionally, ordinarily, an expert cannot testify that the complainant's behavior was consistent with that of a victim because it constitutes vouching. *See* People v. Peterson, 450 Mich. 349, 374, 537 N.W.2d 857, 867 (1995). Therefore, the defendant's argument that the officers' testimony improperly bolstered the victim's credibility was correct. *Id.*

230. People v. Caddell, No. 343750, 2020 WL 1814307 (Mich. Ct. App. Apr. 9, 2020), *appeal denied sub nom.* People v. William-Salmon, 951 N.W.2d 683 (Mich. 2020).

231. *Id.* at *13, *17.

232. *Id*. at *17.

233. *Id*.

234. *Id*.

from testifying.[235] The trial court admitted the witness's prior statements at trial.[236] On appeal, Caddell's codefendant argued that the prior statements were inadmissible hearsay and that his right to confrontation was violated.[237]

Under Rule 804(b)(6), a hearsay statement from an unavailable declarant will not be excluded where the "statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[238] This is commonly referred to as the forfeiture-by-wrongdoing rule.[239] This rule is also an exception to the constitutional right to confrontation.[240] Here, as recounted by the court of appeals, there was ample evidence that the defendant and codefendant had procured the witness's unavailability through wrongdoing, i.e., threats and intimidation.[241] Therefore, the court upheld the trial court's admission of the witness's prior statements.[242]

*Clark*—the murder case where the failure to tape the first half-minute of the defendant's interrogation did not violate the rule of completeness—gets a revisit, too.[243] The defendant's girlfriend in *Clark* apparently assisted in the murder.[244] At trial, the defense called the girlfriend's sister.[245] The sister testified that the girlfriend said that she "did it[,]" but later, the girlfriend said that "the 'guy did it'" and "that she was scared of 'the guy.'"[246] The sister testified that the girlfriend never gave a name for "the guy."[247] On cross-examination, the sister testified that the girlfriend said that she was afraid of the defendant.[248] The prosecutor asked if the girlfriend said that it was the defendant who shot the victim.[249] The defense objected on hearsay grounds, which the trial court overruled.[250] The sister then testified that the girlfriend said that it was the "other guy" who shot the victim.[251]

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235. *Id*.
236. *Id*. at *16.
237. *Id*.
238. MICH. R. EVID. 804(b)(6).
239. *Caddell*, 2020 WL 1814307, at *17.
240. *Id*.
241. *Id*. at *17–18.
242. *Id*. at *18.
243. People v. Clark, 330 Mich. App. 392, 948 N.W.2d 604 (2019).
244. *Id.* at 399, 948 N.W.2d at 612.
245. *Id*. at 407, 948 N.W.2d at 616.
246. *Id*.
247. *Id*.
248. *Id*.
249. *Id*.
250. *Id*.
251. *Id*. at 407–08, 948 N.W.2d at 616.

On appeal, the defense argued that the sister's testimony on cross-examination was inadmissible hearsay.[252] The Michigan Court of Appeals held that the statements elicited from the sister—both from the defense and the prosecutor—were inadmissible hearsay.[253] But because the defense's questioning created a "false impression[]" that the girlfriend implicated a "guy" other than the defendant in the murder, the prosecutor was entitled to correct that false impression through the same means.[254] The court cited *Grist v. Upjohn Co*., where the court aptly stated the rule:

> [I]t frequently happens that evidence which might be inadmissible under strict rules is nevertheless introduced into the case through inadvertence or otherwise, under which circumstances it is held, sometimes as a result of statutory regulation, that the adverse party is entitled to introduce evidence on the same matters lest he be prejudiced. The party who first introduces improper evidence cannot object to the admission of evidence from the adverse party relating to the same matter. However, the admission of such evidence is not a matter of absolute right, but rests in the sound discretion of the court, which will not permit a party to introduce evidence, which should not be admitted, merely because the adverse party has brought out some evidence on the same subject, where the circumstances are such that no prejudice can result from a refusal to go into the matter further.[255]

Accordingly, no error occurred.[256]

Finally, in *People v. Propp*, it was "undisputed that [the] defendant killed the victim by constricting her airway."[257] The defendant claimed, though, that the victim accidentally died by erotic asphyxiation.[258] At issue in the appeal (for this Article's purposes) was testimony admitted under section 768.27b of the Michigan Compiled Laws (MCL), which provides, in pertinent part:

> [I]n a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of

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252. *Id*. at 431, 948 N.W.2d at 628.
253. *Id*. at 432, 948 N.W.2d at 628–29.
254. *Id*.
255. Grist v. Upjohn Co., 16 Mich. App. 452, 482, 168 N.W.2d 389, 405 (1969) (quoting 31A C.J.S. *Evidence* § 190, at 509–12).
256. *Clark*, 330 Mich. App. at 432, 948 N.W.2d at 628–29.
257. People v. Propp, 330 Mich. App. 151, 156, 946 N.W.2d 786, 791 (2019), *appeal granted*, 949 N.W.2d 459 (Mich. 2020).
258. *Id*.

> the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.[259]

Over objection, the prosecution admitted evidence of the defendant's prior acts of domestic violence and stalking behavior against the victim, mostly "in the form of statements the victim made to friends and family members[,]"[260] i.e., hearsay.

On appeal, the defendant argued that MCL section 768.27b does not embrace hearsay evidence.[261] After an extended (and arguably convoluted) analysis, the Michigan Court of Appeals disagreed, holding that MCL section 768.27b allows evidence in the form of hearsay.[262] Concurring, Chief Judge Murray disagreed, saying that evidence under MCL section 768.27b cannot be in the form of hearsay.[263] I endeavor to explore the intricacies of the opinions in *Propp* no further because the Michigan Supreme Court has granted leave in the case to consider, among other things, "whether the [Michigan] Court of Appeals correctly held that evidence of other acts of domestic violence is admissible under MCL 768.27b regardless of whether it might be otherwise inadmissible under the hearsay rules of evidence."[264] Therefore, the appellate court opinions are very likely not the last word.

## VII. CONCLUSION

And there you have it—what I have found to be the most significant developments in evidence law during the *Survey* period. Now, as my evidence law professor, the former federal Judge Gerald E. Rosen, counseled his students, pour yourself a glass of wine and ponder over the rules of evidence and the decisions interpreting them. Perhaps you will reach insights that have eluded me here.

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259. MICH. COMP. LAWS § 768.27b(1) (2019).
260. *Propp*, 330 Mich. App. at 158, 946 N.W.2d at 792.
261. *Id*. at 171, 946 N.W.2d at 798.
262. *Id*. at 171–81, 946 N.W.2d at 798–803.
263. *Id*. at 186–88, 946 N.W.2d at 806–07 (Murray, C.J., concurring).
264. People v. Propp, 949 N.W.2d 459 (Mich. 2020).