Evidence Benchbook–Revised Edition

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This original edition was initially published in 2010, and the text has been revised, reordered, and updated through August 21, 2024. This benchbook is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

Note on Precedential Value

"A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this court rule." MCR 7.215(J)(1).

Several cases in this book have been reversed, vacated, or overruled in part and/or to the extent that they contained a specific holding on one issue or another. Generally, trial courts are bound by decisions of the Court of Appeals "until another panel of the Court of Appeals or [the Supreme] Court rules otherwise[.]" *In re Hague*, 412 Mich 532, 552 (1982). While a case that has been fully reversed, vacated, or overruled is no longer binding precedent, it is less clear when an opinion is not reversed, vacated, or overruled in its entirety. Some cases state that "an overruled proposition in a case is no reason to ignore all other holdings in the case." *People v Carson*, 220 Mich App 662, 672 (1996). See also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389 (2013) (distinguishing between reversals in their entirety and reversals in part); *Graham v Foster*, 500 Mich 23, 31 n 4 (2017) (because the Supreme Court vacated a portion of the Court of Appeals decision, "that portion of the Court of Appeals' opinion [had] no precedential effect and the trial court [was] not bound by its reasoning"). But see *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing MCR 7.215(J)(1) and stating that "a prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision." See also *People v James*, 326 Mich App 98 (2018) (citing *Dunn* and MCR 7.215(J)(1) and stating that the decision, "*People v Crear*, 242 Mich App 158, 165-166 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008), . . . [was] not binding"). Note that *Stein* specifically distinguished its holding from the *Dunn* holding because the precedent discussed in *Dunn* involved a reversal in its entirety while the precedent discussed in *Stein* involved a reversal in part.

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. Because it is unclear how subsequent case history may affect the precedential value of a particular opinion, trial courts should proceed with caution when relying on cases that have negative subsequent history. The analysis presented in a case that is not binding may still be persuasive. See generally, *Dunn*, 254 Mich App at 264-266.

Acknowledgments

The original content of this benchbook was a chapter in the former *Michigan Circuit Court Benchbook*, originally written by former Judge J. Richardson Johnson. The benchbook was revised in 2009 and divided into three separate benchbooks: Civil Proceedings, Criminal Proceedings, and Evidence. Work on the 2010 edition of the Evidence Benchbook was completed by MJI staff and overseen by an Editorial Advisory Committee. Similarly, MJI Research Attorney Danielle Y. Stackpole revised the 2021 revision and facilitated an Editorial Advisory Committee, while MJI Publications Manager Sarah Roth served as editor. Amy Feinauer, MJI Program Assistant, also assisted in the publication of this benchbook.

MJI gratefully acknowledges the time, helpful advice, and expertise contributed by the Committee members, who are as follows:

- The Honorable Michael C. Brown
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- The Honorable Joseph Farah
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- The Honorable Christopher Ninomiya
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- The Honorable Kristina Robinson Garrett
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- The Honorable Michael Servitto
  16th Circuit Court

- The Honorable Anna Rose Talaska
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Using This Benchbook

This benchbook is intended for all Michigan judges. The purpose of this benchbook is to provide a single source to address evidentiary issues that may arise while the judge is on the bench. The benchbook is designed to be a ready reference, not an academic discussion. In that context, one of the most difficult challenges is organizing the text so that the user can readily find any topic as it arises.

This book has underlying themes that may assist the user to understand the overarching concepts around which the book is organized. This book is based upon the following concepts:

- The focus is on process rather than substantive law although substantive law is discussed when important or necessary to decision making and the process as a whole.
- The text covers the routine issues that a judge may face and non-routine issues that require particular care when they arise.
- The text is designed to encourage best practices rather than minimal compliance.
- The text is intended to include the authority the judge needs to have at his or her fingertips to make a decision.
- The text is designed to be read aloud or incorporated in a written decision.

With these concepts in mind, the text is organized as follows:

- The format generally follows the sequence of the Michigan Rules of Evidence.
- The format generally follows the typical sequence in which issues arise during the course of a case.
- At the beginning of each chapter is a table of contents that lists what is covered in the chapter.
- Sections in each chapter are identified by the word or phrase typically used to identify the topic (a keyword concept).

- The discussion of each topic is designed to move from the general to the specific without undue elaboration.

- If the court is required to consider particular factors when making a decision, every effort has been made to identify the necessary elements.

- Every effort has been made to cite the relevant Michigan law using either the seminal case or the best current authority for a body of law. United States Supreme Court decisions are cited when Michigan courts are bound by that authority and they are the original source. There are references to federal decisions or decisions from other states when no applicable Michigan authority could be located.

- Every effort has been made to cite the source for each statement (if no authority is cited for a proposition, then the statement is the author's opinion or part of a committee tip).

- If a proceeding or rule of evidence is based upon a statute, reference to that authority is given in the text.

- If a model or standard jury instruction addresses an issue, it is referenced in the text.

Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the Justices of the Michigan Supreme Court.

The Michigan Judicial Institute (MJI) was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing a comprehensive continuing education program for judicial branch employees; assisting judicial associations and external organizations to plan and conduct training events; providing complete and up-to-date legal reference materials for judges, quasi-judicial hearing officers, and others; maintaining a reference library for use by judicial branch employees; and conducting tours of and other public outreach activities for the Michigan Supreme Court Learning Center. MJI welcomes comments and suggestions. Please send them to: **Michigan Judicial Institute, PO Box 30048, Lansing, MI 48909, or call (517) 373–7171.**

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Chapter 1: General Matters

1.1 Evidence—Overview

The admissibility of evidence is governed by the common law, statutes, and the Michigan Rules of Evidence. See MRE 101. The rules of evidence "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." MRE 102.

A. Applicability of the Rules of Evidence

The MREs "govern proceedings in Michigan courts"; "[t]he specific courts and proceedings to which the rules apply, along with exceptions, are set out in [MRE 1101]." MRE 101(a). "Except as otherwise provided in [MRE 1101(b)] or in a rule prescribed by the Supreme Court, [the MREs] apply to all Michigan court actions and proceedings." MRE 1101(a). Under MRE 1101(b), the MREs — except for those on privilege — do not apply to the following:

- preliminary questions of fact[1];
- grand jury proceedings;
- miscellaneous criminal proceedings (i.e., proceedings for extradition or rendition; sentencing; granting or revoking probation; issuing criminal summonses, arrest warrants, and search warrants; and release on bail);
- contempt proceedings;
- small claims;
- in camera custody hearings;
- proceedings involving juveniles;
- preliminary examinations — property matters;
- domestic relations matters; and
- mental-health hearings. MRE 1101(b).

"The rules of evidence in civil actions, insofar as the same are applicable, shall govern in all criminal and quasi criminal proceedings except as otherwise provided by law." MCL 768.22(1).

[1]Preliminary questions of fact involve "[t]he court's determination under [MRE 104(a)], on a preliminary question of fact governing admissibility." MRE 1101(b)(1).

B. Admissibility Generally

Relevant evidence is admissible unless the United States Constitution, the Michigan Constitution, the MREs, or other rules prescribed by the Supreme Court provide otherwise. MRE 402. "Irrelevant evidence is not admissible." *Id*. "Evidence may also be precluded by statute." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 618 (2016). See also MRE 101(b) ("[a] statutory rule of evidence not in conflict with [the MREs] or other rules adopted by the Supreme Court is effective until superseded by a Supreme Court rule or decision.")

Committee Tip:

The rules of evidence contain exclusionary rules that typically state the exclusion and then provide exceptions to the exclusion. For example, the hearsay rule excludes hearsay (MRE 802) as evidence and then provides exceptions to the exclusion (MRE 803, MRE 803A, and MRE 804).

C. Conflict

When a conflict exists between a statute and a rule of evidence, the rule of evidence "prevails if it governs purely procedural matters" because the "authority to promulgate rules governing practice and procedure in Michigan courts rests exclusively with [the Michigan] Supreme Court." *Donkers v Kovach*, 277 Mich App 366, 373 (2007). "A statutory rule of evidence not in conflict with [the MREs] or other rules adopted by the Supreme Court is effective until superseded by a Supreme Court rule or decision." MRE 101(b); *People v McDonald*, 201 Mich App 270, 273 (1993) (concluding that MCL 257.625a(9)[2] does not conflict with the rules of evidence because it does not allow admission of the evidence for the purpose of establishing guilt, and it requires the court to issue a jury instruction explaining how the evidence is to be used).

See the Michigan Judicial Institute's *Test for Admissibility and Ruling Flowchart* for guidance regarding analyzing and ruling on evidentiary issues.

[2] Formerly MCL 257.625a(7). The statute permits the admission of a person's refusal to submit to a chemical test for the limited purpose of showing that the test was offered to the person.

1.2 Motion in Limine

A motion in limine is "[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial. Typically, a party makes this motion when it believes that mere mention of the evidence during trial would be highly prejudicial and could not be remedied by an instruction to disregard." *Black's Law Dictionary* (8th ed). In criminal cases, the motion is often a motion to suppress. A motion in limine may also be employed by a party seeking to *gain* admission of certain evidence, rather than suppress it. Motions in limine are most commonly made before trial; however, they may also be made and decided during trial. See MRE 104. "To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." MRE 103(d).

Neither the court rules nor the rules of evidence specifically provide for a motion in limine by name. However, the practice is referenced in MRE 103(b), which provides that "[o]nce the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal." In addition, courts have the inherent discretion to decide preliminary evidentiary questions in either a civil or criminal case, and MRE 104(a) obligates a trial court to resolve preliminary evidentiary questions by making a determination about whether evidence is admissible. A court may determine the scheduling of motions in limine through a final pretrial conference and order. See MCR 2.401(H)(2)(a); MCR 6.001(D).

Committee Tip:

Care should be taken to not hastily decide a motion in limine. At times, the context of the trial provides a better basis to determine the evidence's admissibility. Often no harm results by delaying the decision. However, an advance decision may be warranted if the evidence is very impactful.

See the Michigan Judicial Institute's *Common Motions In Limine Table* for a list of situations where motions in limine are commonly used.

1.3 Foundation

A. Lack of Personal Knowledge

"A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. [MRE 602] does not apply to a witness's expert testimony under [MRE 703]." MRE 602.

B. Authenticating or Identifying Evidence

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is." MRE 901(a). "[C]hallenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been *authenticated*—whether there is sufficient reason to believe that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is *actually authentic* or *genuine*—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability." *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154 (2017).

1. Question 1: Authentication or Identification[3]

The first question, whether the evidence has been authenticated, "is reserved solely for the trial judge." *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154 (2017). The proponent of that evidence bears the burden of showing that a foundation has been established, and must provide evidence sufficient to support a finding that the matter in question is what the proponent claims it is. *Id.* at 155; MRE 901. The proponent is not required "to sustain this burden in any particular fashion," and "evidence supporting authentication may be direct or circumstantial and need not be free of all doubt." *Mitchell*, 321 Mich App at 155. The proponent is required "only to make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be." *Id.* "Once the proponent of the evidence has made the prima facie showing, the evidence is authenticated under MRE 901(a) and may be submitted to the jury. *Mitchell*, 321 Mich App at 155. Authentication may be opposed "by arguing that a reasonable juror could not

[3] See Section 1.3(C) for discussion of self-authentication.

conclude that the proffered evidence is what the proponent claims it to be"; however, "this argument must be made on the basis of the proponent's proffer," and "the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage." *Id*.

Committee Tip:

The best practice would be to conduct a hearing regarding the authenticity of evidence outside the presence of the jury. See MRE 103(d); People v Berkey, *437 Mich 40, 46 (1991).*

The following are examples only — not a complete list — of evidence that satisfies the requirements of MRE 901(a):

- Testimony of Witness with Knowledge;
- Nonexpert Opinion[4] About Handwriting;
- Comparison by an Expert Witness or the Trier of Fact;[5]
- Distinctive Characteristics and the Like;
- Opinion About a Voice;
- Evidence About a Telephone Conversation;
- Evidence About Public Records;
- Evidence About Ancient Documents or Data Compilation;
- Evidence About a Process or System; and
- Methods Provided by a Statute or Rule. MRE 901(b)(1)-(10).

In *People v Jambor (Jambor I)*, 271 Mich App 1, 3-5 (2006), the prosecution sought to introduce into evidence four white fingerprint cards, one of which contained the defendant's latent fingerprint, allegedly removed from the scene of a

[4] See Section 3.15 for a discussion of lay opinions.

[5] See Section 4.1 for a discussion of expert opinions.

break-in. The evidence technician who collected the latent print died before trial, and the prosecution attempted to authenticate the evidence by testimony from a police officer who observed the evidence technician collecting the prints at the crime scene. *Id*. However, the witness testified that he only observed the technician working with black cards, not white ones, and the prosecution could offer no explanation for the inconsistency in the colors of the cards the witness observed and the cards the prosecution sought to admit at trial. *Id*. at 5-6. The *Jambor I* Court concluded that the prosecution had failed under MRE 901 to lay a proper foundation for admitting the evidence and affirmed the trial court's order excluding it. *Jambor I*, 271 Mich App at 7. However, the Michigan Supreme Court reversed the Court of Appeals ruling:

> "The exhibits were sufficiently authenticated as fingerprint cards relating to the offense, containing complaint number, address, signature of the preparing officer, and were referenced and described in a report prepared by the officer as confirmed by a witness whose credibility was not questioned, thereby satisfying MRE 901." *People v Jambor (Jambor II)*, 477 Mich 853 (2006).

When deciding whether a social-medial account is authentic, courts should be mindful of concerns such as "fake social-media accounts, hacked accounts, and so-called deep fakes[.]" *People v Smith*, 336 Mich App 79, 107 (2021). In *Smith*, the prosecutor relied on four Facebook posts made by non-testifying third parties to "tease[] from the exhibits . . . that defendant (pictured) was known by the nickname Brick Head (written by someone next to the picture)." *Id*. at 108 ("the prosecutor did not use the posts solely as photographic evidence to identify defendant"). "Although a close call, . . . the trial court did not abuse it discretion by authenticating the four Facebook posts" where an MDOC parole officer "established that the exhibits were accurate depictions of what he claimed they were–four Facebook posts that [the officer] viewed when investigating defendant's possible connection with the [crime]"; the officer "had personal knowledge of defendant and defendant's affiliates, including those who were pictured in the posts"; the officer "had known defendant as Brick Head for 'quite some time,' which reinforced the authenticity of the posts that likewise connected defendant with that nickname"; and there was "nothing on the face of the posts that would suggest that they were faked or hacked so as to undermine the prima facie case for admission." *Id*. at 109. "It was not an abuse of discretion, therefore, for the trial court to conclude that a

reasonable juror might conclude that the four exhibits were what the prosecutor and [officer] claimed they were–the Facebook pages that the [officer] viewed, printed, and believed were associated with defendant's affiliates." *Id.* at 109-110 (concluding, however, that three of the four exhibits were improperly admitted because they consisted of hearsay for which there was no exception, though the erroneous admission was harmless given the cumulative nature of the hearsay evidence). "As technology advances, trial courts and lawyers will need to be vigilant when considering questions of authenticity, at both the first and second stages." *Id.* at 110.

The trial court did not abuse its discretion in admitting a shoe and an insole containing the defendant's DNA after concluding that it was properly authenticated under MRE 901. See *People v Muhammad*, 326 Mich App 40, 59 (2018). In *Muhammad*, the defendant asserted that a shoe insole from which DNA evidence was obtained had been contaminated when it was photographed. *Id.* at 58. The shoe and insole were properly authenticated under MRE 901 and there was no evidence showing that the insole was contaminated or tampered with where "[t]he record showed that police stowed the shoe and the insole in a sealed paper bag before sending the shoe to a . . . [l]aboratory, and that after testing, the shoe and insole were returned to the police department." *Muhammad*, 326 Mich App at 59. Thereafter, the detective "removed the insole from the shoe, wrapped the shoe insole in plastic, and returned the insole to the paper bag in plastic after taking photographs" and "testified that defendant's DNA samples were contained in separate plastic tubes." *Id.*

The trial court did not abuse its discretion by admitting an ultrasound image after concluding that it was properly authenticated under MRE 901(a). *Mitchell*, 321 Mich App at 156. A reasonable jury could conclude that the ultrasound image was an actual depiction of the plaintiff's procedure where "[t]he image showed a sticker that attached the ultrasound to the underlying progress note, and the sticker included plaintiff's identifying information, the date of the procedure at issue, and the name of the doctor who performed the surgery." *Id.* Accordingly, "the digital image had distinctive characteristics that tended to permit an inference that it depicted the ultrasound generated on the date at issue." *Id.* at 156-157, citing MRE 901(b)(4). Additionally, the imaging supervisor testified that the ultrasound image, which was a digital scan, "was made from the original record and was part of plaintiff's medical record." *Mitchell*, 321 Mich App at 157. While the plaintiff "raised several sound arguments against

the image's authenticity, the evidence need not be free from all doubt to be authenticated for purposes of admission[.]" *Id*.

Committee Tips:

- *Care should be taken not to demand too much when it comes to authentication. Authentication is a low, not high, burden to carry.*
- *The method of authentication under MRE 901(b)(4), distinctive characteristics and the like may seem counterintuitive. For example, the contents of a letter may be used to establish the author of a letter. This is a common form of authentication of a letter, whether in hard copy, text, email, or otherwise.*

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2. Question 2: Weight or Reliability Given to the Evidence (Determination of Genuineness)

"[T]he second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder[.]" *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 156 (2017). "When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court. Accordingly, the parties may submit evidence and argument, pro and con, to the jury regarding whether the authenticated evidence is, in fact, genuine and reliable." *Id*. (internal citation omitted)

"Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *People v White*, 208 Mich App 126, 133 (1994) (holding that "a perfect chain of custody is not required"; "evidence may be admitted where the absence of mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty").

Where the trial court properly admitted an ultrasound image under MRE 901(a), it "erred by precluding plaintiff from arguing to the jury that the purported image was not, in fact, an accurate digital scan of the original, i.e., that the image was not genuine or reliable and therefore had little-to-no probative value." *Mitchell*, 321 Mich App at 157. The Court explained:

> "The trial judge's role in examining the genuineness and reliability of the image concluded when he held that the image was admissible. Where a bona fide dispute is presented on the genuineness and reliability of evidence, the jury, as finder of fact, is entitled to hear otherwise admissible evidence regarding that dispute. Furthermore, any potential confusion to the jury related to the chain-of-custody involving a non-defendant could have been cured with an appropriate instruction by the trial judge. By foreclosing plaintiff from presenting any evidence disputing whether the image actually depicted plaintiff's procedure, the trial judge in effect determined that the image was indeed genuine and reliable, even though such questions of evidentiary weight are reserved for the jury." *Mitchell*, 321 Mich App at 157.

While evidentiary errors are not generally grounds for reversal, the Court held that "substantial justice require[d]" it to reverse and vacate the judgment because the evidentiary error "involved a (arguably *the*) crucial piece of evidence." *Mitchell*, 321 Mich App at 158.

Committee Tip:

A determination of genuineness and the weight and credibility to give evidence remains with the fact-finder irrespective of whether the evidence falls under MRE 901(b) or MRE 902 (self-authenticating evidence).

C. Self-Authenticating Evidence

The following items of evidence, found in MRE 902(1)-(11), are self-authenticating and require no extrinsic evidence of authenticity in order to be admitted:

- Domestic Public Document That is Sealed and Signed;
- Domestic Public Document That is Not Sealed but is Signed and Certified;

- Foreign Public Document;
- Certified Copy of Public Record;
- Official Publication;
- Newspapers and Periodicals;
- Trade Inscription and the Like;
- Acknowledged Document;
- Commercial Paper and Related Documents;
- Presumptions Under Law; and
- Certified Domestic or Foreign Record of a Regularly Conducted Activity.

Committee Tip:

Compare the illustrative language of MRE 901(b) discussed in Section 1.3(B)(1) with the list in MRE 902 discussed in this Section. The former is a list of possibilities; the latter is a finite list.

1.4 Judicial Notice

Judicial notice is a substitute for proof. *Winekoff v Pospisil*, 384 Mich 260, 268 (1970). "The right to take judicial notice . . . does not mean that any such judicially noticeable matter is *admissible* in evidence. It must in addition be *relevant* as tending to prove or disprove the pleaded issue." *Id*. at 266.

A. Adjudicative Facts[6]

"The court may take judicial notice on its own and may require a party to supply the necessary information." MRE 201(c). Because "[t]aking judicial notice is discretionary," refusing to do so is reviewed for an abuse of discretion. *Freed v Salas*, 286 Mich App 300, 341 (2009).

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[6] MRE 201 only governs judicial notice of *adjudicative facts*. It "does not preclude judicial notice of *legislative facts*." MRE 201(a) (emphasis added).

"On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard." MRE 201(e). "The court may take judicial notice at any stage of the proceeding." MRE 201(d). Whenever judicial notice is taken, the jury must be instructed. See MRE 201(f). "In a civil case, the court must instruct the jury to accept the noticed fact as conclusive." *Id*. "In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive." *Id*."

"The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." MRE 201(b).

1. Allowed

Another court's opinion or judgment. A trial court may take judicial notice of another court's authenticated opinion or judgment because it constitutes "*prima facie* evidence of all facts recited therein in any other court of this state" pursuant to MCL 600.2106. *In re Sumpter Estate*, 166 Mich App 48, 57 (1988).

County in which a particular city is situated. A trial court may take judicial notice of the county in which a particular city is situated. See *People v Stokes*, 312 Mich App 181, 208 (2015), vacated in part on other grounds 501 Mich 918 (2017)[7] (rejecting the defendant's argument that his defense counsel was ineffective for failing to contest the Wayne County Circuit Court's jurisdiction where testimony at the preliminary examination established that the crime occurred in Detroit and no evidence was admitted specifically demonstrating that Detroit is situated in Wayne County because "[t]he district and circuit courts could take judicial notice of the fact that Detroit is situated within the borders of Wayne County").

2. Not Allowed

Newspaper article. Courts "cannot take judicial notice of a newspaper article for the truth of the matters asserted therein because of the general prohibition against inadmissible hearsay." *Edwards v Detroit News, Inc*, 322 Mich App 1, 4 n 2

[7]For more information on the precedential value of an opinion with negative subsequent history, see our note.

(2017). However, courts can "take notice of the fact that [a newspaper article was] published[.]" *Id.* (noting that the publication of two articles was "especially pertinent in a defamation case implicating First Amendment principles, where the inquiry focuse[d] on . . . what reasonable readers would have understood at the time the communication was made and how a plaintiff's reputation in the community was impacted").

B. Law

On its own, a court may take judicial notice of the common law, constitutions, statutes, Michigan ordinances and regulations, private acts and resolutions of the United States Congress and of the Michigan Legislature, and foreign laws. MRE 202(a). However, judicial notice of these items becomes conditionally mandatory "if a party so requests and: (1) supplies the court with sufficient information to enable it to properly to comply with the request; and (2) gives each adverse party such notice as the court may require to enable the adverse party to meet the request." MRE 202(b). Failure to judicially notice a statute under MRE 202(b) may be harmless error where "(1) the statute[] [was] admitted into evidence at trial and [was] given to the jury for its consideration, (2) the jury was correctly instructed regarding the law, and (3) the statute[] [was] at best only marginally relevant to the issues." *Koenig v City of South Haven*, 221 Mich App 711, 728 (1997), rev'd on other grounds 460 Mich 667 (1999).[8]

1.5 Burdens of Proof/Persuasion and Production

A. Generally

"The term 'burden of proof' is one of the 'slipperiest member[s] of the family of legal terms.' Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced, and the 'burden of production,' *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding." *Schaffer v Weast*, 546 US 49, 56 (2005) (internal citations omitted; alteration in original).

[8]For more information on the precedential value of an opinion with negative subsequent history, see our note.

The burden of production may shift several times during a trial, but the burden of persuasion generally remains with the plaintiff. *Widmayer v Leonard*, 422 Mich 280, 290 (1985). However, the burden of persuasion may rest with the defendant as to particular defenses. For example, a defendant claiming insanity bears the burden of proving it by a preponderance of the evidence. MCL 768.21a.

B. Burden of Proof/Persuasion

The party with the burden of persuasion has the duty of establishing the truth of the case according to the weight of evidence required. *McKinstry v Valley OB-GYN Clinic, PC*, 428 Mich 167, 178-179 (1987).

1. Preponderance of the Evidence

"Proof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Blue Cross and Blue Shield of Mich v Milliken*, 422 Mich 1, 89 (1985).

2. Clear and Convincing Evidence

The intermediate burden of proof, clear and convincing evidence, has been defined as "evidence that 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct, and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" *In re Chmura (After Remand)*, 464 Mich 58, 72 (2001), quoting *In re Martin*, 450 Mich 204, 227 (1995) (alterations in original).

3. Beyond a Reasonable Doubt

The highest burden of proof is beyond a reasonable doubt. "It is a fundamental principle of our system of justice that an accused's guilt must be proved beyond a reasonable doubt to sustain a conviction." *People v Hubbard*, 387 Mich 294, 299 (1972). "A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that: a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of [the] case." M Crim JI 3.2(3).[9]

4. Other Burdens of Proof

There are other burdens of proof created by caselaw, court rules, and rules of evidence. These typically relate to motions and evidentiary rulings.

Some motions require a showing of good cause. Examples include:

- Adjournments. MCR 2.503(B)(1).
- Unendorsed witnesses. MCR 2.401(I)(2).
- Substitution of counsel. *People v Ginther*, 390 Mich 436, 441 (1973).

Another burden of proof is due diligence. Examples include:

- Requests for second summons. MCR 2.102(D).
- Failure to produce an endorsed witness. See *People v Eccles*, 260 Mich App 379, 388 (2004).

C. Burden of Production (Burden of Going Forward)

"'The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced. It is usually cast first upon the party who has pleaded the existence of the fact, but . . . the burden may shift to the adversary when the pleader has discharged his initial duty. The burden of producing evidence is a critical mechanism in a jury trial, as it empowers the judge to decide the case without jury consideration when a party fails to sustain the burden.'" *McKinstry v Valley OB-GYN Clinic, PC*, 428 Mich 167, 179 (1987), quoting McCormick, Evidence (3d ed), §336, p 947. The party with the burden of production has the duty of introducing sufficient evidence to have the relevant issue considered by the court. *McKinstry*, 428 Mich at 179. Presumptions may affect the burden of production.[10] "The immediate effect of a presumption is to shift the burden of going forward with the evidence related to the presumed fact." *Id.* "[A] plaintiff carries the ultimate burden of persuasion and must prove the elements of his or her claim, but a defendant carries the burden of production on an affirmative defense. Once the defendant comes forward with evidence for such a defense, then the

[9] M Crim JI 3.2 must be given in its entirety in every criminal case. See M Crim JI 3.2, *Use Note*. Only subsection (3) is referenced here.

[10] See Section 1.6 for a discussion of presumptions.

plaintiff must produce evidence in response." *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 507 Mich 272, 305 (2021).

D. Standard of Review

A trial court's instruction on the applicable burden of proof is a question of law that is reviewed de novo. *Stein v Home-Owners Ins Co*, 303 Mich App 382, 386-387 (2013).

1.6 Presumptions

A. Civil Case

"In a civil case, unless a statute or [the MREs] provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." MRE 301. Because "the function of a presumption is solely to place the burden of producing evidence on the opposing party," it "allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption." *Widmayer v Leonard*, 422 Mich 280, 289 (1985).

"Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence." *Widmayer*, 422 Mich at 289. "[I]f the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence." *Id.*

Once a judge concludes that the presumption has been rebutted, he or she "should not instruct the jury regarding the presumption: it no longer exists. It has, instead, become a permissible inference on the same level as any inference from the facts. Rather, the judge should instruct the jury about the burden of proof and the underlying facts." *State Farm Mut Auto Ins Co v Allen*, 191 Mich App 18, 23 (1991).

B. Criminal Case

Presumptions in criminal cases are governed by MRE 302, which provides:

> "(a) Scope. In a criminal case, [MRE 302] governs a presumption against a defendant that is recognized at common law or is created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt
>
> (b) Instructing the Jury. When a presumed fact against a defendant is submitted to the jury, the court must instruct the jury that:
>
> > (1) it may or may not conclude from the basic facts that the presumed fact is true; and
> >
> > (2) the prosecution still bears the burden of proof beyond a reasonable doubt of all the elements of the offense."

M Crim JI 3.2 must be given in every criminal case and states, in relevant part:

> "A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty." M Crim JI 3.2(1).

C. Statutory Presumptions

In criminal cases, "[l]egislative [or statutory] presumptions are valid so long as there is a rational connection between the proven facts and the fact to be presumed. If the presumed fact is more likely than not to flow from the proven fact, the presumption is constitutionally valid."[11] *People v Dorris*, 95 Mich App 760, 765 (1980) (internal citations omitted). In *Dorris*, the defendants appealed their conviction of being in possession of an incendiary device because the prosecution had not proven unlawful intent. *Id.* The Court concluded that presuming unlawful intent "was neither unreasonable nor unconstitutional" because "incendiary devices generally have no legal purpose" and "[i]t is more likely than not that one in possession of [an incendiary device] possesses [it] with unlawful intent." *Id.* at 765-766.

[11] Constitutional concerns equivalent to those in a criminal proceeding may not be an issue in civil cases. See *McKinstry v Valley OB-GYN Clinic, PC*, 428 Mich 167, 182-183 (1987) (finding that a civil litigant's contractual choice-of-forum decision did not involve constitutional rights; further noting that waiving a civil jury trial "is not tantamount to deprivation of a fundamental constitutional right" because "[t]he right to a jury trial in a civil action is . . . permissive, not absolute").

"When the trial court undertakes to eliminate from the jury's consideration a statutory presumption as a matter of law, at the very least there must be clear, positive, and credible evidence opposing the presumption." *White v Taylor Distrib Co*, 275 Mich App 615, 621 (2007). For example, MCL 257.402(a) (rear-end collision statute) provides that the offending driver is presumed to be guilty of negligence. *White*, 275 Mich App at 621. However, this presumption may be rebutted by showing an adequate excuse or justification for the collision. *Id.*

1.7 Order of Proof

A. Generally

The trial court has discretion to determine the order of proof and the sequence in which issues are tried. MRE 611(a); MCR 2.513(G).

B. Conditional Admission of Evidence

MRE 104(b) permits the admission of evidence conditioned upon subsequent proof of relevancy.[12]

C. Rebuttal Evidence

"Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *People v Figgures*, 451 Mich 390, 399 (1996) (internal citation and quotation omitted).

1. Criminal Case

"[A] prosecutor may not divide the evidence on which the people propose to rest their case, saving some for rebuttal." *People v Losey*, 413 Mich 346, 351 (1982).

"[T]he test of whether rebuttal evidence was properly admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant," and "depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination." *People v Figgures*, 451 Mich 390, 399 (1996). "As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.*

[12] See Section 2.1 on admissibility.

2. Civil Case

"The scope of rebuttal in civil cases is within the sound discretion of the trial court." *Taylor v Blue Cross/Blue Shield of Mich*, 205 Mich App 644, 655 (1994). "'[A] party may not introduce evidence competent as part of [its] case in chief during rebuttal unless permitted to do so by the court.'" *Lima Twp v Bateson*, 302 Mich App 483, 502 (2013) (the trial court abused its discretion when it refused to allow the testimony of a rebuttal witness where the testimony could have contradicted the opposing party's evidence), quoting *Winiemko v Valenti*, 203 Mich App 411, 418-419 (1994).

D. Reopening Proofs

Generally, whether to reopen proofs for a party rests within the sound discretion of the trial judge. *Bonner v Ames*, 356 Mich 537, 541 (1959); *People v Collier*, 168 Mich App 687, 694 (1988). Relevant in ruling on a motion to reopen proofs in a civil case is "(1) the timing of the motion, (2) whether the adverse party would be surprised, deceived, or disadvantaged by reopening the proofs, and (3) whether there would be inconvenience to the court, parties, or counsel." *Mich Citizens for Water Conservation v Nestle Waters North America Inc*, 269 Mich App 25, 50-51 (2005), rev'd in part on other grounds 479 Mich 280 (2007).[13] In a criminal case, the relevant consideration is "whether any undue advantage would be taken by the moving party and whether there is any showing of surprise or prejudice to the nonmoving party." *Collier*, 168 Mich App at 694-695; see also *People v Herndon*, 246 Mich App 371, 420 (2001).

1.8 Limitations on Evidence

Committee Tip:

The rules and cases discussed in this section do not distinguish between jury and bench trials. Where the court is serving as the fact finder, there might be greater latitude in limiting evidence where the court already has much of the background information.

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[13]For more information on the precedential value of an opinion with negative subsequent history, see our note.

A. Precluding a Witness From Testifying

1. Civil Cases

MCR 2.401(I)(2) allows a trial court to prohibit testimony from witnesses not identified in a pretrial order or required witness list.

"Trial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses." *Pastrick v Gen Tel Co of Mich*, 162 Mich App 243, 245 (1987). The court may impose reasonable conditions on allowing the testimony of an undisclosed witness if there is no prejudice to the opposing party. *Id*. at 246 (finding that giving the "defendants an opportunity to interview the undisclosed witness and to secure their own expert" were reasonable conditions in allowing the prosecutor's undisclosed rebuttal witness to testify). The Court also noted that a reasonable condition will normally include a reasonable time frame. *Id.* at 246-247 n 1.

In deciding whether the court will sanction the party by precluding a witness from testifying, the court should consider the following factors on the record:

> "(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [opposing party]; (4) actual notice to the [opposing party] of the witnesses and the length of time prior to trial that the [opposing party] received such actual notice; (5) whether there exists a history of [the party] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 165 (2010) (quotation marks and citation omitted).

The trial court did not "abuse[] its discretion in denying [the] plaintiff's motion to add [a new] expert witness," which was untimely filed "four days after the trial court had entered its . . . order granting summary disposition in favor of [the] defendants" and "more than one year and three months after the due date for filing and serving witness lists." *Cox v*

Hartman, 322 Mich App 292, 312, 315 (2017). "[The] plaintiff did not act diligently in pursuing [the] case"; furthermore, "the trial court reasonably concluded that [the] defendants would be prejudiced in preparing for trial if the motion was granted." *Id.* at 315-316 (further rejecting the plaintiff's contention "that she should be permitted to file an 'amended' affidavit of merit signed by a new expert witness pursuant to MCR 2.112(L)(2)(b)," because "amendment of the affidavit of merit would not affect or undermine the rationale or basis on which summary disposition was granted," i.e., that the "plaintiff failed to present a standard-of-care expert who was qualified to testify at trial").

2. Criminal Cases

In criminal cases, discovery violations are addressed in MCR 6.201(J). Although that provision does not explicitly mention precluding a witness from testifying, it does give the court discretion to sanction discovery violations.[14] In addition, witness preclusion is an express remedy for violations of sequestration orders and failing to properly file an alibi or insanity defense.[15] See e.g., *People v Meconi*, 277 Mich App 651, 654 (2008); MCL 768.21(1).

For discovery and sequestration order violations, "the exclusion of a witness is an extreme sanction that should not be employed if the trial court can fashion a different remedy that will limit the prejudice to the party injured by the violation while still permitting the witness to testify." *People v Rose*, 289 Mich App 499, 526 (2010) (discovery violation). See also *Meconi*, 277 Mich App at 654 (sequestration).

Where an unlisted expert's testimony was important to the defendant's case and the prosecution would have had adequate time to prepare for it, the trial court abused its discretion when it denied the defendant's late request to add the expert to the witness list. *People v Yost*, 278 Mich App 341, 380-381, 386 (2008) (the trial court's decision to preclude the defense expert's testimony did not fall within the range of reasonable and principled outcomes because without the expert's testimony, the defendant was unable to establish a defense regarding whether the victim actually died of an overdose; the defendant was also unable to contradict the

[14] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9, for more information on discovery violations.

[15] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10, for more information on alibi and insanity defenses.

prosecutor's assertions regarding the number of pills needed to cause an overdose without the expert's testimony). "[G]iven the nature of the toxicology evidence against defendant, the trial court should have realized that the importance of the toxicologist to the defense substantially outweighed any prejudice that the prosecution might suffer in preparing for the late endorsement." *Id.*

For alibi and insanity defense violations, the court must "exclude evidence offered by the defendant for the purpose of establishing an alibi or the insanity of the defendant" if the written notice required by MCL 768.20 or MCL 768.20a is not filed and served, or if "the notice given by the defendant does not state, as particularly as is known to the defendant or the defendant's attorney, the name of a witness to be called in behalf of the defendant to establish" an alibi or insanity defense. MCL 768.21(1). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10, for more information on alibi and insanity defenses.

B. Limitations on Questioning

"The court must exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a).

Committee Tip:

If the judge feels it is necessary to intervene and limit the questioning of a witness, the judge should tell the jury that he or she is not trying to suggest any opinion about the case nor favor one side, but merely trying to move the case along.

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1. Time Limitations on Witness Testimony

"MRE 611(a) grants a trial court broad power to control the manner in which a trial is conducted, including the examination of witnesses." *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595 (1991) (finding "the record show[ed] that the trial court properly exercised its discretion in limiting the time for examination of witnesses," where on the fifth day of

trial, the court limited direct and cross-examination to one hour each due to concerns about "the pace of cross-examination, about counsel's exploration of irrelevant issues, and [his] tendency to pose the same questions over and over"); see also *People v Willis*, 322 Mich App 579, 589 (2018).

The trial court's decision to limit witness testimony to 1.5 hours was not an abuse of discretion where "counsel had adequate time to develop the facts and issues at the center of the parties' dispute" and "the trial court permitted [the plaintiff] more than three hours for its examination of [one of its key witnesses] on the basis of counsel's pledge that he could complete the rest of the witness examinations in a half hour." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 618 (2010). The Court noted that it disapproves of "utterly arbitrary time limitations unrelated to the nature and complexity of a case or the length of time consumed by other witnesses," but found the time limitation was not arbitrary in the current case because it had been suggested by the plaintiff. *Id*. at 618 n 12.

Contrast with *Barksdale v Bert's Marketplace*, 289 Mich App 652, 657 (2010), where the trial court's decision to limit witness examination to 30 minutes per side was arbitrary and an abuse of discretion when both sides quickly picked a jury, delivered opening statements, and the plaintiff's attorney expeditiously examined the plaintiff "without repetitive or irrelevant questions." The Court of Appeals concluded that the facts in *Barksdale* were distinguishable from those in *Alpha Capital Mgt*, and could "discern no reasonable basis for the trial court's determination that limiting witness examinations to 30 minutes for each side advanced the trial-management goals set forth in MRE 611(a)." *Barksdale*, 289 Mich App at 657.

2. Time Limitations on Defendant's Testimony

Restrictions on a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. *Rock v Arkansas*, 483 US 44, 55-56 (1987) (a trial court "must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify").

3. Limitations on Cross-Examination

In controlling trial proceedings, a trial court may impose reasonable limits on cross-examination pursuant to MRE 611(a), even in a criminal case where the defendant has a

constitutional right to confrontation. *People v Willis*, 322 Mich App 579, 590-591 (2018).

Child victims of sexual assault."MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault. The court must balance the criminal defendant's right to self-representation with the State's important interest in protecting child sexual abuse victims from further trauma." *People v Daniels*, 311 Mich App 257, 269-271 (2015) (holding that the "trial court wisely and properly prevented defendant from personally cross-examining [his children regarding their testimony that he sexually abused them], to stop the children from suffering 'harassment or undue embarrassment,'" following "a motion hearing at which [the court] heard considerable evidence that defendant's personal cross-examination would cause [the children] significant trauma and emotional stress") (quoting MRE 611(a); additional quotation marks and citations omitted). The defendant's right to self-representation was not violated under these circumstances where the defendant was instructed "to formulate questions for his [children], which his advisory attorney then used to cross-examine them." *Daniels*, 311 Mich App at 270.

Adult witnesses. In *Willis*, 322 Mich App at 589, the defendant argued that it was improper for the trial court to limit defense counsel's cross-examination of a police sergeant "about the sergeant's incorrect assumption that defendant was prohibited from being around schools pursuant to the Sex Offenders Registration Act (SORA), . . . and purportedly belittling defense counsel by reading out loud the substance of MRE 611 when issuing its ruling." The Court of Appeals concluded that "[t]he trial court's remarks were not of such a nature as to unduly influence the jury." *Willis*, 322 Mich App at 591.[16] The Court also found that the trial court "appropriately exercised its discretion to control the trial to prevent improper questioning of the sergeant and avoid wasting time" where the trial court and the parties discussed the parameters of the testimony before the sergeant took the stand and agreed to limit his testimony to his squad car video, the additional questions defense counsel asked the sergeant were previously covered in similar testimony, and the trial court read the court rule to explain its interruptions of the testimony after first cautioning defense counsel that the questions were "beyond

[16]For a detailed discussion of judicial impartiality see the *Civil Proceedings Benchbook*, Chapter 7, and the *Criminal Proceedings Benchbook, Vol. 1*, Chapter 12.

the redirect," and "beyond what we've gone into and what I said you should do or could cover on recross." *Id.* at 591-592.

C. Limiting Cumulative Evidence

The court has discretion to exclude cumulative evidence. MRE 403. Where a witness's testimony "was entirely consistent with that of several prior witnesses," the trial court properly excluded it on the basis of cumulative evidence. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 608 (1991). However, "cumulative evidence which rebuts the prosecutor's case should be admissible if it assists the defendant." *People v Norwood*, 123 Mich App 287, 293 (1983) (finding the trial court abused its discretion when it determined that the testimony of two witnesses was "merely cumulative" where it "would have been helpful to defendant, since their testimony supported defendant's account of the incident in several particulars and would likely have enhanced his credibility in the eyes of the jury").

"Any error resulting from the exclusion of cumulative evidence is harmless." *Badiee v Brighton Area Sch*, 265 Mich App 343, 357 (2005). However, improperly admitted cumulative evidence is not automatically harmless error. *People v Hamilton*, 500 Mich 938 (2017) (vacating and remanding where the Court of Appeals determined that because the witness's testimony was arguably cumulative, its admission constituted harmless error).

Committee Tip:

If employed by the court, two factors may help uphold decisions on the limitations of proof and arguments: (1) solicit input from counsel; and (2) provide sufficient advance notice.

1.9 Privileges

A. Source and Scope

"The common law governs a claim of privilege, unless a statute or court rule provides otherwise." MRE 501. "Unlike other evidentiary rules that exclude evidence because it is potentially unreliable, privilege statutes shield potentially reliable evidence in an attempt to foster relationships." *People v Stanaway*, 446 Mich 643, 658 (1994).

"While the assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth. Privileges therefore are not easily found or endorsed by the courts. The existence and scope of a statutory privilege ultimately turns on the language and meaning of the statute itself. Even so, the goal of statutory construction is to ascertain and facilitate the intent of the Legislature." *Id*. (quotation marks and citations omitted).

See the Michigan Judicial Institute's *Commonly-Recognized Privileges Table* for more information on various types of privileges.

Committee Tip:

When presented with an asserted privilege, the court may consider employing the following analysis:

- *What privilege is claimed?*
- *Was there a relationship covered by the privilege?*
- *Was there a communication covered by the privilege?*
- *Who holds the privilege?*
- *Has the privilege been waived (expressly, impliedly, or by statute or court rule)? See, for example, MCL 600.2157.*
- *May the privileged communications be disclosed? See, for example, MCL 330.1750.*

B. Assertion of Privilege

1. Invoking a Privilege

Generally, criminal defendants and civil litigants lack the standing to assert a privilege on behalf of a third party. *People v Wood*, 447 Mich 80, 89 (1994). For example, a hospital or a physician may not invoke a patient's physician-patient privilege on behalf of the patient where the patient has no desire to invoke the privilege. *Samson v Saginaw Bldg Prof, Inc*, 44 Mich App 658, 670 (1973).

Similarly, a defendant does not have standing to raise an issue on appeal regarding another witness's testimonial privilege.

People v Allen, 310 Mich App 328, 344 (2015), rev'd on other grounds 499 Mich 307 (2016).[17] The Court held that the defendant lacked standing to challenge the trial court's failure to expressly inform his testifying spouse that she could invoke her spousal privilege, but noted that "nothing should stop counsel for the defendant-spouse from raising an objection [during trial] to the witness-spouse's testimony to ensure that she knows she cannot be required to testify against the defendant-spouse." *Id*. (quotation marks and citation omitted).

2. Determining the Validity of a Claim

A trial court must follow an established procedure when it discovers that a potential witness plans to invoke a testimonial privilege. *People v Paasche*, 207 Mich App 698, 709 (1994). In *Paasche*, the Court of Appeals explained how trial courts should handle these situations:

> "First, a trial court must determine whether the witness understands the privilege and must provide an adequate explanation if the witness does not. The court must then hold an evidentiary hearing outside the jury's presence to determine the validity of the witness' claim of privilege. If the court determines the assertion of the privilege to be valid, the inquiry ends and the witness is excused.
>
> If the assertion of the privilege is not legitimate in the opinion of the trial judge, the court must then consider methods to induce the witness to testify, such as contempt and other proceedings. If the witness continues to assert the privilege, the court must proceed to trial without the witness, because there is no other way to prevent prejudice to the defendant." *Paasche*, 207 Mich App at 709-710 (internal citations omitted).

Committee Tip:

Where there is a claim of privilege under the Fifth Amendment, some courts offer to appoint an attorney for the witness, or allow the witness to bring in his or her own attorney if time

[17] For more information on the precedential value of an opinion with negative subsequent history, see our note.

permits before making a determination on the validity of the claim. Counsel should remain until the witness is excused from testifying or completes the testimony.

"[T]he trial court complied with the applicable procedure and properly ordered that [the witness] could not be called" to testify where the prosecutor informed the trial court at a pretrial hearing that the witness might assert his privilege against self-incrimination if he testified at trial and the trial court appointed counsel for the witness and later held a hearing outside the presence of the jury to determine whether the witness intended to invoke the privilege. *People v Steanhouse*, 313 Mich App 1, 18 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017).[18] While the trial court "did not question [the witness] or make an explicit determination on the record concerning the validity of [the witness's] assertion of the privilege," it "conducted an inquiry with [the witness's] appointed counsel, who indicated that he had counseled [the witness] regarding his Fifth Amendment privilege, and that [the witness] had decided not to testify." *Id.* at 18-19. The witness's counsel explained that he advised the witness not to testify "based on the 'potentially dangerous' nature of [the witness's] prospective testimony—[the witness's] inconsistent statements to the police and possible testimony that he was present when the assault occurred." *Id.* at 19 (noting that the trial court was accordingly aware of the factual basis that supported the assertion of the privilege and that any further questioning may have incriminated the witness). Moreover, the Court also found it "significant that, before trial, the trial court provided defense counsel with an opportunity to further question [the witness's] appointed counsel regarding [the witness's] intent to assert his Fifth Amendment right against self-incrimination, but defense counsel did not avail himself of that opportunity[.]" *Id.*[19]

3. Discovery

a. Civil Cases

In civil cases, privileged material may not be obtained through discovery. MCR 2.302(B)(1). If a party knows

[18]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[19]For additional discussion of protection from self-incrimination, see Section 3.13.

before his or her deposition that he or she will assert a privilege, the party must move to prevent the taking of the deposition or be subject to costs under MCR 2.306(G). MCR 2.306(D)(4). A party must assert a privilege at his or her deposition or lose it. MCR 2.306(D)(5). If the privilege is asserted, the party may not, at trial, offer his or her testimony on the evidence objected to during the deposition. *Id*.

But see MCL 330.1750(2) (psychiatrist/psychologist-patient privilege) and MCL 600.2157 (physician-patient privilege), which require disclosure of, or indicate the waiver of, certain privileged communications in specific circumstances. However, "[i]nformation regarding nonparty patients sought in the discovery process falls within the scope of the physician-patient privilege." *Meier v Awaad*, 299 Mich App 655, 678 (2013) (trial court erred (1) in ordering enforcement of a subpoena requesting the names and addresses of all Medicaid beneficiaries who were treated for a specific disease by defendant doctor and coded as having been diagnosed with a specific disease, and (2) in entering a protective order setting out the permissible uses of the patient information and authorizing plaintiffs' counsel to contact individual patients identified in materials submitted in response to the subpoena).

b. Criminal Cases

In criminal cases, privileged information is generally not discoverable. MCR 6.201(C)(1).[20] However, if the "defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records." MCR 6.201(C)(2). MCR 6.201(C)(2)(a)-(e) explain how the court should proceed once an in camera inspection has been conducted.

A defendant's motion for discovery of a complainant's privileged medical, psychological, and school records is properly denied by a trial court where the records reviewed *in camera* do not contain material necessary to the defense. *People v Masi*, ___ Mich App ___, ___ (2023).

[20] Effective May 1, 2020, MCR 6.201(C) is applicable to both felonies and misdemeanors. See MCR 6.001(A); MCR 6.610(E)(1), amended by ADM File No. 2018-23.

An in camera review should not be conducted when "the party seeking disclosure is on a fishing expedition to see what may turn up." *People v Davis-Christian*, 316 Mich App 204, 208 (2016) (quotation marks and citations omitted). "A defendant 'is fishing' for information when he or she relies on generalized assertions and fails to state any 'specific articulable fact' that indicates the privileged records are needed to prepare a defense." *Id.* at 208, quoting *People v Stanaway*, 446 Mich 643, 681 (1994).

In *Davis-Christian*, the trial court abused its discretion in granting the defendant's motion for an in camera review of the complainant's counseling records where the defendant did not demonstrate that the records "would be 'necessary to the defense'" as required by MCR 6.201(C)(2). *Davis-Christian*, 316 Mich App at 209, 212. The trial court "explicitly disregarded *Stanaway* and articulated its own standard" which would impermissibly "allow an in camera review of most–if not all–of the counseling records of alleged sexual assault victims."[21] *Id.* at 209, 213 (the Court noted that the defendant had "access to the police report and forensic interview" of the victim, which gave him "the information necessary to properly prepare a defense," and that his "assertion of need merely voice[d] a hope of corroborating evidence, untethered to any articulable facts").

Similarly, in *Stanaway*, the Court rejected defendant's assertion that review of confidential records was "necessary to his attempt to unearth any prior inconsistent statements made by the complainant or any other relevant rebuttal evidence," finding that defendant: was "fishing"; had failed to state "any specific articulable fact that would indicate that the requested confidential communications were necessary to a preparation of his defense"; and failed to state "a good-faith basis for believing that such statements were ever made or what the content might be and how it would favorably affect his case." *Stanaway*, 446 Mich at 681.

[21]The standard articulated by the trial court, and rejected by the Court of Appeals, centered on relevance. *Davis-Christian*, 316 Mich App at 209. The trial court explained that the counseling records were relevant because they might contain information to "put[] him behind bars or free[] him[.]" *Id.* Accordingly, the trial court stated that it was "going to read [the records] and say yea or nay." *Id.*

c. Inadvertent Disclosure

Privileged information that is inadvertently disclosed and thereafter used by the parties may become discoverable despite the fact that it would not generally be discoverable. *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 536 (2014). The trial court did not abuse its discretion when it denied the defendant's motion to compel return of confidential non-party medical records when the defendant was aware of the disclosure of the records "for well over a year before contending that they were protected by privilege and seeking their return." *Id.* at 536-537. In declining the defendant's request for relief, the Court of Appeals further noted that inspection of the medical records was necessary to the resolution of the parties' dispute. *Id.*

C. Waiver

Generally, the right to waive a privilege belongs to the individual making the communication. For example, only the patient may waive the physician-patient privilege. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 34 (1999). Similarly, only the client may waive the attorney-client privilege. *Leibel v Gen Motors Corp*, 250 Mich App 229, 240 (2002). But see MCL 600.2162(5)-(7), which provides that the decision whether to waive the spousal communication privilege in certain types of cases rests with the spouse whose testimony is sought, not necessarily the spouse who made the communication.

Voluntary disclosure of privileged materials to a third party generally results in waiver of the privilege because "such action necessarily runs the risk the third party may reveal it, either inadvertently or under examination by an adverse party[.]" *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 81 (2014) (quotation marks and citation omitted). However, this "principle is not ironclad[.]" *Id.* "[W]here work product is prepared for certain third parties, the qualified privilege may be retained." *Id.*; MCR 2.302(B)(3)(a) (work product prepared by or for another party or another party's representative is privileged material). Further, even when material is not prepared by or for a specific party, disclosure to a third party will not result in waiver when the "common-interest doctrine" applies. *D'Alessandro Contracting Group, LLC*, 308 Mich App at 82, 84 (finding that even though "courts in this state have not expressly addressed the so-called common-interest doctrine," federal "application of the common-interest doctrine [was] instructive . . . because both the state and federal rules recognizing the work-product doctrine are 'virtually

identical'"). Thus, "the disclosure of work product to a third party does not result in a waiver if there is a reasonable expectation of confidentiality between the transferor . . . and the recipient . . . ." *Id.* at 82, 84-88 (holding that the common-interest doctrine applied and the work product privilege was not waived because the defendants had a reasonable expectation of confidentiality in sharing the report with the third party where the defendants and the third party had an indemnification agreement).

The federal common-interest doctrine similarly applies to Michigan's attorney-client privilege in limited circumstances. *Nash Estate v Grand Haven*, 321 Mich App 587, 598 (2017). It applies only "where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise." *Id.* at 596 (quotation marks and citation omitted; applying the common-interest doctrine to exempt from disclosure under FOIA certain communications between the defendant-city's attorney and other "attorneys representing common legal interests made in connection with facilitating professional legal services related to" property involved in underlying tort litigation, even though the city was not a party to the underlying tort litigation).

1.10 Missing Physical Evidence

A. Civil Case

Under certain circumstances, a fact-finder either must presume or may infer that missing, lost, or destroyed evidence operates against the party who misplaced, destroyed, or failed to produce it. An adverse *presumption* arises from intentional and fraudulent conduct, while an adverse *inference* is permissible under M Civ JI 6.01(d) for a failure to produce evidence with no reasonable excuse. *Ward v Consol Rail Corp*, 472 Mich 77, 84-86 (2005). "A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party." *Ward*, 472 Mich at 85-86. See also *Komendat v Gifford*, 334 Mich App 138, 150 (2020) (quotation marks and citation omitted) (holding "a spoliation instruction is warranted if the evidence that is the subject of the instruction is (1) material, (2) not merely cumulative, and (3) not equally available to the opposite party"). In *Ward*, the defendant introduced evidence that missing evidence was disposed of as part of a routine business practice, thereby rebutting the presumption that the missing evidence was

intentionally made unavailable. *Ward*, 472 Mich at 82. The Court held that "the trial court erred when it instructed the jury that it could draw an adverse inference, but failed to explain that no inference should be drawn if [the jury concluded that the] defendant had a reasonable excuse for its failure to produce the evidence." *Id.* at 80.

"'Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action.'" *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 25 (2018), quoting *Brenner v Kolk*, 226 Mich App 149, 162 (1997) ("the trial court did not abuse its discretion by providing [a] spoliation instruction" where defendant's "failure to preserve the pallets [that fell and struck plaintiff] deprived plaintiff of the opportunity to inspect a possible cause of the collapse").

A party may be sanctioned for spoliation of evidence even though the evidence was not technically lost or destroyed. *Bloemendaal v Town & Country Sports, Inc*, 255 Mich App 207, 212 (2002). In *Bloemendaal*, the plaintiff's experts failed to conduct a test on a piece of evidence during disassembly "that was essential to their ultimate theory of liability." *Id.* at 214. The Court concluded that failure to conduct the test amounted to a failure to preserve the evidence. *Id.* Because the defendants were precluded from conducting their own tests (which could only be done while the evidence was being disassembled), they were severely prejudiced and dismissal was appropriate where the trial court considered "other remedies and concluded that they were insufficient to overcome the prejudice[.]" *Id.* at 214-215 (the Court noted that even though dismissal is a possible sanction, it is a drastic step that should be taken cautiously and only after evaluating all other available options on the record).

B. Criminal Case

The failure to preserve or produce material exculpatory evidence violates a defendant's due process rights. *Arizona v Youngblood*, 488 US 51, 57 (1988). "To warrant reversal on a claimed due process violation involving the failure to preserve evidence, 'a defendant must prove that the missing evidence *was exculpatory* or that law enforcement personnel acted in bad faith.'" *People v Richards*, 315 Mich App 564, 581 (2016), rev'd on other grounds 501 Mich 921 (2017),[22] quoting *People v Hanks*, 276 Mich App 91, 95 (2007). The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *Id.* It is the trial

[22]For more information on the precedential value of an opinion with negative subsequent history, see our note.

court's responsibility, not the jury's, to determine whether the missing evidence was destroyed in bad faith. *People v Cress*, 466 Mich 883 (2002).

The defendant failed to demonstrate that the evidence was exculpatory where the evidence at issue was saliva that only *could have been* subjected to testing. *Richards*, 315 Mich App at 582-583. Accordingly, because the defendant could only show that the evidence was *potentially* exculpatory, he was required to demonstrate bad faith on the part of the officers who failed to preserve the evidence. *Id.* The defendant failed to demonstrate bad faith where the prison's standard operating procedures for collecting saliva evidence were followed,[23] and the prison lacked the equipment to preserve saliva for DNA testing purposes. *Id.* at 583-584.

The defendant was not deprived of due process where the police failed to preserve a balloon that contained heroin. *People v Dickinson*, 321 Mich App 1, 15 (2017). The defendant argued that the balloon should have been preserved "because DNA testing [of the balloon] may have provided a basis for the jury to doubt that she possessed and delivered the heroin." *Id.* at 16-17. However, the "defendant concede[d] that the balloon was only 'potentially exculpatory.'" *Id.* at 17. Further, the record contained no evidence that the police destroyed the balloon in bad faith; rather, the balloon was disposed of "according to standard police protocol for processing such evidence." *Id.* "Moreover, the overwhelming evidence at trial established that defendant possessed and passed the heroin to [a prisoner]. Consequently, even if the balloon had been tested for DNA and someone else's DNA (rather than defendant's) was found on it, the test results would have made no difference to the outcome of the case." *Id.*

"Absent intentional suppression or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal." *People v Jones*, 301 Mich App 566, 580 (2013). "The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Id.* at 581. In *Jones*, 301 Mich App at 569, the police found marijuana in the defendant's car following a traffic stop. The defendant argued that she was "entitled to dismissal of the charges because the police destroyed the recording of her roadside stop, and that the destruction amounted to a violation of due process and prevented

[23]Testimony was presented that the prison's procedure for collecting saliva evidence was to photograph the saliva on the person's skin or clothing and then have the person clean off the saliva as quickly as possible to prevent the transfer of communicable diseases. *Richards*, 315 Mich App at 583-584. Testimony also established that clothing is not collected when it has small amounts of saliva on it, such as the clothing at issue in *Richards*. *Id.* at 584.

her from presenting a meaningful defense." *Id*. at 580. However, it was police department policy to automatically destroy all traffic stop recordings six months after the date of the traffic stop, and the defendant was arrested after the recording had already been destroyed. *Id*. at 581. Further, the defendant "failed to present any evidence of bad faith on the part of the police department and failed to provide any evidence that the recording would have been exculpatory." *Id*. Accordingly, the trial court did not abuse its discretion in denying the defendant's motion to dismiss. *Id*.

1.11 Circumstantial Evidence

"Circumstantial evidence is evidence of a fact, or a chain of facts or circumstances, that, by indirection or inference, carries conviction to the mind and logically or reasonably establishes the fact to be proved. Circumstantial evidence may sustain criminal convictions, but the circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *People v Wang*, 505 Mich 239, 251 (2020) (quotation marks, alteration, and citation omitted). See also M Crim JI 4.3; M Civ JI 3.10.

1.12 Weight of Evidence

"[A] jury is free to credit or discredit any testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39 (2001). "That the [witnesses] involved . . . are professional observers [(physicians, in this case)] does not change the rule that their eyewitness testimony may be disbelieved by a jury." *Taylor Estate v Univ Physician Group*, 329 Mich App 268, 285 (2019).

1.13 Standard of Review

"A trial court's decision to admit evidence 'will not be disturbed absent an abuse of . . . discretion.'" *People v Musser*, 494 Mich 337, 348 (2013), quoting *People v McDaniel*, 469 Mich 409, 412 (2003). In reviewing evidentiary decisions, "[a]n abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113 (2001). However, "[a] decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Id*.

Committee Tip:

The abuse of discretion standard is highly deferential to the trial court's decision.

Additionally, close evidentiary calls are typically not the subject of an abuse of discretion. These points underscore the importance of: (1) recognition by the trial court of its discretion; and (2) a clear record reflecting the court's decisional process.

If the decision involves a preliminary question of law, such as the meaning of a rule of evidence or whether a rule of evidence or statute precludes the admission of the evidence, it is reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332 (2002); *People v Katt*, 468 Mich 272, 278 (2003). "Therefore, when such preliminary questions are at issue, . . . an abuse of discretion [will be found] when a trial court admits evidence that is inadmissible as a matter of law." *Katt*, 468 Mich at 278.

"An error in the admission or the exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. Under this rule, reversal is required only if the error is prejudicial. The defendant claiming error must show that it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence." *People v McLaughlin*, 258 Mich App 635, 650 (2003) (internal citations omitted). See also MRE 103(a); MRE 103(e). "An error is outcome determinative if it undermined the reliability of the verdict and, in making this determination, a court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *Musser*, 494 Mich at 348 (quotation marks and citations omitted).

Chapter 2: Admissibility and Relevancy

2.1 Admissibility

A. Preliminary Question Concerning Admissibility

"The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." MRE 104(a).

B. Who Decides Specific Admissibility Questions

1. Exhibits

"Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under [MRE 1004] or [MRE 1005]. But in a jury trial, the jury determines — in accordance with [MRE 104(b)] — any issue about whether: (a) an asserted writing, recording, or photograph ever existed; (b) another one produced at the trial or hearing is the original; or (c) other evidence of content accurately reflects the content." MRE 1008.

2. Other Evidence

When the evidence is of a kind other than the "contents of writings, recordings, or photographs" as addressed by MRE 1008, some preliminary questions are for the judge and some questions are for the jury. *People v Vega*, 413 Mich 773, 778-779 (1982), superseded by statute on other grounds as stated in *People v Barrett*, 480 Mich 125 (2008). "[P]reliminary questions of conditional relevance envisioned by [MRE] 104(b) [(relevancy depends upon the fulfillment of a condition of fact)] are those which present no . . . danger of prejudice to the defendant. They are questions of probative force rather than evidentiary policy. They involve questions as to the fulfillment of factual conditions which the *jury* must answer," unlike MRE 1008, which provides such questions are ordinarily for the court to decide when the evidence involves the contents of writings, recordings, or photographs. *Vega*, 480 Mich at 778-779 (quotation marks and citation omitted; emphasis added). "The standard for screening evidence under [MRE 104](b) is quite low." *Howard v Kowalski*, 296 Mich App 664, 682 (2012), rev'd in part 495 Mich 982 (2014).[1] "[A]s long as some rational jury

[1]For more information on the precedential value of an opinion with negative subsequent history, see our note.

could resolve the issue in favor of admissibility, the court must let the jury weigh the disputed facts. Specifically, the court must allow the jurors to assess the credibility of the evidence presented by the parties." *Howard*, 296 Mich App at 683.

C. Stay Pending Appeal Following Admissibility Decision

"The mechanics of interlocutory appeals are entirely the product of court rules promulgated by [the Michigan Supreme] Court pursuant to [its] constitutional imperative to 'establish, modify, amend and simplify the practice and procedure in all courts of this state.'" *People v Scott*, ___ Mich ___, ___ (2024), quoting Const 1963, art 6, § 5.

"Where the court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the court reconsider whether pretrial release is appropriate." MCR 6.126.

"While an automatic stay does not necessarily prevent a court from commencing trial when an interlocutory appeal is pending and the question on review is collateral to the trial," failure to adhere to the automatic stay during an interlocutory appeal is a procedural error. *Scott*, ___ Mich at ___. According to *Scott*, "Interlocutory appeals, in contrast to appeals from final orders, do not divest a trial court of subject-matter jurisdiction over a case. A trial court is divested of subject-matter jurisdiction upon entry of a final order. Until that time, the trial court retains general subject-matter jurisdiction over the case while an interlocutory appeal is pending." *Id.* at ___. Any error by the trial court that arises during or from the interlocutory appeal is subject to appellate review after a final order is entered. *Id.* at ___. See also *People v Robinson*, ___ Mich App ___, ___ (2024).

A stay of proceedings only applies to "proceedings related to the disputed order and not to other issues," and "a trial court's decision in regard to which aspects of the case are and are not involved in the appeal depends on the nature of the appeal." *Scott*, ___ Mich at ___ (quotation marks and citation omitted). "This decision will require familiarity with the facts of the case and experience in maintaining a trial court docket." *Id.* at ___. Accordingly, "the trial court's decision on this issue is reviewed for an abuse of discretion and will not be

disturbed unless that decision falls outside the range of principled outcomes." *Id.* at ___ (quotation marks and citation omitted).

In *Scott*, the defendant applied in the Michigan Supreme Court "for leave to appeal a Court of Appeals judgment that remanded the case to the trial court for further proceedings." *Id.* at ___ (Court of Appeals reversed the trial court's decision that evidence of previous sexual assaults was inadmissible against defendant at trial). "Under those circumstances, an automatic stay of the remand proceedings was in place that barred the trial court from addressing aspects of that interlocutory appeal." *Id.* at ___, citing MCR 7.305(C)(6)(a). While the defendant's application was pending, "the trial court conducted a trial that clearly involved aspects of defendant's pending interlocutory appeal." *Scott*, ___ Mich at ___. "During trial, the very evidence that was disputed in the interlocutory appeal was admitted." *Id.* at ___ (explaining that "the Court of Appeals' decision to initially grant the prosecution's application for leave to appeal [was] itself a solid indicator that the disputed evidence was not collateral and was indeed significant to the case"). "Admitting into evidence at trial arguably prejudicial testimony that remained in dispute on appeal is not only highly irregular; it was also unreasonable and outside the range of principled outcomes." *Id.* at ___. Although "the trial court abused its discretion by holding a trial that included this evidence under these circumstances," the *Scott* Court held that it was "a procedural error" that could "be remedied through subsequent appellate review after a final judgment [was] entered." *Id.* at ___.

2.2 Relevancy

A. Relevant Evidence Defined

Evidence must be relevant to be admissible. MRE 402. There are two types of relevance as it relates to admissibility: logical relevance and legal relevance. See *Rock v Crocker*, 499 Mich 247, 256 (2016).

Logical relevance. MRE 401 and MRE 402 contemplate logical relevance. *Rock*, 499 Mich at 256. Two separate questions must be answered in determining whether evidence is logically relevant:

> "First, [the court] must determine the materiality of the evidence. In other words, . . . whether the evidence was of consequence to the determination of the action. Second, [the court] must determine the probative force of the evidence, or rather, whether the evidence makes a fact of consequence more or less probable than it would be without the evidence.

> . . . A fact that is of consequence to the action is a material fact. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.
>
> . . . Probative force is the 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. Further, any tendency is sufficient probative force." *People v Mills*, 450 Mich 61, 67-68 (1995) (quotation marks and citations omitted).

Legal relevance. "Even if logically relevant under MRE 401 and MRE 402, evidence may still be excluded under . . . a rule of legal relevance, defined as a rule limiting the use of evidence that is logically relevant," such as MRE 404.[2] *Rock*, 499 Mich at 256 (quotation marks and citation omitted). "Legal relevance, as a limiting rule, concerns the purpose for which evidence is used." *Id.* See Section 2.2(D) for examples of relevant and irrelevant evidence.

B. Relevant Evidence Admissible

Relevant evidence is generally admissible. MRE 402. The Michigan Supreme Court has addressed the issue of admissibility as follows:

> "The test of relevancy is designed to determine whether a single piece of evidence is of such significant import that it warrants being considered in a case. The standards for admissibility are designed to permit the introduction of all relevant evidence, not otherwise excluded, on the theory that it is best to have as much useful information as possible in making these types of decisions[.]" *People v Hampton*, 407 Mich 354, 367 (1979).

C. Relevant Evidence Excluded (Balancing Test)

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." MRE 403. For example, subject to any exceptions listed in the specific rule, MRE 404 and MRE 407–MRE 411 exclude from admission certain categories of evidence that may be otherwise relevant to the case. These include character evidence,

[2] See Section 2.3 for more information on MRE 404.

subsequent remedial measures, settlement negotiations, offers to pay medical expenses, plea discussions, and insurance coverage. Although these matters may be relevant, they are generally excluded by MRE 403 because they tend to be more prejudicial than probative as a matter of law. These specific rules of evidence are discussed throughout this chapter.

"Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony[.]" *People v VanderVliet*, 444 Mich 52, 81 (1993). "Assessing probative value against prejudicial effect requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects." *People v Blackston*, 481 Mich 451, 462 (2008).

The Michigan Court of Appeals addressed the issue of "unfair prejudice":

> "'Unfair prejudice' does not mean 'damaging.' *Bradbury v Ford Motor Co*, 123 Mich App 179, 185 (1983). Any relevant testimony will be damaging to some extent. We believe that the notion of 'unfair prejudice' encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of 'prejudice' exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a substantial danger of prejudice exists from the admission of particular evidence, unfairness will usually, but not invariably, exist. Unfairness might not exist where, for instance, the critical evidence supporting a party's position on a key issue raises the danger of prejudice within the meaning of MRE 403 as we have defined this term but the proponent of this evidence has no less prejudicial means by which the substance of this evidence can be admitted." *Sclafani v Peter S Cusimano Inc*, 130 Mich App 728, 735-736 (1983).

"All 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." *People v Mills*, 450 Mich 61, 75 (1995).

D. Caselaw

1. Evidence Relevant

Evidence of the complaining witness's unrelated death. "The explanation for why a witness is unavailable to testify may be probative of the witness's credibility." *People v Horton*, 341 Mich App 397, 405 (2022). "[T]he knowledge that the complaining witness did not appear because she [was] dead would assist the jury in assessing her credibility." *Id*. at 406. "If the jury were aware that the complaining witness died in an unrelated accident, then it would know that her absence was caused by circumstances that have no bearing on her credibility, and this would negate the risk that the jury might erroneously allow her absence to impact its assessment of her credibility." *Id*. at 406. The Court also held that "an explanation as to why the complaining witness [was] unavailable to testify [was] also relevant because Snapchat videos in which defendant threatened to kill the witness [were] deemed by the trial court to be admissible evidence at trial" and her "unexplained absence" "at the trial could [have] wrongly lead the jury to infer that her absence [was] attributable to defendant, i.e., that he killed her." *Id*. at 406-407.

Evidence addressed material issue of self defense. Evidence that the victims' boyfriend told her to "shoot, shoot," was "relevant because it addressed a material issue–the issue of self-defense." *People v Rajput*, 505 Mich 7, 14 (2020). The Court of Appeals "made an improper factual finding that defendant and [another individual] were initial aggressors and could have fled," and "it also erred by finding [the] testimony irrelevant for this reason." *Id*. "Regardless of the merits of this defense, whether defendant and [the other individual] were the initial aggressors or could have fled were issues for the jury to decide because defendant presented sufficient evidence to satisfy his burden of proof on self-defense." *Id*. at 12 (quotation marks and citation omitted).

Evidence was probative of who impregnated complainant. Evidence of the complainant's pregnancy and abortion was relevant during defendant's criminal sexual conduct trial because the evidence made it more probable that sexual

penetration had occurred. *People v Sharpe*, 502 Mich 313, 332-333 (2018). Evidence of the complainant's lack of sexual partners was also relevant because it was probative of the identity of the person who impregnated the complainant.[3] *Id.* (further holding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice).

Evidence of pregnancy. Photographs showing a dead fetus were "highly relevant" to the elements of assaulting a pregnant woman causing stillbirth or miscarriage, MCL 750.90a(b), and "the prosecution was entitled to offer all relevant evidence establishing that [the victim] was pregnant and that defendant's actions resulted in the death of [the victim's] fetus." *People v Boshell*, 337 Mich App 322, 331 (2021).

Evidence of text messages. Text messages between the defendant and the victim were "highly relevant to show the past relationship between the defendant and the victim" in defendant's "first-degree, premeditated murder case[.]" *Boshell*, 337 Mich App at 333 (2021).

Evidence of motive. "In a murder case, proof of motive is always relevant, even if not always necessary." *People v Smith*, 336 Mich App 79, 113 (2021) (concluding that although "gang-related evidence cannot be admitted to show that a person acted in conformance with gang membership," such evidence can "be admissible if it is used for a nonconformity purpose").[4]

Evidence of consciousness of guilt. Evidence that defendant presented a badge and inquired of a police officer who was conducting a drunk driving investigation whether "anything could be done" was "relevant to proving his consciousness of guilt." *People v Parrott*, 335 Mich App 648, 680 (2021). "[A] jury could infer from defendant's conduct that defendant knew he was unlawfully operating a vehicle while under the influence. Defendant's conduct and statements could also support an argument that he was attempting to curry favor with law enforcement and influence the investigation's outcome to avoid arrest." *Id.*

Evidence of other murders relevant to charge of conspiracy. Evidence of other murders "was relevant to the charge of conspiracy in [defendant's] case" where "[t]he prosecutor's theory of the case was that [defendant] conspired with [his co-

[3] See Section 2.3(D) for discussion of admissibility under MCL 750.520j.

[4] See Section 4.5 for more information on gang-related evidence.

defendant] and others to perform hits on behalf of" other individuals. *People v Caddell*, 332 Mich App 27, 69, 70 (2020). Although defendant was not charged with the additional murders, "he was charged with conspiracy to commit murder, which included a conspiracy related to the [other] murders[.]" *Id*. ("although he was incarcerated at the time of the murders, the jury could still conclude that [defendant] conspired and planned the murders from within jail").

Lack of financial motive. Where "financial motive may be relevant evidence of [the charged crime], it logically follows that a lack of financial motive is also relevant to whether a defendant committed [the charged crime]." *People v Burger*, 331 Mich App 504, 515 (2020) (the trial court erred in excluding testimony from defendant's landlord in his arson trial where the "testimony was offered to show that defendant was current on his rent and to thus further his theory that he had no financial motive to commit an arson") (citation omitted).

Evidence made a fact of consequence more probable than without it. Defendant's statement "that he sexually abused his relatives while he was a juvenile," which was contained in an affidavit that was prepared in support of a previous motion to withdraw his plea, was relevant evidence in his criminal sexual conduct trial "because it [had] a tendency to make a fact of consequence–[defendant's] guilt and the children's credibility–more probable than it would be without the evidence." *People v Cowhy*, 330 Mich App 452, 467 (2019) (the court further determined that the affidavit was not otherwise inadmissible under MRE 410[5]).

Evidence reflected defendant's emotional state. The victim's testimony that the defendant "said Islamic prayers and 'Muslim things' in Arabic," and that the victim "'hated the fact that [defendant] felt he was a bad person' and 'the fact that [Muslims had] made him [that] way," and that he "had become more emotional and upset as they spoke about personal matters" "was relevant to demonstrate [the defendant's] state of mind as observed by [the victim] during the time that he unlawfully confined her." *People v Urban*, 321 Mich App 198, 209-210 (2017) (second alteration in original), vacated in part on other grounds 504 Mich 950 (2019).[6] "The prosecution's theory of the case was that defendant committed the crimes because he had become upset at recent losses in his

[5]See Section 2.10 for information on MRE 410 and the admissibility of plea discussions.

[6]For more information on the precedential value of an opinion with negative subsequent history, see our note.

life, and [the victim's] testimony reflected defendant's emotional turmoil." *Urban*, 321 Mich App at 210 (further holding that the testimony was not unfairly prejudicial because "evidence that defendant engaged in prayer and religious practices and was severely emotionally distressed during the commission of the crime was unlikely to inflame the jury to the extent that it could not evaluate the case based on the evidence presented").

Evidence about the state of the defendant's home – that it was a mess, smelled bad, had broken doors, holes in some walls, and had things painted on the walls – "was . . . relevant to the prosecution's theory that defendant's deteriorating emotional state, as evidenced by the neglect and defacement of his home, contributed to his commission of the charged crimes." *Urban*, 321 Mich App at 213-214.

Evidence regarding concurrent proceeding was inextricably linked to current case. Evidence from a concurrent proceeding in the probate court involving matters related to trust assets was properly admitted during the proceeding regarding the estate where the evidence from the trust matter was "inextricably linked" to the handling of the estate; specifically, the probate court properly admitted a letter ordering the payment of expenses from the trust where "the record demonstrated that income from the Rhea Trust flows directly to [the] personal estate." *In re Brody Conservatorship*, 321 Mich App 332, 349 (2017).

Evidence affected who jury believed and reflected defendant's state of mind. During the defendant's murder trial, where the defendant claimed she killed her boyfriend in self-defense, testimony from the victim's biological daughter that the defendant attempted to prevent the victim's biological daughter from having custody of her half sister the day after the victim's death was relevant because it provided a "conflicting portrayal of defendant after the victim's death," and "had a tendency to affect whether the jury believed defendant's daughters' testimony and reflected defendant's state of mind shortly after the victim was killed[.]" *People v Dixon-Bey*, 321 Mich App 490, 513-515 (2017) (the testimony was not unfairly prejudicial because it was "a brief portion of one witness's testimony during six days of testimony over an eight-day trial," there was no evidence to support it portrayed the defendant "as an evil person" as she claimed, and "any prejudicial effect from the fact that the jury might have viewed defendant negatively because of how she handled" the custody dispute was "minimal at best when compared to the probative value that this testimony had on several witnesses'

biases and defendant's mindset shortly after the victim was killed"; the defendant did not make any argument regarding whether the testimony constituted improper character evidence under MRE 404).

Evidence showed defendant was in close proximity to crime. Testimony that an individual matching the defendant's description was at a gas station 25 minutes before an armed robbery occurred at a Halo Burger located seven miles away from the gas station was relevant evidence during the defendant's trial for the Halo burger armed robbery. *People v Henry*, 315 Mich App 130, 145-146 (2016). Testimony established that the witness cooperated in finding an image of the individual matching the defendant's description on the gas station surveillance video, and this image was later shown to two Halo Burger employees, who identified the robber as the person depicted in the surveillance video image. *Id.* at 146. The Court of Appeals held that "the evidence was highly relevant" because it "placed defendant in the vicinity of the Halo Burger at the time of the robbery," and the defendant's presence at the gas station "resulted in surveillance images that allowed the Halo Burger victims . . . to identify the robber." *Id.* (noting further that the probative value of the evidence was not outweighed by the danger of unfair prejudice).

Committee Tip:

When making a determination or inquiring of counsel whether evidence is relevant, consider "then what." For example, is the evidence otherwise excluded by another rule of evidence such as hearsay?

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2. Evidence Irrelevant

Evidence of dismissal of a civil action not relevant in criminal trial. The trial court did not abuse its discretion in excluding evidence of the dismissal of a civil lawsuit in defendants' criminal trial where they were charged with the general intent crime of conducting an unlicensed gambling operation.[7] *People v Zitka*, 335 Mich App 324, 335-336 (2021) ("[d]efendants maintain[ed] that this evidence was relevant to

[7] A violation of MCL 432.218(1)(a).

show that they believed they were operating their business in compliance with the law"). "[W]hile evidence concerning whether defendants' operation met the statutory requirements for a gambling operation involving 'gambling games' was relevant, evidence whether defendants specifically intended their operation to be an unlicensed gambling operation or specifically intended to violate MCL 432.218(1)(a) was not relevant." *Zitka*, 335 Mich App at 338. Defendants were also charged with the specific intent crime of unlawful use of a computer to commit a crime.[8] "The specific intent necessary to commit this offense is the intent to use a computer to conduct a gambling operation without a license"; "the prosecution was not required to prove that defendants used the computer with the specific intent or knowledge that the gambling operation they were conducting was illegal." *Id.* at 340. "This would effectively convert the underlying offense into a specific-intent crime"; thus, "the settlement in [the] civil lawsuit would be no more relevant to determining defendants' guilt or innocence for the crime of unlawful use of a computer than for the underlying crime of conducting the gambling operation." *Id.*

Evidence did not have tendency to make consequential fact more or less probable than without it. "In the absence of evidence connecting [a] fracture to defendant," expert testimony that the victim may have suffered a fracture prior to the events at issue in defendant's trial for first-degree child abuse was irrelevant because "it did not have 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."[9] *People v McFarlane*, 325 Mich App 507, 530 (2018) (quotation marks omitted).

Evidence did not relate to crime. The trial court erred by permitting testimony from a witness who was in a romantic relationship with the defendant that the defendant's mother asked her to lie while testifying about whether the witness gave the defendant permission to use her car on the day he was arrested. *People v Henry*, 315 Mich App 130, 146-147 (2016). The evidence was irrelevant, and thus inadmissible, because the defendant "was not on trial for stealing the vehicle or unlawfully driving it away," and it was not disputed that he was arrested in the car. *Id.* at 147. Moreover, the Court rejected the prosecution's argument that the evidence was relevant to the witness's credibility because it showed her "motivation not to lie." *Id.* The Court acknowledged that if "a witness is

[8] A violation of MCL 752.796 and MCL 752.797(3)(e).

[9] See Section 4.3(C) for additional information on physically abused child syndrome.

offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact," but concluded that it was "unclear how the [testimony in this case] touched on anything other than defendant's mother's potential wrongdoing." *Id.* at 147-148 (quotation marks and citation omitted).

3. Balancing Probative Value and Unfair Prejudice

Evidence of a complaining witness's death in a car accident may be probative of the witness's credibility to explain why she was unavailable to testify. *People v Horton*, 341 Mich App 397, 405-407 (2022). In *Horton*, the Court rejected the defendant's argument that evidence of the complaining witness's death should be excluded under MRE 403, stating that "the fact that her death was caused by a car accident does not have [any] tendency to unfairly bolster her credibility or generate any anger toward defendant," and noting that "evidence that the complaining witness's death was not caused by defendant would eliminate the risk that the jury could infer that defendant played a role in her death, in light of the evidence that defendant threatened to kill her in Snapchat videos." *Id.* at 409. The Court was "unconvinced that the jury's sympathy would motivate it to find defendant guilty" because "the witness's death was wholly unconnected to the merits of [the] case." *Id.* at 409. Although the Court conceded that "experience and intuition suggest" the defendant's concerns that "the complaining witness's credibility would be unfairly bolstered because people 'valorize' the dead," it concluded that the "trial court was presented with a close call, and the trial court's decision on a close call cannot be an abuse of discretion." *Id.* at 409, 410.

The Court also rejected the defendant's argument that video from the preliminary examination of the complaining witness's testimony should have been excluded under MRE 403 because it briefly showed the defendant wearing jail garb. *Horton*, 341 Mich App at 402, 403. In "undertaking the balancing test articulated in MRE 403," the *Horton* Court "assess[ed] the value gained from seeing the complaining witness rather than just hearing her, and weigh[ed] this against the risk of unfair prejudice stemming from defendant's clothing." *Id.* at 404. The Court found that "[t]he probative value added by playing the video of the testimony instead of playing the audio or reading the transcripts [was] substantial." *Id.* at 404. "Seeing the witness is an important component of assessing the witness's credibility because it enables jurors to observe factors such as

demeanor and body language, and the jurors can obtain a better understanding of the witness's mood and nonverbal cues. Anything that can assist the jury in assessing the credibility of the complaining witness in a credibility contest has significant probative value." *Id*. at 405. The *Horton* Court held that the "risk of unfair prejudice posed by the video, however, [was] less significant" because "defendant [was] dressed in civilian clothes" "[f]or the entirety of the trial." *Id*. at 405.

"The mere fact that [a black-and-white photograph displayed] a fetus [was] not unfairly prejudicial to defendant because . . . that [was] what [made] the photo relevant and probative" in defendant's trial for assault causing stillbirth or miscarriage. *People v Boshell*, 337 Mich App 322, 332 (2021). The Court noted that "[w]hile a fetus [was] identifiable, the black-and-white photo lack[ed] any 'gruesomeness' factor," and "[t]he copy of the photo that defense counsel provided . . . look[ed] more like an illustration from a textbook or dictionary, or a copy of an ultrasound photo." *Id* (concluding that introduction of the photo did not inject "any risk of unfair prejudice" where it lacked color, and thus lacked details "such as blood or other 'wetness'").

The trial court did not reach "an unprincipled decision in determining that any unfair prejudice did not *substantially* outweigh the probative value" of texts between the defendant and victim that "contained many crude sexual terms and . . . exhibited a lack of respect toward" the victim because the texts were "highly relevant to show the past relationship between the defendant and the victim." *Boshell*, 337 Mich App at 333-334 ("while there arguably was some potential for unfair prejudice that could have been injected into the proceedings through these text messages, it did not substantially outweigh the messages' probative value").

Where four Facebook posts constituting gang-related evidence were relevant to establish motive and absence of mistake, their admission did not violate MRE 403 because the posts "were not particularly shocking or gratuitous" and while one post contained "some vile homophobic slurs," the slurs were not gang-related and were made by a rival gang member not the defendant. *People v Smith*, 336 Mich App 79, 114 (2021).[10]

Evidence that defendant presented a badge and inquired of a police officer who was conducting a drunk driving

[10]See Section 4.5 for more information on gang-related evidence.

investigation whether "anything could be done" was "admissible under MRE 403." *People v Parrott*, 335 Mich App 648, 680-681 (2021). "Although this evidence could potentially prejudice defendant, . . . the probative value of defendant's alleged statement and display of his badge [was] not substantially outweighed by unfair prejudice because it [was] highly probative in that it reflect[ed] his consciousness of guilt." *Id*. at 681-682.

Evidence contained in an affidavit, drafted by defendant in support of a previous motion to withdraw his plea, "that he sexually abused his relatives while he was a juvenile, . . . while damaging to [defendant's] case, [was] not unfairly prejudicial" because "it [bore] directly on his guilt and on the credibility of the [victims]." *People v Cowhy*, 330 Mich App 452, 467, 468 (2019) (the court further determined that the affidavit was not otherwise inadmissible under MRE 410[11]).

"[T]he risk of unfair prejudice did not substantially outweigh the probative force of the evidence" where the trial court admitted evidence of the defendant's participation in "a serious and entirely separate crime." *People v Murphy (On Remand)*, 282 Mich App 571, 583 (2009). In *Murphy*, the defendant robbed the victim at gunpoint while stopped at a traffic light. *Id*. at 573-574. The trial court properly admitted evidence that arose from the defendant's subsequent participation in a separate carjacking. *Id*. at 574-575. The carjacking evidence did not violate MRE 403 because (1) it connected the defendant to the vehicle and weapon used to rob the victim in the instant case, (2) the prosecutor never argued to the jury that the defendant's participation in the subsequent carjacking established his guilt in the armed robbery, and (3) the judge issued a cautionary instruction to the jury limiting the potential of undue prejudice. *Murphy (On Remand)*, 282 Mich App at 583. Upon request, the court "may provide a limiting instruction under MRE 105." *People v Knox*, 469 Mich 502, 509 (2004); see also *People v VanderVliet*, 444 Mich 52, 75 (1993). "If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly." MRE 105.

[11]See Section 2.10 for information on MRE 410 and the admissibility of plea discussions.

E. Interrogation Statements

"[I]f an interrogator's out-of-court statement is offered to provide context to a defendant's statement that is not 'in issue,' it follows that both the interrogator's and the defendant's statements are immaterial and, thus, not relevant." *People v Musser*, 494 Mich 337, 355 (2013). See also *People v Tomasik*, 498 Mich 953, 953 (2015) (holding that the trial court erred in "admitting the recording of the defendants interrogation" because "nothing of any relevance was said during the interrogation . . . and thus was not admissible evidence"). "Likewise, the interrogator's out-of-court statements or questions have no probative value if those statements or questions, when considered in relationship to a defendant's statements, do not actually provide context to the defendant's statements. *Musser*, 494 Mich at 355-356. "Accordingly, an interrogator's out-of-court statements must be redacted if that can be done without harming the probative value of a defendant's statements." *Id.* at 356.

However, just because an interrogator's statement "has some relevance to its proffered purpose does not necessarily mean that the statement may be presented to the jury"; it must satisfy the balancing test under MRE 403. *Musser*, 494 Mich at 356-357. That is, "a trial court must . . . evaluate the probative value of the out-of-court statements in providing context to a defendant's statements and the resulting prejudice to a defendant before the interrogator's out-of-court statements are presented to the jury." *Id.* When employing this test, the court "should be particularly mindful that when a statement is not being offered for the truth of the matter asserted and would otherwise be inadmissible if a witness testified to the same at trial, there is a 'danger that the jury might have difficulty limiting its consideration of the material to [its] proper purpose[.]'" *Id.* at 357, quoting *Stachowiak v Subczynski*, 411 Mich 459, 465 (1981) (first alteration in original).

In addition, an investigating officer's statement "'may be given undue weight by the jury' where the determination of a defendant's guilt or innocence hinges on who the jury determines is more credible–the complainant or the defendant," and "courts must be mindful of the problems inherent in presenting the statements to the jury[.]" *Musser*, 494 Mich at 358. "In a trial in which the evidence essentially presents a 'one-on-one' credibility contest between the complainant and the defendant, the prosecutor cannot improperly introduce statements from the investigating detective that vouch for the veracity of the complainant and indicate that the detective believes the defendant to be guilty." *Tomasik*, 498 Mich at 953.

Finally, even if the statement is relevant for purposes of providing context for a defendant's statements, the statement(s) must be

restricted to their proper scope–providing context to the defendant's statement. *Musser*, 494 Mich at 358.

Committee Tip:

An objection may appear to involve hearsay, but can end up being about relevance, as demonstrated in Musser, 494 Mich at 350-363.

2.3 Character Evidence

A. Character Evidence Generally Not Admissible to Prove Conduct

Generally, evidence of a person's character or a character trait, and evidence of any other crime, wrong, or act is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait. MRE 404(a); MRE 404(b). MRE 404 is a rule of legal relevance, which limits the use character evidence that is logically relevant under MRE 401 and MRE 402. *Rock v Crocker*, 499 Mich 247, 256 (2016). "Such evidence is strictly limited because of its highly prejudicial nature; there is a significant danger that the jury will overestimate the probative value of the character evidence." *People v Roper*, 286 Mich App 77, 91 (2009). MRE 404 applies to both criminal and civil cases. *Rock*, 499 Mich at 256 n 5.

1. Exceptions

MRE 404(a)(2) contains exceptions for a defendant or victim in a criminal case:

> "(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
>
> (B) in a homicide case, when self-defense is an issue, the defendant may offer evidence of the alleged victim's trait for aggression, and if the evidence is admitted, the prosecution may:
>
> (i) offer evidence of the defendant's same trait, and

> (ii) offer evidence of the alleged victim's trait for peacefulness to rebut evidence that the alleged victim was the first aggressor; and
>
> (C) in a criminal-sexual-conduct case, the defendant may offer evidence of:
>
> (i) the alleged victim's past sexual conduct with the defendant, and
>
> (ii) specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." MRE 404(a)(2).

MRE 404(a)(3) contains exceptions for a witness:

> "Evidence of a witness's character may be admitted under [MRE 607], [MRE 608], and [MRE 609]."[12] MRE 404(a)(3).

When relevant to an issue in the case, MRE 404(b)(2)[13] sets out an exception where evidence of any other crime, wrong, or act may be admitted for purposes other than to prove propensity to commit the crime charged, irrespective of whether the other incident occurred prior to, contemporaneous with, or subsequent to the conduct at issue in the case. See also *People v VanderVliet*, 444 Mich 52, 74 (1993).[14] Those purposes include proving:

- Motive,
- Opportunity,
- Intent,
- Preparation,
- Scheme, plan, or system in doing an act,
- Knowledge,
- Identity,
- Absence of mistake, or
- Lack of accident. MRE 404(b)(2).

[12] See Section 3.9 for information on MRE 608 and MRE 609.

[13] See Section 2.4(A) for a detailed discussion of MRE 404(b).

[14] The other acts permitted previously appeared in MRE 404(b)(1); those other acts now appear in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

Note that "under MRE 404(b), the other acts may be uncharged conduct and even conduct for which a defendant was acquitted." *People v Kelly*, 317 Mich App 637, 646 n 3 (2016).

Statutes that permit the use of specific past acts of the accused in specified classes of criminal cases to prove conduct on the date charged include:

- Prior listed offenses committed against a minor. MCL 768.27a(1).[15]
- Prior domestic violence or sexual assault offenses. MCL 768.27b.[16]

2. Doctrine of Chances

In many MRE 404(b) cases, it may be necessary to discuss the "doctrine of chances," which states that "as the number of incidents of an out-of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act *and/or* the prior occurrences were not the result of natural causes." *People v Mardlin*, 487 Mich 609, 616 (2010). In other words, "[i]f a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance." *Id.* at 617.

In *Mardlin*, 487 Mich at 612, the defendant's home was damaged by fire after which he filed an insurance claim for the damage to his home. The defendant was charged with arson after an investigation showed that the fire had been intentionally set. *Id.* During the previous 12 years, the defendant had also been "associated with four previous home or vehicle fires—each of which also involved insurance claims and arguably benefited defendant in some way[.]" *Id.* at 613. The Michigan Supreme Court concluded that evidence of the previous fires was admissible "precisely because they constituted a series of similar incidents—fires involving homes and vehicles owned or controlled by defendant—the frequency of which objectively suggested that one or more of the fires was not caused by accident." *Id.* at 619. The evidence "need not bear striking similarity to the offense charged if the theory of

[15] See Section 2.4(B) for information on MCL 768.27a.

[16] See Section 2.4(C) on MCL 768.27b.

relevance does not itself center on similarity." *Id.* at 620. The Court explained:

> "Rather, '[w]here the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, *similarity between charged and uncharged conduct is not required*.' Different theories of relevance require different degrees of similarity between past acts and the charged offense to warrant admission. Thus, the 'level of similarity required when disproving innocent intent is less than when proving modus operandi.' 'When other acts are offered to show innocent intent, logical relevance dictates only that the charged crime and the proffered other acts "are of the same general category."' Past events—such as fires in relation to an arson case—that suggest the absence of accident are offered on the basis of a theory of logical relevance that is a subset of innocent intent theories. As such, the past events need *only* be of the same general category as the charged offense." *Mardlin*, 487 Mich at 622-623 (alteration in original), quoting *People v VanderVliet*, 444 Mich 52, 69, 79-80, 80 n 36 (1993).

Where the defendant claimed consent as a defense during his trial for charges arising from a sexual assault, the Court found evidence of additional sexual assault allegations that the defendant claimed were consensual to be relevant, explaining that "employing the doctrine of chances, it [was] extraordinarily improbable that eight unrelated women in four different states would fabricate reports of sexual assault after engaging in consensual sex with defendant." *People v Kelly*, 317 Mich App 637, 646 n 4 (2016).

Committee Tip:

MRE 404(a) provides situations where character or propensity evidence is allowed under pertinent exceptions to the rule. MRE 404(b) does not provide additional exceptions. It retains the bar on character/conformity/propensity evidence and rather allows its evidentiary subject matter–crimes, wrongs, acts–to be used

for non-character purposes such as those stated in the rule.

B. Presenting Character Evidence

1. Reputation and Opinion

"When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct." MRE 405(a). However, "these inquiries should not be made without: (1) the trial judge determining, in the absence of the jury, whether or not the criminal acts actually took place, the time of their commission, and a determination as to whether they were relevant to the issue being tried, and (2) the trial judge making a careful instruction to the jury as to the reasons testimony as to the criminal acts is being admitted." *People v Meshkin*, ___ Mich ___, ___ (2022). Inquiries "without any basis in fact and without any of the necessary protections afforded by the trial court, are improper." *Id.* at ___. Accordingly, a "trial court err[s] by allowing a groundless question to waft an unwarranted innuendo into the jury box." *Id.* at ___ (cleaned up).

Evidence of the "reputation among a person's associates or in the community concerning the person's character" is not excluded by the hearsay rule. MRE 803(21). See Chapter 5 for information on hearsay.

a. Reputation in the Community

A character witness must have knowledge about the reputation of the individual about whom he or she is testifying. *People v King*, 158 Mich App 672, 678 (1987). "[T]estimony regarding a person's character can only relate what the witness has heard others say about the person's reputation, and cannot relate specific instances of the person's conduct or the witness's personal opinion as to the person's character. *Id.* (a witness's testimony that "they personally believed the defendant was honest, or related specific instances of the defendant's trustworthy conduct . . . [did] not rise to the level of admissible character evidence").

Reputation evidence is admissible when it is based on the party's or the witness's reputation in his or her residential or business community. *People v Bieri*, 153 Mich App 696, 712-713 (1986).[17] "One's community can be either where one lives or works, and a reputation may be established wherever one interacts with others over a period of time." *Id*. at 713 (finding that jail could be considered a residential community where the amount of time that the individual spends there is sufficient to establish a reputation, and the witness in fact becomes acquainted with the individual's reputation).

b. Opinion Testimony

A party may call a witness "to offer testimony concerning their personal opinion of [a] person's character[.]" *People v Roper*, 286 Mich App 77, 97 (2009). The witness's opinion must be derived from their association with the person whose character is in question. See *People v Dobek*, 274 Mich App 58, 102 (2007) (an opinion by a psychologist based on psychological testing and interviews is not "traditional character evidence" that "fits within the language of and is admissible under . . . MRE 405(a)" because the opinion does not come from knowing the person and how he or she lived their life).[18]

c. Extrinsic Evidence

Generally, MRE 405(a) does not permit a party to prove character through evidence of specific instances of conduct. *People v Roper*, 286 Mich App 77, 104 (2009). However, "a prosecutor may elicit testimony through a rebuttal witness concerning specific instances of conduct where a defendant places his character at issue on direct examination and then denies the occurrence of specific instances of conduct on cross-examination." *Id*. at 102. Rebuttal evidence involving specific conduct may be introduced to prove a defendant's character if all of the following are true:

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[17]The *Bieri* Court considered "the impeachment of a witness' credibility by evidence of the witness' reputation for truthfulness or untruthfulness" under MRE 608. *Bieri*, 153 Mich App at 712 (holding "admissibility of such evidence is limited and the testimony of a character witness must be based upon what he has heard other people in the subject's residential or business community say about the subject's reputation"). See Section 2.3(E) for information on MRE 608.

[18]The *Dobek* Court concluded that the psychologist's opinion was inadmissible because it did not satisfy the requirements of MRE 702. Nevertheless, the Court briefly touched on defendant's argument that the opinion was admissible under MRE 405(a). See Section 4.1(A) for information on MRE 702.

- the defendant placed his or her character at issue during direct examination;
- the prosecution cross-examined the defendant regarding specific instances of conduct that "tend[ed] to show that the defendant did not have the character trait he or she asserted on direct examination";
- the defendant denied in whole or in part the specific instances brought up by the prosecution during cross-examination; and
- the rebuttal testimony offered by the prosecution was limited to contradicting the defendant's cross-examination testimony. *Roper*, 286 Mich App at 105.

2. Specific Instances of Conduct

"When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct." MRE 405(b).

Where the defendant was charged with two counts of first-degree murder, and his defense was that he was not present and did not commit the crime, evidence of specific instances of the defendant's good conduct were inadmissible because "[n]either the charge nor the defense [made] character an essential element." *People v Williams*, 134 Mich App 639, 642 (1984). "It is only in the narrow situation where character is an element of the offense that specific acts of conduct are admissible to show character under MRE 405(b)." *Williams*, 134 Mich App at 642.[19] See also *People v Orlewicz*, 293 Mich App 96, 104-105 (2011) (where character was not an essential element of the defendant's self-defense claim, evidence of PPOs issued against the victim were properly excluded as specific instances of conduct, but evidence of the victim's MySpace page should have been admitted because it did not constitute a specific instance of conduct). The *Orlewicz* Court stated:

> "While a social-networking or other kind of personal website might well contain depictions of specific instances of conduct, such a website must be deemed a gestalt and not simply a conglomerate of parts. When regarded by *itself*, a social-

[19] See Section 2.3(C) for discussion regarding evidence of character of the defendant.

> networking or personal website is more in the nature of a semipermanent yet fluid autobiography presented to the world. In effect, it is self-directed and self-controlled general-character evidence. Clearly, because people change over time, its relevance might be limited only to recent additions or changes; furthermore, it is obviously possible for people to misrepresent themselves, which could present a fact issue. But in the abstract, social-networking and personal websites constitute general reputational evidence rather than evidence concerning specific instances of conduct[.]" *Orlewicz*, 293 Mich App at 104-105.

Committee Tip:

Be cautious of basing character by reputation decisions on social media gestalt generalities. MRE 404(a) concerns relevant character and pertinent traits of character not satisfied by general reputation evidence - even in the form of social media.

"[E]vidence of [a] decedent's specific acts of violence is admissible only to prove an essential element of self-defense, such as a reasonable apprehension of harm." *People v Edwards*, 328 Mich App 29, 37 (2019). The trial court erred in precluding defendant from admitting "evidence of the decedent's specific act of violence committed against him personally" because "defendant had to present evidence that he had a reasonable belief that he had to use deadly force to prevent his death or to prevent great bodily harm to himself," and the evidence was "directly relevant to an ultimate issue in his defense." *Id*. at 37-38. The trial court also erred in summarily denying the defendant's request to admit evidence of "specific acts of violence by the decedent [against third persons] that [the defendant] knew about at the time of the shooting to show his reasonable apprehension of harm" because "the trial court was required to examine each allegation and then determine its admissibility." *Id*. at 39-40 (remanded for the trial court to "determine whether each of the decedent's violent acts against third persons is relevant to the self-defense claim," and also "whether the evidence is admissible under MRE 403").

Committee Tip:

It might be best to ask the proponent about the purpose for admission of specific instances of conduct. If they are known to defendant and formulate a state of mind, they are not character evidence. Specific instances of conduct, sought for admission otherwise, are limited by MRE 405(b).

C. Evidence of Defendant's Character in Criminal Case

1. Offered by Defendant

While "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait," "a defendant may offer evidence of the defendant's pertinent trait[.]" MRE 404(a)(2)(A). While MRE 404(a)(2) "allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime[,]" *People v Whitfield*, 425 Mich 116, 130-131 (1986),[20] a defendant may only present favorable evidence in the form of reputation or opinion testimony. MRE 405(a).

The trial court did not abuse its discretion in precluding defendant from presenting witnesses that would have testified as to her character and reputation for being a law-abiding citizen in her criminal trial of conducting an unlicensed gambling operation because defendant's "truthfulness or general reputation for adhering to the law [had] no bearing on whether she intended to operate . . . in a manner that met the definition of a gambling operation," especially where it had already been determined on appeal that her "intent to 'break the law' was not relevant to the illegal-gambling charges." *People v Zitka*, 335 Mich App 324, 342 (2021) (the court did not err by excluding the evidence because defendant "sought to introduce this evidence only to make an irrelevant point").

[20] However, failure to allow the defendant to introduce admissible character evidence may be harmless error unless "after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v King*, 297 Mich App 465, 472, 479 (2012).

2. Offered by Prosecution

If "a defendant . . . offer[s] evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it[.]" MRE 404(a)(2)(A). If "the defendant does not offer character evidence, a prosecutor's attempt to elicit character evidence regarding the defendant on cross-examination of another witness is not permitted" by MRE 404(a)(2)(A).[21] *People v Wilder*, 502 Mich 57, 67-68 (2018) (remanding to the trial court to determine whether the error in admitting the evidence was harmless). However, "once the defendant presents testimony or other evidence that he or she has a good character trait, the defendant has opened the door; the prosecutor may then walk through it, armed with contrary evidence, on rebuttal, and the fact that the contrary evidence is damaging to the defense does not equate with error." *People v Steele*, 283 Mich App 472, 486 (2009).

The prosecution is limited to rebutting the trait or traits introduced by the defendant. *People v Johnson*, 409 Mich 552, 561 (1980). "A defendant does not open the door to any and all evidence concerning his character merely by basing an argument on some aspects of his character. He opens the door only for evidence that his character is not what he claims it to be." *Id.*

The trial court properly allowed the prosecution to present specific instances of defendant's conduct to rebut evidence of his character for peacefulness after the defendant testified "I'm not the person that . . . would want to [react with violence], especially to a friend," and denied that he reacted with violence to other situations in which he was confronted by an unhappy person. *People v Roper*, 286 Mich App 77, 94-105 (2009).

D. Evidence of Victim's Character in Criminal Case

1. Homicide Victim

a. Offered by Defendant

"[I]n a homicide case, when self-defense is an issue, the defendant may offer evidence of the alleged victim's trait for aggression, and if the evidence is admitted, the

[21]The provisions previously found in MRE 404(a)(1) now appear in MRE 404(a)(2)(A). See ADM File No. 2021-10, effective January 1, 2024.

prosecution may: (i) offer evidence of the defendant's same trait, and (ii) offer evidence of the alleged victim's trait for peacefulness to rebut evidence that the alleged victim was the first aggressor[.]" A defendant asserting self-defense in a homicide case may offer "evidence of the alleged victim's trait for aggression." MRE 404(a)(2)(B).

Character evidence of a deceased victim can be offered to prove that the victim acted in conformity with his or her violent reputation on a particular occasion, and thus, was the aggressor in the case at hand. *People v Harris*, 458 Mich 310, 315-316 (1998). If the defendant offers character evidence of the deceased victim to show that the defendant acted in self-defense, the evidence is being offered to show the defendant's state of mind, and the defendant must have had knowledge of the victim's violent reputation before the evidence will be admitted. *Id*. at 316. If, however, the character evidence is being offered to show that the victim was the probable aggressor, the defendant need not know of the victim's reputation at the time. *People v Orlewicz*, 293 Mich App 96, 104 (2011). "[T]his type of character evidence may only be admitted in the form of reputation testimony, not by testimony regarding specific instances of conduct unless the testimony regarding those instances is independently admissible for some other reason or where character is an essential element of a claim or defense." *Id*. (finding that social networking and personal websites may be used as character evidence because they are self-edited and thus "constitute general reputational evidence rather than evidence concerning specific instances of conduct").

In cases where the defendant is claiming self-defense, a jury instruction on the alleged victim's past acts or reputation may be appropriate. See M Crim JI 7.23. M Crim JI 7.23(1) addresses past violent acts committed by the alleged victim. M Crim JI 7.23(2) addresses the alleged victim's reputation for cruelty and violence.

b. Offered by Prosecution

If self-defense is an issue in a homicide case and the defendant introduces evidence of the alleged victim's trait for aggression, the prosecution may "offer evidence of the defendant's same trait" and "offer evidence of the alleged victim's trait for peacefulness to rebut evidence that the alleged victim was the first aggressor[.]" MRE 404(a)(2)(B)(i)-(ii).

Committee Tip:

When it comes to MRE 404(a)((2), the prosecutor is limited to rebutting the accused's reputation or opinion character evidence and is not in a first strike position.

2. Sexual Assault Victim

MCL 750.520j (Rape Shield Act)[22] states:

> "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under [MCL 750.520b] to [MCL 750.520g] unless and only to the extent that the judge finds 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:
>
> > (a) Evidence of the victim's past sexual conduct with the actor.
> >
> > (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

[22] See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 6, for more information on rape shield provisions.

"[A] specific instance of the victim's sexual conduct [admissible under MCL 750.520j(1)(a)-(b)] must relate to a particular occurrence of the victim's sexual conduct." *People v Sharpe*, 502 Mich 313, 328 (2018).

See also MRE 404(a)(2)(C), which provides that the defendant in a criminal-sexual-conduct case may offer evidence of "the alleged victim's past sexual conduct with the defendant," and "specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." MRE 404(a)(1) "only excludes character evidence used to prove conformity to a character trait"; it is error to exclude evidence under MRE 404(a)(2)(C) where a valid, nonpropensity explanation for the admission of the evidence has been articulated. *Sharpe*, 502 Mich at 332 n 11.

While "MCL 750.520j generally excludes evidence of a rape victim's prior sexual conduct with others, and sexual reputation, when offered to prove that the conduct at issue was consensual or for general impeachment[,]" "in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." *People v Butler*, ___ Mich ___, ___ (2024) (quotation marks and citation omitted) (holding that "the defendant should be permitted to show that the complainant has made false accusations of rape in the past").

"When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case." *People v Benton*, 294 Mich App 191, 198 (2011). If a trial court determines that evidence of a victim's past sexual conduct is not admissible under one of the statutory exceptions, it must consider whether admission is required to preserve the defendant's constitutional right to confrontation; if the evidence is not so required, the court "'should . . . favor exclusion of [the] evidence[.]'" *Id.* at 197, quoting *People v Hackett*, 421 Mich 338, 349 (1984).

"The rape-shield law does not prohibit defense counsel from introducing 'specific instances of sexual activity . . . to show the origin of a physical condition when evidence of that condition is offered by the prosecution to prove one of the elements of the crime charged provided the inflammatory or prejudicial nature of the rebuttal evidence does not outweigh its probative value.'" *People v Shaw*, 315 Mich App 668, 680 (2016), quoting *People v Mikula*, 84 Mich App 108, 115 (1978).

"There is no indication from our Legislature or in our caselaw that the rape-shield statute was designed to prevent a

complainant's disclosure of her own sexual history or its attendant consequences." *Sharpe*, 502 Mich at 330-331. Accordingly, voluntarily-offered evidence of a complainant's "pregnancy, abortion, and lack of sexual history to bolster her allegations of criminal sexual conduct against defendant" may be admissible; however "admission of this type of evidence may open the door to the introduction of evidence whose admission may otherwise have been precluded by the rape-shield statute." *Id*. at 330, 331 n 10.

a. Evaluating Admissibility of Evidence of Complainant's Prior Sexual Conduct: Trial Court Procedure

Trial courts must employ the following procedure when evaluating the admissibility of evidence of the complainant's prior sexual conduct:

> "The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court *shall order* an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury." [*Butler*, ___ Mich at ___ (quoting *Hackett*, 421 Mich at 350-351).]

"'[I]n ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation.'" *Butler*, ___ Mich at ___ (quoting *Hackett*, 421 Mich at 351). The trial court is required to make an explicit finding on whether "defendant's offer of proof was sufficient to require an *in camera* evidentiary hearing under *Hackett*." *Butler*, ___ Mich at ___. "There must be a showing of at least some apparently credible and potentially admissible evidence that the prior allegation was false." *Id*. at ___.

"Once a sufficient offer of proof is made, the *in camera* evidentiary hearing is not optional." *Id*. at ___. In *Butler*, the Michigan Supreme Court held that "defendant's offer of proof was sufficient, but an evidentiary hearing is required under *Hackett* before the trial court may admit the evidence." *Id*. at ___ (holding that "the trial court erred by failing to conduct an *in camera* evidentiary hearing before granting admission of the evidence.") However, "the ultimate question of admissibility at trial" requires determining whether defendant has satisfied the evidentiary burden of proving that the complainant's prior allegations were false. *Id*. at ___ (stating "[s]ince the adoption of an appropriate standard [for making that determination] is a question of first impression in Michigan, we believe it is appropriate for the lower courts to assess this question in the first instance").

b. Examples of Application of Character Evidence of Sexual Assault Victim

Past sexual conduct. "'[P]ast' sexual conduct refers to conduct that has occurred before the evidence is offered at trial." *People v Adair*, 452 Mich 473, 483 (1996). In *Adair*, the defendant was charged with sexually assaulting his wife and sought to introduce evidence of specific incidents when he and his wife engaged in consensual sexual relations *after* the alleged assault. *Id*. at 477. In deciding whether subsequent sexual relations are sufficiently probative to be admitted, the court should consider (1) the length of time between the alleged assault and the subsequent sexual relations, and (2) whether the complainant and the defendant had a personal relationship before the alleged assault. *Id*. at 486-487. In explaining its reasoning, the Court stated:

> "On a common-sense level, a trial court could find that the closer in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with her alleged assailant, the stronger the argument would be that if indeed she had been sexually assaulted, she would not have consented to sexual relations with him in the immediate aftermath of sexual assault. Accordingly, the evidence may be probative. Conversely, the greater the time interval, the less probative force the evidence may have, depending on the circumstances.
>
> "Even so, time should not be the only factor. The trial court should also carefully consider the circumstances and nature of the relationship between the complainant and the defendant. If the two did not have a personal relationship before the alleged sexual assault, then any consensual sexual relations after the alleged sexual assault would likely be more probative than if the two had been living together in a long-term marital relationship. Additionally, the trial court could find that there may be other human emotions intertwined with the relationship that may have interceded, leading to consensual sexual relations in spite of an earlier sexual assault. Depending on the circumstances, the trial court may find that these other considerations have intensified the inflammatory and prejudicial nature of subsequent consensual sexual conduct evidence and properly conclude that it should be precluded or limited." *Adair*, 452 Mich at 486-487.

Viewing Lawful Pornography. "[E]vidence of viewing pornography," "[w]ithout more, such as evidence that the viewer engaged in acts of sexual gratification," "is not 'sexual conduct' subject to the exclusionary bar of the rape-shield statute, [MCL 750.520j]." *People v Masi*, ___ Mich App ___, ___ (2023). Accordingly, "evidence of a victim viewing lawful pornography, without more, is not evidence of 'sexual conduct' subject to Michigan's rape-shield statute." *Id.* at ___.

Prior sexual abuse. "[E]vidence of prior sexual abuse of [a victim] falls within the rape-shield statute's prohibition

on evidence of specific instances of the victim's sexual conduct." *Masi*, ___ Mich App at ___ (cleaned up). This includes when the abuse involves forcing the victim to watch pornography, which unlike a victim watching pornography on their own accord, is itself "alleged criminal activity that [is] a component of the involuntary sexual conduct suffered by [the victim]." *Id.* at ___. Additionally, a trial court does not abuse its discretion in excluding evidence of prior sexual abuse where the victim suffered abuse at the hands of someone other than the defendant when the abuse is not "significantly similar" to the abuse inflicted by the defendant. *Id.* at ___.

Sexual contact with someone other than the defendant. "The trial court's refusal to allow [testimony from the victim's former boyfriend about his consensual sex with the victim before she was examined by a pediatrician who testified that he found extensive hymenal changes and a chronic anal fissure and that these findings were consistent with those of either a sexually active adult woman or an abused child] for purposes of the *Ginther*[23] hearing was erroneous because such testimony is permitted as an offer of proof if the applicability of the rape-shield statute is at issue." *People v Shaw*, 315 Mich App 668, 679 n 7 (2016). Further, because the defendant's guilt was the only likely explanation for the victim's extensive hymenal changes and chronic anal fissure, "evidence of an alternative explanation for the hymenal changes and source for the chronic anal fissure would have been admissible under the exception to the rape-shield statute[.]" *Id.* at 680.

Sexual contact between complainants. "[E]vidence of sexual conduct between [complainants] falls squarely within the rape-shield statute's exclusion for evidence of 'specific instances of the victim's sexual conduct,' and the evidence does not fall within either of the statute's narrow exceptions." *Masi*, ___ Mich App at ___, quoting MCL 750.520j(1).

Evidence of abortion. Because evidence of an abortion is "not evidence of a specific instance of a victim's sexual conduct," it does not fall under the purview of MCL 750.520j. *People v Sharpe*, 502 Mich 313, 328 (2018). "Although this evidence necessarily implies that sexual activity occurred that caused [a] pregnancy, the

[23] *People v Ginther*, 390 Mich 436 (1973).

pregnancy and abortion are not evidence regarding a specific instance of sexual conduct." *Id.* at 328. Although the evidence was "not excluded under the rape-shield statute," the *Sharpe* Court analyzed whether it was "otherwise admissible under the Michigan Rules of Evidence," concluding that the trial court abused its discretion when it excluded evidence of the complainant's abortion as inadmissible character evidence because the prosecutor identified a valid nonpropensity explanation for its admission. *Id*. at 331, 332 n 11 (evidence of the abortion "definitively demonstrat[ed] that sexual penetration occurred" and also "explain[ed] the lack of DNA evidence to identify the man who impregnated [the complainant]").

Lack of sexual activity with people other than the defendant. Evidence that a complainant "did not engage in other sexual intercourse . . . does not fall within the plain language of the rape-shield statute, [MCL 750.520j,]" for exclusion at trial because the "evidence demonstrates an absence of conduct, not a 'specific instance' of sexual conduct." *Sharpe*, 502 Mich at 330. However, because the evidence was "not excluded under the rape-shield statute," the *Sharpe* Court analyzed whether it was "otherwise admissible under the Michigan Rules of Evidence." *Id*. at 331. It concluded that the trial court abused its discretion when it excluded evidence of the complainant's lack of other sexual partners as inadmissible character evidence because the prosecutor identified a valid nonpropensity explanation for its admission. *Id*. at 332 n 11 (evidence of the complainant's lack of sexual partners eliminated the possibility that someone other than the defendant impregnated her).

Evidence of pregnancy. Because evidence of a pregnancy is "not evidence of a specific instance of a victim's sexual conduct," it does not fall under the purview of MCL 750.520j. *Sharpe*, 502 Mich at 328. "Although this evidence necessarily implies that sexual activity occurred that caused the pregnancy, the pregnancy . . . [is] not evidence regarding a specific instance of sexual conduct." *Id*. Although the evidence was "not excluded under the rape-shield statute," the *Sharpe* Court analyzed whether it was "otherwise admissible under the Michigan Rules of Evidence," concluding that the trial court properly admitted evidence of the complainant's pregnancy. *Id*. at 331, 334-335 (evidence of the pregnancy was probative of the issue of whether sexual penetration occurred).

E. A Witness's Character for Truthfulness or Untruthfulness (Impeachment)

Evidence of a witness's character may be admitted under MRE 607–MRE 609. MRE 404(a)(3). This section discusses MRE 608. See Section 3.7 for information on the credibility of a witness, MRE 607, and Section 3.9 for information on impeachment by evidence of a criminal conviction, MRE 609.

"By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness." MRE 608(b).

1. Reputation or Opinion

"A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." MRE 608(a).

Where a party attacks a witness's credibility, but not the witness's character for truthfulness, the opposing party may not present evidence to bolster the witness's truthful character. *People v Lukity*, 460 Mich 484, 490-491 (1999) (the trial court abused its discretion in admitting evidence of the complainant's truthful character where the defense counsel asserted during his opening statement that the complainant had emotional problems which affected her ability to describe the alleged sexual assaults; MRE 608(a) was not implicated because the defendant's opening statement did not attack the complainant's truthful character).

It may be error for a court to allow character testimony that goes "beyond [the witness's] reputation for truthfulness and encompasse[s] [the witness's] overall 'integrity.'" *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 102 (2009). In *Ykimoff* (a medical malpractice case), the defendant offered a surveillance videotape into evidence, showing the plaintiff engaging in certain activities, which "impliedly impugned plaintiff's truthfulness, as it suggested that plaintiff's residual injuries were not as extensive or limiting as alleged." *Id.* However, admitting the evidence was harmless error because witness testimony tended to prove the same things that the videotape showed. *Id*. at 103.

2. Specific Instances of Conduct

MRE 608(b) prohibits extrinsic evidence of specific instances of a witness's conduct to attack or support the witness's character for truthfulness, except for a criminal conviction under MRE 609; however, on cross-examination, the court may allow inquiry into specific instances of conduct if they are probative of the character for truthfulness or untruthfulness of the witness or "another witness whose character the witness being cross-examined has testified about." MRE 608(b).

A "complainant's statements concerning a threat to make prior false allegations were not inadmissible hearsay because they were not offered for the truth of the matter asserted"; "[r]ather, the complainant's out-of-court statements were offered to directly attack the complainant's credibility." *People v Martinez*, 507 Mich 855 (2021). Although absent an exception, "[c]haracter evidence is not admissible to prove an action in conformity therewith, . . . MRE 608 provides such an exception[, and t]he statements were admissible pursuant to MRE 608(b)[.]" *Martinez*, 507 Mich at 855. The "evidence was specific, highly relevant, and acknowledged by the complainant while under oath during the preliminary examination," and "in light of the absence of other direct or circumstantial evidence supporting the defendant's convictions, the exclusion of this impeachment evidence was not harmless error. The risk of prejudice is especially high in a case such as this in which the evidence essentially presents a one-on-one credibility contest between the complainant and the defendant because of the reasonable probability that this additional attack on the complainant's credibility would have tipped the scales in favor of finding a reasonable doubt about the defendant's guilt." *Id* (cleaned up).

Where a witness was not called as a character witness and did not testify on direct examination about the plaintiff's truthfulness or untruthfulness, the defendant was not permitted to cross-examine the witness about specific instances of the plaintiff's conduct for the purpose of impeaching the plaintiff. *Guerrero v Smith*, 280 Mich App 647, 655 (2008). In *Guerrero*, the plaintiff testified about his limited marijuana use. *Id*. at 654. Defense counsel cross-examined one of the plaintiff's witnesses in an effort to impeach the plaintiff's testimony regarding his marijuana use. *Id*. The Court concluded that the witness's testimony should not have been admitted because it did not satisfy the technical requirements of MRE 608(b)(2). *Guerrero*, 280 Mich App at 654. The Court stated:

> "Before specific instances concerning another witness's character for truthfulness or untruthfulness may be inquired into on cross-examination, the witness subject to cross-examination must already have testified on direct examination regarding the other witness's character for truthfulness or untruthfulness." *Guerrero*, 280 Mich App at 654-655.

3. Impeachment by Contradiction

Impeachment by contradiction "can be a proper purpose for the admission of other-acts evidence" under MRE 404(b), and it "usually occurs when a prosecutor seeks to cross-examine a defendant about prior convictions in order to impeach a defendant's blanket denial on direct examination of ever engaging in conduct similar to the charged conduct." *People v Wilder*, 502 Mich 57, 64 (2018). However, a defendant's prior conviction(s) may also be admissible for purposes of impeaching a *witness* by contradiction. See *id*. at 64 n 9 (noting that "admissibility of defendant's prior convictions to impeach by contradiction a witness' testimony is governed by MRE 404(b)," which requires the evidence to be both logically and legally relevant; the questions asked in this case were not relevant to a proper purpose). See Section 2.4 for more information on the admission of other-acts evidence under MRE 404(b).

2.4 Other-Acts Evidence[24]

A. Rule 404(b) and Section 768.27

"Evidence of any other crime, wrong, or 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." MRE 404(b)(1). However, "[i]f it is material, the evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, absence of mistake, or lack of accident." MRE 404(b)(2).

"In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or

[24]See the Michigan Judicial Institute's *Other-Acts Evidence Flowchart*.

other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant." MCL 768.27.

"[W]hile MRE 404(b) and MCL 768.27 certainly overlap, they are not interchangeable." *People v Jackson*, 498 Mich 246, 269 (2015). MCL 768.27 authorizes the admission of other-acts evidence for the same purposes listed in MRE 404(b)(2)[25] when one or more of the matters "is material." *Jackson*, 498 Mich at 269. "Unlike MCL 768.27, however, MRE 404(b)'s list of such purposes is expressly nonexhaustive, and thus plainly contemplates the admission of evidence that may fall outside the statute's articulated scope." *Jackson*, 498 Mich at 269. Accordingly, "MCL 768.27 does not purport to define the limits of admissibility for evidence of uncharged conduct." *Jackson*, 498 Mich at 269.

"Other-acts evidence may also be admissible without regard to MRE 404(b) if the other acts are so intertwined with the charged offense that they directly prove the charged offense or their presentation is necessary to comprehend the context of the charged offense." *People v Spaulding*, 332 Mich App 638, 650 (2020). "Such evidence is also admissible to fill what would otherwise be a chronological and conceptual void regarding the events to the finder of fact." *Id.* (quotation marks and citation omitted). In *Spaulding*, other-acts evidence "consisting of [the victim's] description of . . . four [prior] incidents" was relevant "in proving defendant's connection to aggravated stalking," and "did not rely on an improper character-to-conduct inference." *Id.* at 650, 652 (quotation marks and citation omitted). Although evidence of "defendant's three communications . . . did not *explicitly* convey any threats[,] [i]t was impossible to comprehend the *significance of* those communications without an understanding of the history of the relationship between [the victim] and defendant." *Id.* at 651. "Without knowing that history, the communications would have been innocuous. The prior incidents were critical to understand why a reasonable person would have felt . . . scared by defendant's conduct under the circumstances." *Id.* at 651-652 (noting "defendant's prior acts of domestic violence were direct evidence of his aggravated stalking: it was literally his own prior misconduct that *made* the communications at issue crimes").

[25]The provision previously found in MRE 404(b)(1) now appears in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

1. Applicability of MRE 404(b)

"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." *People v Mardlin*, 487 Mich 609, 615-616 (2010).

"MRE 404(b) only applies to evidence of crimes, wrongs, or acts 'other' than the 'conduct at issue in the case' that risks an impermissible character-to-conduct inference. Correspondingly, acts comprised by or directly evidencing the 'conduct at issue' are not subject to scrutiny under MRE 404(b)." *People v Jackson*, 498 Mich 246, 262 (2015) (holding that "[e]vidence that the defendant," who was charged with CSC-I involving a child who was a member of the church where the defendant served as a pastor, "previously engaged in sexual relationships with other parishioners, above or below the age of consent, [fell] well within this scope of coverage" and required the prosecution to provide notice under MRE 404(b)).

"MRE 404(b) applies to the admissibility of evidence of other acts of *any* person, such as a defendant, a plaintiff, or a witness." *People v Rockwell*, 188 Mich App 405, 409-410 (1991). This includes "admissibility of defendant's prior convictions to impeach by contradiction a witness' testimony[.]" *People v Wilder*, 502 Mich 57, 64, n 9 (2018). The rule applies to both civil and criminal cases. *Wlosinski v Cohn*, 269 Mich App 303, 322 (2005).

In order for other-acts evidence to be admissible under MRE 404(b)(2),[26] a party must "show that it is (1) offered for a proper purpose, i.e., to prove something other than the defendant's propensity to act in a certain way, (2) logically relevant, and (3) not unfairly prejudicial under MRE 403." *Rock v Crocker*, 499 Mich 247, 257 (2016). "Before applying MRE 403, the trial court must consider whether . . . there [is] a proper purpose for admitting other-acts evidence" under MRE 404(b)(2). *Rock*, 499 Mich at 259.[27] "Only if the trial court finds a proper purpose under MRE 404(b) should the trial court then apply MRE 403." *Rock*, 499 Mich at 259.

"If necessary to determine the admissibility of evidence under [MRE 404(b)], the court must require the defendant to state the

[26]The provision previously found in MRE 404(b)(1) now appears in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

[27]*Id.*

theory or theories of defense, limited only by the defendant's privilege against self-incrimination." MRE 404(b)(4). However, a ruling on whether to admit MRE 404(b) evidence does not require an evidentiary hearing if no motion in limine was filed. See *People v Williamson*, 205 Mich App 592, 596 (1994) ("the trial court's failure to conduct an evidentiary hearing regarding the admissibility of the evidence [did] not require reversal" because neither *People v Golochowicz*, 413 Mich 298 (1982),[28] nor *People v Engelman*, 434 Mich 204 (1990), "mandates that an evidentiary hearing be held where, as in this case, no motion in limine has been made by the defense").

A trial court may not circumvent MRE 404(b)(2)[29] by taking judicial notice[30] of the respondent's past conduct. *In re Kabanuk*, 295 Mich App 252, 260 (2012). In *Kabanuk*, the trial court took judicial notice of the defendant's past bad courtroom behavior, essentially finding that because he had been disruptive at earlier hearings, he had likely been disruptive in the matter before the court. *Id*. The Court of Appeals found that the trial court's consideration of the defendant's prior acts violated MRE 404(b)(2),[31] but concluded the error was not outcome determinative and therefore, did not require reversal. *Kabanuk*, 295 Mich App at 260.

A defendant accused of criminal sexual conduct may introduce testimony under MRE 404(b) to show that the complainant's father previously induced the complainant to make false allegations of sexual abuse against other persons disliked by the father. *People v Jackson*, 477 Mich 1019 (2007) ("[s]uch testimony does not implicate the rape shield statute"). See also *People v Parks*, 478 Mich 910 (2007), where the Court remanded the case for an evidentiary hearing at which the defendant was to be given "the opportunity to offer proof that the complainant made a prior false accusation of sexual abuse against another person."

"[T]here is no 'res gestae exception' to MRE 404(b), nor does the definition of 'res gestae' set forth in [*People v*] *Delgado*[, 404 Mich 76 (1978),] and [*People v*] *Sholl*[, 453 Mich 730 (1996),] delineate the limits of that rule's applicability." *Jackson*, 498 Mich at 268 n 9, 274, overruling any conflicting caselaw "[t]o

[28]See Section 2.4(A)(4) for information on *Golochowicz*.

[29]The provision previously found in MRE 404(b)(1) now appears in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

[30]See Section 1.4 for information on judicial notice.

[31]The provision previously found in MRE 404(b)(1) now appears in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

the extent that such caselaw holds that there is a 'res gestae exception' to MRE 404(b)[.]"

Other-acts evidence is admissible to rebut forensic center staff's testimony on the issue of a defendant's sanity. See *People v McRunels*, 237 Mich App 168, 183 (1999). "[T]he concerns that underlie MRE 404[(b)] are not implicated where the challenged evidence is introduced on the issue of the defendant's sanity, and not in an attempt to have the jury convict of the crime charged on the basis of past misconduct[.]" *McRunels*, 237 Mich App at 183 (second alteration in original).

2. Notice Requirement in Criminal Case

The prosecutor must provide notice of other acts evidence intended to be offered "at trial, so that the defendant has a fair opportunity to meet it[.]" MRE 404(b)(3)(A). The notice must articulate "the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose[.]" MRE 404(b)(3)(B).[32] The prosecutor must provide the defendant with the notice "in writing at least 14 days before trial, unless the court, for good cause, excuses pretrial notice, in which case the notice may be submitted in any form." MRE 404(b)(3)(C).

MRE 404 does not provide a definition of good cause. However, "[a] trial court has broad discretion to determine what constitutes 'good cause.'" *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 264 (2013) (considered in context of an unrelated court rule). "[N]otice is not required when the evidence the prosecution intends to present falls within the res gestae exception to MRE 404(b)." *People v Jackson*, 498 Mich 246, 256 (2015) (quotation marks, alteration, and citation omitted).

The reasons for the notice requirement are: "(1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record." *People v Hawkins*, 245 Mich App 439, 454-455 (2001).

Where the prosecution fails to provide notice of its intent to offer other-acts evidence as required under MRE 404(b)(3),[33]

[32] MRE 404(b)(2) mentions "proving motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, absence of mistake, or lack of accident."

the defendant is not entitled to relief unless he or she "demonstrate[s] that this error 'more probably than not . . . was outcome determinative.'" *Jackson*, 498 Mich at 278, 281 (holding that where "the lack of proper pretrial notice did not result in the admission of substantively improper other-acts evidence," and where the defendant did not show "that any . . . arguments [(against the admission of the other-acts evidence)] would have been availing, or would have affected the scope of testimony ultimately presented to the jury," he failed to "demonstrate[] entitlement to relief based on the erroneous handling of [the MRE 404(b)] testimony") (quotation marks and citations omitted).

Where "'written notice' was not timely provided, . . . and . . . 'oral notice on the record' was not provided until one day before trial," "the trial court erred by admitting [MRE 404(b)] evidence . . . [because] there was [no] good cause to excuse the noncompliance." *People v Felton*, 326 Mich App 412, 421 (2018). The prosecution's claim that it did not timely provide notice of its intent to present evidence of the defendant's prior conviction because it did not know the prior bad act evidence existed "[held] no weight" because "it [was] undisputed that the prosecution was aware of defendant's conviction . . . at the time the information was filed." *Id.* at 422. Further, "the prosecution's claim that it did not have the police report . . . until the day before it filed the notice required by MRE 404(b) [was] not adequate to show good cause," where the record demonstrated "no efforts were made [to obtain the police report] during the six months between the filing of the information and defendant's trial[.]" *Felton*, 326 Mich App at 422. Evidence that another witness purchased drugs from the defendant days prior to the current incident was also "procedurally inadmissible" because the prosecutor "failed to indicate that [the] testimony would concern other acts." *Id.* at 423-424 ("[i]t was only in response to [the defendant's] objection that the prosecution explained the general content of [the] expected testimony"). The prosecutor's argument that it did not know it would need the witness's testimony until another witness took flight "carrie[d] little weight given that no MRE 404(b) notice was ever filed for [that] witness either." *Felton*, 326 Mich App at 424. Under these circumstances, "[i]t is clear that the late notice . . . did 'unfair[ly] surprise' defendant and did not provide him with time to 'marshal arguments regarding both relevancy and unfair prejudice.'" *Id.* at 421 (alteration in original). Additionally, "the court improperly put

[33]The provision previously found in MRE 404(b)(2) now appears in MRE 404(b)(3). See ADM File No. 2021-10, effective January 1, 2024.

the burden on the defendant to produce evidence [that admission of the MRE 404(b) evidence was improper], while it accepted the prosecutor's statements–that were wholly unsupported by any evidence–as conclusive." *Felton*, 326 Mich App at 424.

While failure to provide notice under MRE 404(b)(3)[34]constitutes plain error, "it may be deemed harmless and therefore not grounds for reversal." *People v Lowrey*, 342 Mich App 99, 117 (2022). In *Lowrey*, the defendant argued "that the trial court erred by admitting evidence of prior domestic and sexual abuse between himself and the victim because of lack of notice." *Id*. at 115. However, "defendant fail[ed] to articulate *how* he would have proceeded differently" or provide "any offer of proof to the effect that the victim's testimony was untrue." *Id*. at 118. Although "it was plain error for [evidence of prior abuse] to be admitted without providing proper notice," the *Lowrey* Court determined that the evidence was relevant and "the probative value of this evidence was [not] *substantially* outweighed by the danger of unfair prejudice." *Id*. at 118, 119. Because defendant was unable to "demonstrate that any error was outcome-determinative," the Court of Appeals concluded that he was "not entitled to relief."*Id*. at 119.

3. *VanderVliet* Test

MRE 404(b) codifies the requirements set forth in *People v VanderVliet*, 444 Mich 52 (1993). See MRE 404, *Note to 1994 Amendment*. The admissibility of other-acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity,[35] is generally governed by the test established in *VanderVliet*, which is as follows:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime. *VanderVliet*, 444 Mich at 74. Trial courts must "vigilantly weed out character evidence that is disguised as something else." *People v Denson*, 500 Mich 385, 400 (2017) (quotation marks and citation omitted). "[M]erely *reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose for the particular other-acts evidence at issue

[34]The provision previously found in MRE 404(b)(2) now appears in MRE 404(b)(3). See ADM File No. 2021-10, effective January 1, 2024.

[35] See Section 2.4(A)(5)(e) for a discussion on how modus operandi evidence used to prove identity may be admissible.

and does not automatically render the evidence admissible." *Id.* "[I]n order to determine whether an articulated purpose is, in fact, merely a front for the improper admission of other-acts evidence, the trial court must closely scrutinize the logical relevance of the evidence under the second prong of the *VanderVliet* test." *Denson*, 500 Mich at 400.

- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial. *VanderVliet*, 444 Mich at 74. "Other-acts evidence is logically relevant if two components are present: materiality and probative value." *Denson*, 500 Mich at 401. See Section 2.2(A) for a detailed discussion of logical relevance.

- The trial court should determine whether the danger of undue prejudice substantially outweighs the probative value of the evidence under MRE 403, in view of the availability of other means of proof and other appropriate facts. *VanderVliet*, 444 Mich at 74-75.

- Upon request, the trial court may provide a limiting instruction[36] under MRE 105, cautioning the jury to use the evidence only for its proper purpose and not to infer that a bad or criminal character caused the defendant to commit the charged offense. *VanderVliet*, 444 Mich at 75.

The Supreme Court in *VanderVliet* characterized MRE 404(b) as a rule of inclusion rather than exclusion:

> "There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in [MRE] 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate [MRE] 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.
>
> * * *
>
> "[MRE] 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *VanderVliet*, 444 Mich at 65.

[36] The jury instruction is M Crim JI 4.11.

The *VanderVliet* case underscores the following principles of MRE 404(b):

- There is no presumption that other-acts evidence should be excluded. *VanderVliet*, 444 Mich at 65.
- The rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except criminal propensity. *VanderVliet*, 444 Mich at 65.
- A defendant's general denial of the charges does not automatically prevent the prosecutor from introducing other-acts evidence at trial. *VanderVliet*, 444 Mich at 78.
- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet*, 444 Mich at 68, 71-72.

If other-acts evidence is admissible for a proper purpose under MRE 404(b), it should not be deemed inadmissible simply because it also demonstrates criminal propensity. See *VanderVliet*, 444 Mich at 65.

"In evaluating whether the prosecution has provided an intermediate inference other than an impermissible character inference, [the court] examine[s] the similarity between a defendant's other act and the charged offense." *Denson*, 500 Mich at 402. "The degree of similarity that is required between a defendant's other act and the charged offense depends on the manner in which the prosecution intends to use the other-acts evidence." *Id.* at 402-403. "If the prosecution creates a theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, [the Michigan Supreme Court] require[s] a 'striking similarity' between the two acts to find the other act admissible." *Id.* at 403, quoting *VanderVliet*, 444 Mich at 67. "When the prosecution's theory of relevancy is not based on the similarity between the other act and the charged offense, a 'striking similarity' between the acts is not required." *Denson*, Mich at 403, quoting *VanderVliet*, 444 Mich at 67. "For example, when the theory of relevance of the other-acts evidence is to identify the defendant as the perpetrator of the charged crime considering the uncommon or distinctive similarity of the facts and circumstances of both the uncharged and charged offenses, there must be a high degree–or striking–similarity so as to earmark the charged offense as the handiwork of the accused, i.e., the defendant's

signature." *People v Galloway*, 335 Mich App 629, 639 (2021) (cleaned up). "[W]hen the other-acts evidence is offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category." *Id*. at 640 (quotation marks and citations omitted).

Committee Tip:

Over the years, other acts evidence under MRE 404(b) has been referred to as 'similar acts' evidence. This nomenclature, although a misnomer, is only partly so. The rule does not use the word similar, but similarity may or may not drive the relevancy and materiality questions. Depending on the prosecutor's stated purpose for use of other acts evidence, and in conjunction with the theory of the prosecution, the stated purpose for admission may demand a low degree of similarity (intent) or an exceedingly high one (identity). This underscores the need for judicial persistence in ensuring precisely what purpose is advanced for admission.

In cases where the evidence is admissible for one purpose but not others, the trial court may, upon request, give a limiting instruction pursuant to MRE 105. *People v Sabin (After Remand)*, 463 Mich 43, 56 (2000). The trial court has no duty to give a limiting instruction sua sponte, though it *should* give a limiting instruction even in the absence of a party's request. *People v Chism*, 390 Mich 104, 120-121 (1973).

The Michigan Supreme Court and Court of Appeals affirmed the continued viability of *VanderVliet's* analytical framework, and its characterization of MRE 404(b) as a rule of inclusion rather than exclusion in *Sabin (After Remand)*, 463 Mich at 55-59, and in *People v Katt*, 248 Mich App 282, 304 (2001).

Although a panel of the Court of Appeals has said that courts should conduct the VanderVliet analysis on the record, the court is not required to do so. See *People v Vesnaugh*, 128 Mich App 440, 448 (1983), citing *People v Nabers*, 103 Mich App 354, 366-367 (1981).

4. *Golochowicz* Test

Another test for admission of other-acts evidence results from *People v Golochowicz*, 413 Mich 298, 309 (1982). Generally speaking, the *VanderVliet*[37] test has supplanted the *Golochowicz* test. However, the *Golochowicz* test remains valid when the proponent of other-acts evidence seeks to show identification through modus operandi. *People v VanderVliet*, 444 Mich 52, 66 (1993); *People v Ho*, 231 Mich App 178, 186 (1998).

Before the other-acts evidence may be admitted pursuant to *Golochowicz*, "(1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act . . ., opportunity, preparation and knowledge; (3) one or more of these factors must be material to the determination of the defendant's guilt of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice." *Golochowicz*, 413 Mich at 309.

"[W]hen the theory of relevance of the other-acts evidence is to identify the defendant as the perpetrator of the charged crime considering the uncommon or distinctive similarity of the facts and circumstances of both the uncharged and charged offenses, there must be a high degree–or striking–similarity so as to earmark the charged offense as the handiwork of the accused, i.e., the defendant's signature." *People v Galloway*, 335 Mich App 629, 639 (2021) (quotation marks, alteration, and citation omitted).

5. Other Purposes

a. Motive

Where the defendant was charged with killing the decedent (a woman with whom he lived and had two children in common) on the day their adult daughter moved back into their home, evidence that the defendant sexually assaulted the daughter when she was five years old was admissible for the purpose of establishing the defendant's motive for killing the girlfriend. *People v Edwards*, 328 Mich App 29, 32-33 (2019). In explaining

[37] *People v VanderVliet*, 444 Mich 52 (1993)

how the other-acts evidence related to motive, the prosecutor stated that (1) on the day of the murder, the daughter moved into the decedent's home (where the defendant resided), (2) the defendant was angry at the decedent's decision to allow the daughter to move in because of the previous allegations of sexual assault and because he was not allowed to live in the same home as the daughter, and (3) he directed his anger at the decedent by killing her. *Id*. at 42 (the reasons stated by the prosecutor were supported in the record where a detective testified at the preliminary examination that the defendant stated that he had argued with the decedent about the daughter moving in and that the argument escalated to the point where the defendant shot the decedent). Accordingly, admission of the previous sexual assault of the defendant's daughter was admissible under MRE 404(b) for a proper purpose. *Edwards*, 328 Mich App at 43.

In *People v Galloway*, 335 Mich App 629, 635 (2021), the prosecution argued that evidence of a prior assault was admissible in defendant's first-degree premeditated murder case "for the proper purpose[] of showing motive[.]" The *Galloway* Court concluded that "the trial court did not abuse its discretion in excluding evidence of defendant's assault . . . under MRE 404(b) because there [was] an insufficient factual nexus between the prior conviction and the present charged offense to support any noncharacter theory of admission" where "[t]he incidents did not share idiosyncratic or unexpected conduct like the removal of clothing without sexual assault," and there was no evidence that the assault victim and murder victim "shared similar injuries because [the murder victim's] body was never recovered." *Galloway*, 335 Mich App at 644-645 (quotation marks and citation omitted; finding that "evidence of defendant's assault . . . [was] only relevant to show his character or propensity to commit the charged offense and therefore [was] inadmissible"). Defendant's charge of "first-degree premeditated murder, and the fact that defendant assaulted [another victim did] not tend to establish defendant's motive" and "there [was] no intermediate fact linking the charged acts and the previous convictions." *Id*. at 641. The prosecution's assertion that the assault was a "practice run" for the murder tended only "to establish defendant's motive for attacking [the assault victim], not his motive . . . to kill [the murder victim]." *Id*.

b. Intent

The trial court did not abuse its discretion by permitting the prosecution "to admit evidence of a 2006 incident at a 7-Eleven in which defendant allegedly indicated that he had a gun and that he would shoot the clerk if she did not hand over the money" during the defendant's trial for an armed robbery of a Halo Burger where the defendant allegedly demanded all the money in the till while holding his hand in his sweatshirt in a way that suggested he had a weapon. *People v Henry*, 315 Mich App 130, 133, 141 (2016). The Court concluded that "[t]he evidence was offered for a proper purpose and was highly relevant. It was not offered for the purpose of showing that defendant was a bad person. Instead, it was offered to give context to the crime itself. Defendant's behavior demonstrated an intent to place his victims in fear that he was armed with a dangerous weapon." *Id.* at 142 (also concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, "especially in light of defendant's claim that he was not armed and that both [of the employees working at Halo Burger on the night of the robbery] were unreasonable in their fear that defendant was armed").

In the defendant's trial for fatally stabbing the victim, "the trial court did not abuse its discretion by admitting evidence of [the] defendant's prior stabbing of the victim" because the other-acts evidence was admitted "not to demonstrate criminal propensity, but to disprove defendant's claim that her decision to stab the victim was emotional and made in self-defense, i.e., to prove her intent[.]" *People v Dixon-Bey*, 321 Mich App 490, 517-519 (2017) (noting that, "much like a victim's prior acts of violence, a defendant's prior acts of violence are also highly relevant as to whether a defendant was acting in self-defense") (citation omitted).

In *People v Galloway*, 335 Mich App 629, 635 (2021), the prosecution argued that evidence of a prior assault was admissible in defendant's first-degree premeditated murder case "for the proper purpose[] of showing motive[.]" The *Galloway* Court concluded that "the trial court did not abuse its discretion in excluding evidence of defendant's assault . . . under MRE 404(b) because there [was] an insufficient factual nexus between the prior conviction and the present charged offense to support any noncharacter theory of admission" where "[t]he incidents did not share idiosyncratic or unexpected

conduct like the removal of clothing without sexual assault," and there was no evidence that the assault victim and murder victim "shared similar injuries because [the murder victim's] body was never recovered." *Galloway*, 335 Mich App at 644-645 (quotation marks and citation omitted; finding that "evidence of defendant's assault . . . [was] only relevant to show his character or propensity to commit the charged offense and therefore [was] inadmissible"). Defendant's charge of "first-degree premeditated murder, and the fact that defendant assaulted [another victim did] not tend to establish defendant's motive" and "there [was] no intermediate fact linking the charged acts and the previous convictions." *Id.* at 641. The prosecution's assertion that the assault was a "practice run" for the murder tended only "to establish defendant's motive for attacking [the assault victim], not his motive . . . to kill [the murder victim]." *Id.*

c. Knowledge and Absence of Mistake or Accident

Where the prosecutor sought to establish the defendant's intent and absence of mistake by introducing evidence that other infants in the defendant's care had suspicious injuries, it was error for the trial court to prohibit the evidence as impermissible character evidence under MRE 404(b). *People v Martzke (On Remand)*, 251 Mich App 282, 292 (2002).

Where the defendant was charged with second-degree murder and other offenses involving driving while intoxicated, "prior acts evidence . . . involv[ing] incidents in which defendant either drove unsafely, was passed out in her vehicle, or was involved in an accident while impaired or under the influence of prescription substances, or was in possession of pills" was admissible under MRE 404(b)(2)[38] "to show defendant's knowledge and absence of mistake, and was relevant to the malice element for second-degree murder because it was probative of defendant's knowledge of her inability to drive safely after consuming prescription substances." *People v Bergman*, 312 Mich App 471, 494 (2015). Further, "because the prior incidents were minor in comparison to the charged offense involving a head-on collision that caused the deaths of two individuals, the probative value

[38]The provision previously found in MRE 404(b)(1) now appears in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403." *Bergman*, 312 Mich App at 494 (additionally noting that "the trial court gave an appropriate cautionary instruction to reduce any potential for prejudice").

d. Opportunity, Scheme, or Plan

The trial court did not abuse its discretion in admitting testimony from other-acts witnesses describing a "pattern of defendant using enticements (e.g., promises, jobs, or money) to lure or recruit them to motels for purposes of prostituting or sexually exploiting them, and resorting to threats and violence if they refused" because "there were sufficient similarities between the other incidents and the charged offenses[.]" *People v Thurmond*, ___ Mich App ___, ___ (2023). "The testimonies of the other-acts witnesses" "was highly probative of defendant's plan or scheme to use these women for his own financial gain or to satisfy his personal interests[.]" *Id.* at ___. Considering "the trial court gave a cautionary instruction," "the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice." *Id.* at ___. The Court further held that "[a]lthough [records extracted from two cell phones recovered from defendant at the time of his arrest did] not fall within the scope of the human-trafficking charge as alleged in the information, the records were still highly probative of defendant's scheme or plan to prostitute women and engage in human trafficking during the relevant time period." *Id.* at ___.

In *People v Smith*, 282 Mich App 191, 193 (2009), it was alleged during defendant's CSC trial that on two occasions the defendant entered his 10 or 11-year-old daughter's bedroom, pulled down her pants and underwear, and penetrated her vagina with his penis. Under MRE 404(b)(2),[39] the trial court admitted testimony from the victim's stepsister that she lived with the defendant when she was 11 or 12 years old, and that the defendant exposed his penis to her on three occasions during that time. *Smith*, 282 Mich App at 193-194. The Court of Appeals held that the trial court did not abuse its discretion in admitting evidence of the defendant's prior acts of indecent exposure finding that the evidence was

[39]The provision previously found in MRE 404(b)(1) now appears in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

offered for the proper purposes of showing opportunity, scheme, or plan. *Id*. at 197 (also finding that while "[t]he evidence was damaging to defendant, . . . MRE 403 seeks to avoid *unfair* prejudice, which was not shown here").

Evidence of the defendant's previous larcenies of snowmobiles and a trailer, granite and bags of setting materials, and three incidents of thefts from car dealerships was properly admitted under MRE 404(b)(2)[40] during defendant's trial for charges stemming from allegations that he broke into a car dealership and stole paint and chemical hardeners because (1) it was offered for the proper purpose of proving "that defendant had a common scheme or plan," (2) it "was relevant in that it showed that defendant had the same scheme or plan in the case at bar," (3) it was sufficiently similar to the other incidents such that it made the evidence "highly probative of a common scheme or plan," and (4) "the trial court provided a limiting instruction, which can help alleviate any danger of unfair prejudice, given that jurors are presumed to follow their instructions." *People v Roscoe*, 303 Mich App 633, 645-647 (2014) (the previous larcenies showed that the defendant had a common scheme or plan of breaking into businesses and stealing items that have a higher resale value when sold together and that do not appear to be of much value to the average person).

The trial court did not abuse its discretion by admitting evidence of the defendant's previous thefts during the defendant's trial for larceny and murder where the other-acts evidence was admissible to show the existence of a common plan, scheme, or system. *People v Wood*, 307 Mich App 485, 502-503 (2014), vacated in part on other grounds 498 Mich 914 (2015).[41] Specifically, the trial court admitted testimony regarding the defendant's multiple thefts from the shared home of two disabled women who had hired the defendant to work around their house, the theft of his 77-year-old landlady's purse from her home, and a theft from another home where the defendant was working. *Wood*, 307 Mich App at 502-503. The evidence was properly admitted because "[t]he bulk of the other acts . . . shared several common features with the offenses in the

[40]The provision previously found in MRE 404(b)(1) now appears in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

[41]For more information on the precedential value of an opinion with negative subsequent history, see our note.

instant case." *Id.* at 502. Specifically, the evidence regarding the robbery of the two disabled women "demonstrated that defendant targeted vulnerable women . . . by offering to work around their home[s]" and later returned to their homes, intending to steal and armed with a weapon. *Id.* at 502-503. In the instant case, the defendant was alleged to have met the 80-year-old female victim by offering to perform yard work before returning to her home to commit larceny and murder with a knife he was carrying. *Id.* at 503. Further, the Court found that the evidence regarding the defendant's theft from his landlady was another instance of the defendant "target[ing] a vulnerable and elderly woman for theft" by entry into her home.[42] *Id.*

The trial court did not abuse its discretion "in admitting evidence related to [previous Child Protective Services (CPS)] investigations involving allegations that [the father of the defendant's daughter] sexually abused his daughter"; "the uncharged conduct . . . was logically relevant under MRE 404(b) to show defendant's common plan, scheme, or system in using [her daughter] to make a false allegation of sexual abuse against [her daughter's father] . . . [and] was also relevant to show defendant's motive for causing the false report to be made in the instant case in that the false report could cause CPS to remove [her daughter] from [her daughter's father's] care." *People v Mullins*, 322 Mich App 151, 167, 169 (2017). Additionally, "[b]ecause defendant was the party who first pursued the substantive allegations involving the [earlier CPS] petition," she opened the door to the CPS petition testimony even though "the prosecution never noticed her of its intent to admit such evidence," and "any prejudice flowing from the evidence was of defendant's own making." *Id.* at 170, 172.

In *People v Galloway*, 335 Mich App 629, ___ (2021), the prosecution sought to admit evidence of a prior assault in defendant's first-degree premeditated murder case arguing "that there were striking similarities in each case, which demonstrated a common scheme, plan, or system." *Id.* at 635. "There must be *such a concurrence of common features* that the charged acts and the other acts are logically seen as part of a general plan, scheme, or

[42]The Court also held that "the trial court acted within its discretion in admitting the other acts evidence" because the evidence was admitted for the purpose of "proving several elements of the offenses with which defendant was charged." *Wood*, 307 Mich App at 501.

design." *Id*. at 644 (quotation marks and citation omitted). "A high degree of similarity is required–more than is needed to prove intent, but less than is required to prove identity–but the plan itself need not be unusual or distinctive." *Id*. at 644-645 (quotation marks and citation omitted). "[P]hysical similarities between [the two victims] did not persuasively establish a common scheme or plan." *Id*. at 645.

e. Identity

Other-acts evidence regarding a prior attempted murder was properly admitted in defendant's first-degree murder trial because it was relevant to "whether defendant [was] the person who shot and killed the victim, then tried to dispose of her body using fire," and it tended "to show defendant's scheme, plan, or system in committing the charged offenses." *People v Bass*, 317 Mich App 241, 260 (2016). There were significant factual similarities between the other-acts evidence and the circumstances in the instant case, specifically: both victims were attacked from behind, both victims were women the defendant knew for a substantial time, the defendant had a sexual relationship with both victims at the time of the offenses, a liquid that smelled like gasoline was poured on the victim during the attempted murder and gasoline was used to burn the victim's body in the instant case, and the victim in the attempted murder case was wrapped "in a carpet or something" and the victim's body in the instant case "was found bound with wire atop a plastic tarp." *Id*. Further, while it was "a closer question whether the probative value of [the other-acts] evidence was substantially outweighed by the danger of unfair prejudice," the defendant's identity was a primary issue at the trial; thus, "the similarities between his assault against [the attempted murder victim] and the facts known about the victim's death had a heightened probative value." *Id*. at 261. Accordingly, "[t]he decision to admit the attempted-murder evidence fell within the range of reasonable and principled outcomes." *Id*.

In *People v Galloway*, 335 Mich App 629, 635 (2021), the prosecution argued that evidence of a prior assault was admissible in defendant's first-degree premeditated murder case "to identify defendant as [the victim's] killer." Although there was substantial evidence that defendant committed the assault because he pleaded guilty to doing so, "the prosecution . . . failed to identify

some special quality of the act that tend[ed] to prove defendant's identity"; "the two cases . . . [did] not show similar degrees or characteristics of preparation," and "[t]he prosecution [did] not explain how the specific facts of each case [gave] rise to recognizable shared elements of stalking behavior or isolation and asportation of the victim." *Id.* at 642-644 (quotation marks and citation omitted; finding the evidence insufficient to prove defendant's identity under *Golowchowicz*[43]).

6. Error in the Admission of Other-Acts Evidence

Other-acts evidence is not logically relevant to prove a common plan or scheme where is it "undisputed that the alleged offense occurred." *People v Heath*, ___ Mich ___, ___ (2022). Indeed, "evidence of similar misconduct is logically relevant *to show that the charged act occurred* where the uncharged misconduct and the charged offense are sufficiently similar to support *an inference that they are manifestations of a common plan, scheme, or system*[.]" *Id.* at ___ (quotation marks and citation omitted).

Improper admission of other-acts evidence "is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict."[44] *People v Denson*, 500 Mich 385, 409 (2017) (quotation marks and citation omitted). Courts should "focus on the nature of the error and assess its effect in light of the weight and strength of the untainted evidence." *Id.* at 409-410 (alterations, quotation marks and citation omitted). "[W]hether admission of other-acts evidence is harmless is a case-specific inquiry; the effect of an error should be determined by the particularities of an individual case." *Id.* at 413 n 15.

In the defendant's trial for assaulting a teenager who was dating his daughter, evidence of the defendant's prior conviction for assaulting an unrelated individual in an unrelated incident involving a drug debt "was [not] admissible under MRE 404(b) to rebut defendant's claims of self-defense and defense of others"; "the trial court erred when it admitted defendant's prior act because the prosecution failed to establish that it was logically relevant to a proper noncharacter purpose" and relied upon the other-acts evidence to "evoke[]

[43] *People v Golochowicz*, 413 Mich 298 (1982). See Section 2.4(A)(4) for more information on *Golochowicz*.

[44] Harmless-error review is applied to all preserved nonconstitutional error. See *People v Denson*, 500 Mich 385, 409 (2017).

the very propensity inference that MRE 404(b) forbids." *Denson*, 500 Mich at 389, 411. During trial, the prosecution questioned several witnesses about the defendant's prior violent acts and "further compounded the problem" by arguing in closing that the defendant "did not act in 'defense of anybody' because [he] was a 'bully' and a 'coward' who lost control with [the victim], just as he had lost control with [a prior victim, and . . .] it was 'not a coincidence' that '[the defendant] pounded on [the victim in this case].'" *Id.* at 411-412. The prosecutor asserted that "[b]ecause there was no viable self-defense claim in the [prior] incident, . . . there could be no viable self-defense claim [in the current case]." *Id.* at 412. Additionally, the defendant and the victim testified to "highly conflicting accounts of the same incident, but the introduction of the inadmissible evidence tipped the scales, buoying [the victim's] credibility while helping to sink defendant's." *Id.* at 410, 413 (noting that the "defendant's version of events was not wholly inconsistent with the injuries [the victim] sustained"). Accordingly, "the improper admission of the other-acts evidence undermined the reliability of the verdict by making it more probable than not that, had this evidence not been admitted, the result of the proceedings would have been different." *Id* at 412-413 *(*"[a]lthough the prosecution also introduced photographs and medical testimony regarding [the victim's] injuries, the mere presence of some corroborating evidence does not automatically render an error harmless"; "[o]therwise, [the Court's] directive to assess the effect of the error 'in light of the weight and strength of the untainted evidence' would have no meaning").

In *Denson*, "the prosecution built a theory of relevance centered upon the supposed similarity between the [prior] incident and the charged offense to rebut defendant's claims of self-defense and defense of others"; "[c]onsequently, . . . the prosecution [was required to] show 'striking similarity' between the other act and the charged offense." *Denson*, 500 Mich at 406, quoting *People v VanderVliet*, 444 Mich 52, 67 (1993). However, "the circumstances of the prior conviction did not bear a striking similarity to those of the charged offense. Instead, the prosecution relied on the impermissible inference that defendant had committed the charged offense because of his supposed violent character." *Denson*, 500 Mich at 408 (noting that "although the prosecution nominally recited what could be a proper purpose under the first prong of the *VanderVliet* test, evaluation of the probative value of the other-acts evidence under the second prong of the *VanderVliet* test reveal[ed] that no such purpose actually existed").

Where a defendant was charged with sexually abusing his daughter, the trial court erred in admitting evidence of the defendant's alleged sexual misconduct involving a coworker, because "the workplace acts and their contextual circumstances [were] not remotely similar to the charged conduct and [did] not support any inference that defendant's charged conduct was part of a common plan." *People v Pattison*, 276 Mich App 613, 617 (2007). In *Pattison*, the defendant was charged with four counts of first-degree criminal sexual conduct for the alleged sexual abuse of his minor daughter that occurred repeatedly over two years while she lived with him. *Id.* at 615. However, the alleged sexual misconduct toward the defendant's coworker was not admissible because there was no evidence of a "personal or familial relationship" between the defendant and his coworker. *Id.* at 616-617. Furthermore, the workplace incident involved "surprise, ambush, and force" of a grown woman, while the defendant's conduct toward his daughter involved "manipulation and abuse of parental authority" of a child. *Id.*

"[T]he similarity of the drugs sold, unless of some unusual or unique type, [does not constitute] a common scheme for purposes of MRE 404(b)." *People v Felton*, 326 Mich App 412, 430 (2018). In *Felton*, the defendant was charged with possession with intent to deliver cocaine and heroin, and the trial court erred in admitting evidence that the defendant previously sold similar types of drugs (crack cocaine) to an undercover detective because "heroin and cocaine are neither unique nor unusual street drugs, nor are they in fact, as the prosecutor repeatedly represented to the jury, 'the same.'" *Id.* The prosecution intended to introduce evidence of a prior incident where the defendant "[w]as in possession of heroin," "[w]as selling it to other individuals," and "[u]tilized a separate individual and their vehicle to drive him around and assist him with the sale of illegal drugs" (i.e. a common plan or scheme). *Id.* at 426-427 (quotation marks omitted). Being in possession of heroin and selling it to others were "clearly insufficient" reasons to satisfy the requirements of MRE 404(b) because "they amount[ed] to nothing more than propensity evidence[.]" *Felton*, 326 Mich App at 427. In addition, the prosecution never established its third reason (utilizing a separate individual/vehicle) because the prior incident was inconsistent with the actions in the instant case. *Id.* at 427-428 ("[t]here was no evidence that the driver [in the prior incident] was involved in recruiting buyers or doing anything other than driving" unlike the situation in the instant case; in the prior incident, the defendant possessed the drugs and admitted they were his, unlike the situation in the instant case).

"The mere fact that defendant possessed drugs in a vehicle driven by someone else is not sufficient to establish a common plan or scheme." *Id*. at 427.

Evidence that defendant sold drugs to another witness (a few days prior to the current incident) also failed to demonstrate a common scheme or plan, notably because there was no vehicle involved and defendant possessed the drugs and sold them to the witness directly. *Felton*, 326 Mich App at 428.

The trial court erred by treating other-acts testimony against the defendant during his trial for first-degree murder and mutilation of a human body "as if it involved just one prior bad act," where the testimony conceptually involved "two distinct prior bad acts: attempted murder and rape." *People v Bass*, 317 Mich App 241, 259-260 (2016). The trial court abused its discretion by admitting the sexual assault other-acts evidence because it lacked logical relevance to the facts of the instant case; however, the attempted murder other-acts evidence was properly admitted to show identity and the defendant's scheme, plan, or system. *Id*. at 260-262. The sexual assault other-acts evidence was not relevant to any fact in consequence where the defendant was not charged with criminal sexual conduct, and there was no evidence that the victim was ever sexually assaulted; accordingly, "the only logical purpose for the introduction of the sexual-assault evidence was the improper character purpose, i.e., proof that defendant is a bad person and therefore probably committed the charged offenses." *Id.* at 261. Further, the danger of unfair prejudice under MRE 403 outweighed any marginal probative value that might exist because "[s]ex offenders are a loathed class," and "knowledge that defendant is a rapist did nothing to help the jurors decide whether he committed the charged offenses." *Bass*, 317 Mich App at 262 (concluding that reversal was unwarranted because the defendant failed to meet his burden of demonstrating that the erroneous admission of evidence more probably than not resulted in a miscarriage of justice where there was "overwhelming" circumstantial evidence of the defendant's guilt and the trial court gave a limiting instruction proscribing the jurors from considering the evidence for improper character purposes).

The trial court abused its discretion by admitting testimony from the defendant's first wife about the defendant's domestic abuse that occurred at least 16 years before the charged offense under MRE 404(b), "because the purpose of the evidence was to show that in this case, defendant acted in conformity with the character shown in the prior acts, i.e., that defendant was threatening, abusive, and violent." *People v Rosa*, 322 Mich App

726, 735 (2018) (also finding that the evidence was inadmissible under MCL 768.27b[45] because it was not "uniquely probative" or "needed to ensure that the jury was not misled"). The defendant's first wife's testimony "did not offer probative evidence on a material issue," where it did not demonstrate a particular pattern or scheme that would serve to identify the defendant and "[t]estimony about defendant's abusive treatment of his first wife many years ago" did not provide information "about whether defendant had an intent to kill when he strangled [the victim in the current case]." *Id.* at 735-736 (concluding that compared to the highly probative evidence offered by the victim and the defendant's son, evidence about "16-year-old assaults against a different person are barely probative of intent, if at all" and "would not survive review under MRE 403"). Notwithstanding, the court found the error harmless because "exclusion of the testimony of defendant's first wife would not have spared defendant from the devastating propensity evidence that was properly admitted." *Rosa*, 322 Mich App at 738.

The trial court abused its discretion by allowing the prosecutor to introduce defendant's prior convictions through a defense witness for purposes of impeaching the witness by contradiction where "the prosecutor's initial questions were not logically relevant to a proper purpose under MRE 404(b) because they were not designed to elicit an answer contradicting any statements made by the witness on direct examination." *People v Wilder*, 502 Mich 57, 65 (2018). In *Wilder*, "the witness's direct testimony was limited to whether defendant owned a gun or possessed one on the date in question," and the prosecutor repeatedly asked the witness about the defendant's two prior convictions and whether the witness knew of the defendant "to more generally carry weapons." *Id.* (the Court noted that the witness's "testimony would not have been contradicted even if the witness had acknowledged 'know[ing] of' defendant to more generally carry weapons"). The Court concluded that the prosecutor's questions were not logically relevant to a proper purpose under MRE 404(b); they "were simply an attempt to elicit propensity evidence." *Wilder*, 502 Mich at 66 (also concluding that this evidence was not permissible as character evidence under MRE 404(a) and remanding to the trial court to determine whether the error in admitting the evidence was harmless).

[45] See Section 2.4(C) for discussion of MCL 768.27b.

7. Error in the Exclusion of Other-Acts Evidence

The trial court abused its discretion by excluding, at the defendant's trial for charges arising from a sexual assault, evidence of seven other instances of alleged criminal sexual conduct by the defendant that did not result in convictions; "the trial court neglected a fundamental responsibility in its MRE 404(b) evidentiary analysis, and . . . therefore abused its discretion by excluding the proposed testimony" without considering whether the evidence was offered for a proper purpose or its legal relevance. *People v Kelly*, 317 Mich App 637, 647-648 (2016). "Without considering the evidence's legal relevance for a proper purpose, the trial court could not conclude that the evidence's probative value was substantially outweighed by unfair prejudice or any of the other concerns identified in MRE 403," resulting in a failure "to follow the proper legal framework[.]"[46] *Kelly*, 317 Mich App 647. Further, "the trial court . . . abdicated the necessary relevancy analysis on the basis of impermissible credibility concerns" by allowing the "defendant's protestations of 'consent' in respect to the other acts to control the MRE 404(b) analysis." *Kelly*, 317 Mich App at 645. "[T]here [was] considerable evidence that the sexual acts in question occurred and that defendant was the actor"; "[t]he only issue [was] whether that conduct was consensual as claimed by defendant or constituted criminal sexual conduct as asserted by the alleged victims, . . . and the trial court should not have dismissed the evidence . . . merely because there was a credibility dispute." *Id.* at 645-646.

Where the prosecutor sought to establish the defendant's intent and absence of mistake by introducing evidence that other infants in the defendant's care had suspicious injuries, it was error for the trial court to prohibit the evidence as impermissible character evidence under MRE 404(b). *People v Martzke (On Remand)*, 251 Mich App 282, 292 (2002).

Where the defendant was charged with second-degree murder, operating under the influence of intoxicating liquor or a controlled substance causing death, and operating with a suspended license causing death, the defendant's offer to stipulate that she had a suspended license did not render the prior acts evidence inadmissible under *Old Chief v United States*, 519 US 172 (1997).[47] *People v Bergman*, 312 Mich App 471, 495-496 (2015) (holding that "the trial court did not abuse its discretion by admitting" the prior acts evidence because the "defendant's offer to stipulate that she had a suspended

[46] See Section 2.2(C) for a discussion of the MRE 403 balancing test.

license, while being conclusive of a necessary element for that offense, would not have been conclusive of or a sufficient substitute for the malice element of second-degree murder, for which the evidence was offered").

B. Certain Offenses Against Minors–§ 768.27a

"Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a.

"[T]he language in MCL 768.27a allowing admission of another listed offense 'for its bearing on any matter to which it is relevant' permits the use of evidence to show a defendant's character and propensity to commit the charged crime, precisely that which MRE 404(b) precludes." *People v Watkins (Watkins II)*, 491 Mich 450, 470 (2012). Because MCL 768.27a "'does not principally regulate the operation or administration of the courts,'" it is a substantive rule of evidence and prevails over MRE 404(b). *People v Watkins (Watkins I)*, 277 Mich App 358, 363-364 (2008), aff'd 491 Mich 450 (2012), quoting *People v Pattison*, 276 Mich App 613, 619 (2007). "MCL 768.27a does not run afoul of [separation-of-powers principles], and in cases in which the statute applies, it supersedes MRE 404(b)." *Watkins II*, 491 Mich at 476-477.

"[W]hile MCL 768.27a prevails over MRE 404(b) as to evidence that falls within the statute's scope, the statute does not mandate the admission of all such evidence, but rather 'the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the [non-MRE 404(b)] rules of evidence,' including MRE 403 and the 'other ordinary rules of evidence, such as those pertaining to hearsay and privilege[.]'" *People v Uribe*, 499 Mich 921, 922 (2016), quoting *Watkins II*, 491 Mich at 484-485. While evidence admissible under MCL 768.27a remains subject to MRE 403, "courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Watkins II*, 491 Mich at 496.

[47] "In *Old Chief*, the United States Supreme Court held that the trial court abused its discretion in rejecting the defendant's offer to stipulate that he had a prior felony conviction, a necessary element of the charged offense of felon in possession of a firearm." *People v Bergman*, 312 Mich App 471, 494 (2015). The *Old Chief* Court explained that "'evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant,' and that the defendant's admission of a prior conviction was not only sufficient to prove that element of the charged offense, but also was 'seemingly conclusive evidence of the element.'" *Bergman*, 312 Mich App at 494-495, quoting *Old Chief*, 519 US at 185-186.

When deciding whether MRE 403 requires exclusion of other-acts evidence admissible under MCL 768.27a, a court's considerations may include:

> "(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony." *Watkins II*, 491 Mich at 487-488. See also *Uribe*, 499 Mich at 922.

"There is no indication from *Watkins* that these factors *must* be discussed on the record." *People v Hoskins*, 342 Mich App 194, 203 (2022) (noting, however, that "the trial court cited *Watkins* on the record, stated that it had considered the *Watkins* factors, and referenced a number of these factors in support of its decision to deny [defendant's] motion" to exclude evidence; defendant "failed to persuasively show that the trial court's analysis was legally deficient" where the "trial court also cited MRE 403 and discussed its application to evidence admissible under ML 768.27a").

A court may also "consider whether charges were filed or a conviction rendered when weighing the evidence under MRE 403." *Watkins II*, 491 Mich at 489.

"The list of considerations in *Watkins* provides a tool to facilitate, not a standard to supplant, [the] proper MRE 403 analysis, and it remains the court's 'responsibility' to carry out such an analysis in determining whether to exclude MCL 768.27a evidence under that rule." *Uribe*, 499 Mich at 922 (quotation marks and citation omitted). The trial court abused its discretion by excluding MCL 768.27a evidence where it failed to conduct an MRE 403 analysis and instead focused only on the considerations listed in *Watkins II*. *Uribe*, 499 Mich at 922. "In ruling the proposed testimony inadmissible under MRE 403, the trial court, citing the illustrative list of considerations in *Watkins*, expressed concern regarding apparent inconsistencies between the proposed testimony and prior statements made by the witness, and certain dissimilarities between the other act and the charged offenses," but "failed to explain . . . how or why these concerns were sufficient . . . to render the 'probative value [of the proposed testimony] . . . 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,' as required for exclusion under MRE 403." *Uribe*, 499 Mich at 922 (quotation marks and citation omitted).

MCL 768.27a "is applicable in juvenile-delinquency trials" because the statute "embodies substantive policy considerations regarding criminal law, and there is no provision in the juvenile code or juvenile court rules that conflicts with or parallels MCL 768.27a." *In re Kerr*, 323 Mich App 407, 414-415 (2018) (citation omitted) (holding that the trial court erred by concluding that MCL 768.27a did not apply to juvenile-delinquency trials, the Court "vacate[d] the trial court's order excluding the other-acts evidence and direct[ed] the trial court to make its MRE 403 determination in accordance with the principles set forth in *Watkins*, 491 Mich at 486-490"). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 9, for information on the rules of evidence and standard of proof applicable in a delinquency trial.

In *People v Pattison*, 276 Mich App 613, 619 (2007), the Court found that MCL 768.27a did not violate the Ex Post Facto Clause because admission of propensity evidence occurring before the statute's effective date "[did] not lower the quantum of proof or value of the evidence needed to convict a defendant."

In order to conform to the Legislature's intent in enacting MCL 768.27a "to extend safeguards for the protection of children against sexual predators," the statute should be used as a rule of inclusion, not exclusion. *People v Smith*, 282 Mich App 191, 205 (2009). Although it is unnecessary to consider MCL 768.27a when evidence is deemed admissible under MCL 768.27 or MRE 404(b), "the proper analysis chronologically is to begin with MCL 768.27a when addressing other-acts evidence that can be categorized as involving a sexual offense against a minor and make a determination whether 'listed offenses' are at issue relative to the crime charged and the acts sought to be admitted." *Smith*, 282 Mich App at 205. In examining the admissibility of an offense committed against a minor, the *Smith* Court offered the following guidance:

> "Where listed offenses are at issue, the analysis begins and ends with MCL 768.27a. If listed offenses are not at issue, even where an uncharged offense may genuinely constitute an offense committed against a minor that was sexual in nature, MCL 768.27a is not implicated, but this is not to say that evidence of the offense is inadmissible. We do not construe MCL 768.27a as suggesting that evidence of an uncharged sexual offense committed against a minor is inadmissible if the offense does not constitute a listed offense. Rather, the analysis simply turns to MRE 404(b) to decipher admissibility. Only where the evidence does not fall under the umbrella of MCL 768.27a, nor is otherwise admissible

under MRE 404(b), should the court exclude the evidence." *Smith*, 282 Mich App at 205-206.

See M Crim JI 20.28a for an instruction on Evidence of Other Acts of Child Sexual Abuse.

1. Notice Requirement

MCL 768.27a requires the prosecuting attorney to disclose evidence admissible under the statute to the defendant "at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered."

2. Examples of Application

Evidence that the defendant previously committed the crime of attempted CSC-I against another minor was deemed admissible for any relevant reason under MCL 768.27a at the defendant's subsequent trial for criminal sexual conduct with two other minors. *People v Mann*, 288 Mich App 114, 118 (2010). In *Mann*, "[t]he challenged evidence was relevant because it tended to show that it was more probable than not that the two minors in [the current] case were telling the truth when they indicated that [the defendant] had committed CSC offenses against them." *Id*. In addition, the evidence tended to make the likelihood of the defendant's behavior in the current case more probable. *Id*. Finally, "the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice" because whether the victims were telling the truth was significantly probative of whether the defendant should be convicted. *Id*.

In *People v Buie (On Remand)*, 298 Mich App 50, 72-73 (2012), the defendant was charged with first-degree criminal sexual conduct and had previously been convicted of sexually assaulting a 13-year-old. The testimony of the previous victim indicated that the manner in which the sexual assaults occurred in both instances was similar, the subject crimes occurred within three years of each other, and the evidence of each crime was supported by DNA evidence establishing that the defendant was the offender. *Id*. at 73. The Court noted that "[a]lthough the evidence was highly prejudicial, it was also highly probative of defendant's propensity for sexually assaulting young girls." *Id*. Accordingly, the defendant failed to "demonstrate[] that the probative value of the evidence was substantially outweighed by the danger of undue prejudice,"

and "[t]he trial court did not abuse its discretion by admitting [the] evidence under MCL 768.27a." *Buie (On Remand)*, 298 Mich App at 73.

Where the defendant was on trial for various counts of criminal sexual conduct against a child who was almost 8 years old, the trial court did not abuse its discretion by admitting evidence under MCL 768.27a that the defendant allegedly assaulted his 13-year-old stepdaughter a few months earlier and was convicted in Arizona of child molestation against a different child after the abuse in this case occurred. *People v Duenaz*, 306 Mich App 85, 98, 100 (2014). "[T]he trial court applied the proper standard by asking whether the evidence was more prejudicial than probative." *Id*. Specifically, "the trial court correctly found that these [other-acts against the defendant's stepdaughter] were similar to the present crimes" where the defendant's assault on his stepdaughter was similar to the crime for which he was on trial because both crimes involved anal and vaginal penetration, the defendant threatened both victims with harm to their families if they discussed the assault, the age difference was not material, and less than six months elapsed between the two crimes. *Id*. at 100. "The evidence of the similar assault against the other victim was very probative and important to the prosecution's case, especially because defendant was able to claim a lack of physical evidence," and "the passage of time had faded the victim's memory regarding some details." *Id*. The evidence was also "relevant because it tended to show that it was more probable than not that the minors were telling the truth." *Id*. The evidence of defendant's previous conviction was also properly admitted because although details of the offense were not disclosed, it was a conviction of a crime of the same general category (involving sex crimes against a child) that tended to make the victim's story more believable by showing propensity to commit the charged offense, and it was not "too far removed temporally from the instant offenses in Michigan." *Id*. at 101.

Where the defendant was on trial for first-degree criminal sexual conduct against his then 9-year-old son, the trial court did not abuse its discretion by admitting evidence under MCL 768.27a that the defendant inappropriately touched his nephew when his nephew was 9 years old and living with the defendant. *People v Solloway*, 316 Mich App 174, 191-192 (2016). The Court held that the other-acts evidence was relevant because evidence that the defendant previously assaulted a 9-year-old relative made it more probable that he committed the charged offense against his son, who was also related to the defendant and 9 years old. *Id*. at 193. Further, the evidence was

relevant to the victim's credibility because "[t]he fact that defendant committed a similar crime against his nephew made it more probable that [his son] was telling the truth." *Id.* Additionally, MRE 403 did not bar admission of the other-acts evidence where the six *Watkins* considerations favored admission. *Solloway*, 316 Mich App at 194-195. First, the other-acts and the charged crime were similar – the victims were the same age, defendant was related to both of them, the offenses occurred at a time when the victims were living with the defendant, and both offenses "involved defendant entering the victim's bedroom in the middle of the night, climbing on top of him, and engaging in some sort of inappropriate touching." *Id.* Second, the fact that the acts occurred 12 years apart did not bar admission under MRE 403 in light of the similarity of the acts. *Solloway*, 316 Mich App at 195. Third, the defendant's nephew testified that the inappropriate touching occurred multiple times; "[t]herefore, it cannot be said that the other acts occurred so infrequently to support exclusion of the evidence." *Id.* Fourth, there were no intervening acts that weighed against admissibility. *Id.* Fifth, the defendant did not challenge the credibility of the witness offering the other-acts evidence, and the witness's credibility was bolstered by the fact that the defendant pleaded guilty to CSC-IV with respect to his conduct against the witness. *Id.* at 195-196. Sixth, "because there were no eyewitnesses to corroborate [the victim's] testimony and to refute defendant's theories in regard to the physical evidence of the crime, there was a need for evidence beyond [the victim's] and defendant's testimony." *Id.* at 196.

"[E]vidence of acquitted conduct is not inadmissible as a matter of law when introduced as other-acts evidence in a subsequent trial for a different offense." *People v Hoskins*, 342 Mich App 194, 212 (2022). "MCL 768.27a does not, by its plain language, preclude the admission of other-acts evidence when the defendant was acquitted of charges involving those acts." *Hoskins*, 342 Mich App at 212."[A]s with other evidence offered under MCL 768.27a, the admissibility of evidence of a prior acquittal depends on the application of MRE 403." *Hoskins*, 342 Mich App at 212.

Applying MRE 403 to the facts of the case, the *Hoskins* Court held that "the trial courts ruling to allow the prosecution to introduce evidence of [the defendant's] acquitted acts was an abuse of discretion" because it "present[ed] a particularly unique risk of unfair prejudice" that "substantially outweigh[ed] the evidence's probative value." *Hoskins*, 342 Mich App at 212, 213. The Court observed that due process guarantees that an individual "who has been acquitted of a

crime" is "presumed innocent as to any acquitted conduct" and "prohibits a court from subjecting a defendant to an increased sentence based on acquitted conduct." *Id*. at 213. "A jury considering other-acts evidence of acquitted conduct will make its own independent determination of whether the defendant committed the acquitted acts, despite a previous jury's unanimous verdict finding that defendant not guilty." *Id*. at 213 ("other-acts evidence of acquitted conduct is unfairly prejudicial because the accused must again defend against allegations of which he has already been acquitted"). "Perhaps most importantly, the introduction of other-acts evidence also presents the danger that a jury will convict the defendant solely because it believes he committed other criminal conduct, a possibility that is particularly egregious when the defendant has been *acquitted* of these other acts." *Id*. at 214. Accordingly, the *Hoskins* Court held that "although the evidence of this acquitted conduct has some probative value — particularly to demonstrate [defendant's] propensity to commit the charged offenses — the danger of unfair prejudice from admitting this acquitted conduct is extremely high." *Id*. at 215 (concluding that the trial court abused its discretion by denying the motion to exclude evidence of defendant's acquitted conduct from a prior trial for a different offense).

In *People v Beck*, ___ Mich ___, ___ (2022), the defendant's first trial in 2016 on two counts of CSC-II "for allegedly rubbing his underage daughter TG's genitals and chest through her clothing while he was alone with her" was declared a mistrial. "In 2017, while awaiting retrial on the original charges, defendant was accused of sexually penetrating one of his son's friends, CS, who was a minor." *Id*. As a result, Defendant was "charged with two counts of CSC-I and one count of CSC-II." *Id*. at ___. Subsequently, the 2016 charges and 2017 charges "were jointly tried in a second trial" and "the jury found defendant guilty of all counts." *Id*. at ___. On appeal, the Michigan Supreme Court vacated the defendant's convictions resulting from the 2016 charges because "the trial court's inquiry was insufficient to find manifest necessity [to declare a mistrial], and therefore, retrial on the 2016 charges violated the Double Jeopardy Clauses of the federal and state Constitutions." *Id*. at ___.

However, the Court rejected the defendant's argument that he was "entitled to a new trial for the 2017 charges because his convictions on those counts were tainted by the admission of evidence during the joint trial relating to the 2016 charges[.]" *Beck*, ___ Mich at ___. The *Beck* Court noted that "[w]hile the evidence was admitted at the joint trial, the issue is whether

the trial court would have abused its discretion if it had admitted this same evidence in a trial limited only to the 2017 charges." *Id*. at ___. Accordingly, the Court considered "whether the testimony of defendant's daughters and ex-wife would have been inadmissible propensity evidence if the charges had been tried separately." *Id*. at ___.

When a defendant is charged with committing a listed offense against a minor, MCL 768.27a allows for the admission of evidence "for its bearing on any matter to which it is relevant" that the defendant committed *another* listed offense against a minor. *Beck*, ___ Mich at ___. The victim of the 2016 charges against the defendant and the victim of the 2017 charges testified at the defendant's retrial. *Id*. at ___. Further, although the defendant objected, the court permitted the defendant's ex-wife and three of his other daughters to testify about their experiences with the defendant. *Id*. at ___. The evidence was relevant to the charges in the 2017 retrial, but the Court had also to examine the evidence as indicated by MRE 403. *Beck*, ___ Mich at ___. The Court analyzed the evidence under MRE 403 as instructed by the Court in *People v Watkins (Watkins III)*, 491 Mich 450 (2012). *Beck*, ___ Mich at ___. Admission of the other-acts evidence under *Watkins III* required the Court to consider the dissimilarity, temporal proximity, frequency of the intervening acts, reliability of evidence in support of the other acts, and whether there was a need for evidence other than the testimony of the defendant and a complainant. *Id*. at ___. Under MCL 768.27a, and after the probative/prejudicial test of MRE 403, the Court concluded that evidence of the defendant's conduct related to the 2016 charges and the testimony of other witnesses about the defendant's conduct with them was properly admitted to show the defendant's propensity to commit listed offenses against a minor. *Beck*, ___ Mich at ___. As a result, the convictions arising from the 2017 charges were valid. *Id*. at ___.

C. Domestic Violence or Sexual Assault–§ 768.27b

MCL 768.27b governs the admissibility of evidence of other acts of domestic violence or sexual assault during a criminal evidentiary hearing or trial in which the defendant is charged with an offense involving domestic violence or sexual assault. MCL 768.27b "does not limit or preclude the admission or consideration of evidence under any other statute, including, but not limited to, under [MCL 768.27a], rule of evidence, or case law." MCL 768.27b(3). The plain language of MCL 768.27b allows the court to consider evidence admitted under any other rule of evidence, including rules not specifically mentioned in MCL 768.27b. *People v Propp*, 508 Mich 374,

385-386 (2021).[48] Accordingly, MCL 768.27b does not prevent the court from precluding evidence of other acts of domestic violence or sexual assault under MRE 802 as inadmissible hearsay. *Propp*, 508 Mich at 385-386.

"[P]rior-bad-acts evidence of domestic violence can be admitted at trial because 'a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed.'" *People v Cameron*, 291 Mich App 599, 610 (2011), quoting *People v Pattison*, 276 Mich App 613, 620 (2007) (alteration in original).[49]

MCL 768.27b states in part:

> "(1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of 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 [MRE] 403.
>
> * * *
>
> (4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section unless the court determines that 1 or more of the following apply:
>
> (a) The act was a sexual assault that was reported to law enforcement within 5 years of the date of the sexual assault.
>
> (b) The act was a sexual assault and a sexual assault evidence kit was collected.
>
> (c) The act was a sexual assault and the testing of evidence connected to the assault resulted in a DNA identification profile that is associated with the defendant.

[48] In *Propp*, 508 Mich at 385, the Michigan Supreme Court held that the Michigan Court of Appeals erred by relying on *People v Watkins*, 491 Mich 450, 456, 466, 481-486 (2012), which discussed MCL 768.27a, to interpret MCL 768.27b, "because there is no equivalent to MCL 768.27b(3) in MCL 768.27a, [so] any reliance on *Watkins*'s interpretation of MCL 768.27a is ultimately irrelevant to the meaning of MCL 768.27b."

[49] Effective March 17, 2019, 2018 PA 372 amended MCL 768.27b to include offenses involving sexual assault.

> (d) Admitting the evidence is in the interest of justice."

Although MCL 768.27b "does not define 'interest of justice,'" "the exception should be narrowly construed." *People v Rosa*, 322 Mich App 726, 733-734 (2018). Rather, "evidence of prior acts that occurred more than 10 years before the charged offense is admissible under the [interest of justice exception in] MCL 768.27b only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence." *Rosa*, 322 Mich App at 734 (concluding that testimony about abuse that occurred at least 16 years before the charged crimes was not uniquely probative or needed to assure that the jury was not misled because it was "consistent with and cumulative to [the current victim's] testimony regarding defendant's character and propensity for violence").[50]

The Michigan Court of Appeals extended to MCL 768.27b the holding in *Pattison*, 276 Mich App at 558, that MCL 768.27a does not constitute an ex post facto law. *People v Schultz*, 278 Mich App 776, 778-779 (2008). In rejecting the defendant's ex post facto argument, the Court stated:

> "[MCL 768.27b] does not permit conviction on less evidence or evidence of a lesser quality. As with the sister statute [(MCL 768.27a)] analyzed in *Pattison*, MCL 768.27b did not change the burden of proof necessary to establish the crime, ease the presumption of innocence, or downgrade the type of evidence necessary to support a conviction. Therefore, the statute affects only the admissibility of a type of evidence, and its enactment did not turn otherwise innocent behavior into a criminal act." *Schultz*, 278 Mich App at 778-779 (internal citations omitted).

In addition, MCL 768.27b does not violate the separation of powers doctrine. *Schultz*, 278 Mich App at 779. The Court responded to the defendant's separation of powers argument by emphasizing that the Legislature's passage of MCL 768.27b was a reaction to the judicially created standards in MRE 404(b). *Schultz*, 278 Mich App at 779. The Court stated that "[MCL 768.27b] is a substantive rule engendered by a policy choice, and it does not interfere with our Supreme Court's constitutional authority to make rules that govern the administration of the judiciary and its process." *Schultz*, 278 Mich App at 779. Further, "MCL 768.27b does not infringe on [the

[50]Note that effective March 17, 2019, MCL 768.27b was amended to expand the admission of prior acts occurring more than 10 years before the charged offense to include certain sexual assaults (in addition to still allowing admission of prior acts "in the interest of justice"). See 2018 PA 372. *Rosa* was decided before this statutory amendment.

Michigan Supreme] Court's authority to establish rules of 'practice and procedure' under Const 1963, art 6, § 5." *People v Mack*, 493 Mich 1, 3 (2012).

See M Crim JI 4.11a for an instruction on Evidence of Other Acts of Domestic Violence.[51]

1. Notice Requirement

MCL 768.27b requires the prosecuting attorney to disclose evidence admissible under this statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown." MCL 768.27b(2).

"[A]lthough failure to provide notice [under MCL 768.27b(2)] constitutes plain error, it may be deemed harmless and therefore not grounds for reversal." *People v Lowrey*, 342 Mich App 99, 117 (2022). In *Lowrey*, the defendant argued "that the trial court erred by admitting evidence of prior domestic and sexual abuse between himself and the victim because of lack of notice." *Id*. at 115. However, "defendant fail[ed] to articulate *how* he would have proceeded differently" or provide "any offer of proof to the effect that the victim's testimony was untrue." *Id*. at 118. Although "it was plain error for [evidence of prior abuse] to be admitted without providing proper notice," the *Lowrey* Court determined that the evidence was relevant and "the probative value of this evidence was [not] *substantially* outweighed by the danger of unfair prejudice." *Id*. at 118, 119. Because defendant was unable to "demonstrate that any error was outcome-determinative," the Court of Appeals concluded that he was "not entitled to relief."*Id*. at 119.

2. Test for Admission

MCL 768.27b allows for admission of prior acts of domestic violence or sexual assault evidence at trial "as long as the evidence satisfies the 'more probative than prejudicial' balancing test of MRE 403[.]" *People v Cameron*, 291 Mich App 599, 610 (2011).[52] To make this determination, the court must first decide whether introduction of the evidence would be

[51] A similar jury instruction has not been adopted to instruct on evidence of other acts of sexual assault following the amendment of MCL 768.27b to include offenses involving sexual assault. See 2018 PA 372, effective March 17, 2019.

unfairly prejudicial, then "weigh the probativeness or relevance of the evidence against the unfair prejudice." *Id.* at 611 (quotation marks and citation omitted). Relevant evidence of domestic violence or sexual assault acts that satisfies this standard must be admitted by the trial court. See *People v Daniels*, 311 Mich App 257, 274 (2015)[53] (holding that in the defendant's trial for molesting and abusing two of his children, "MCL 768.27b *required* the trial court to admit" the testimony of his other children "regarding the physical violence defendant committed against them," because "(1) it [was] relevant; (2) it describe[d] acts of 'domestic violence' under [MCL 768.27b(6)(a)[54]]; and (3) its probative value [was] not outweighed by the risk of unfair prejudice under MRE 403"; the testimony was "highly probative because it demonstrate[d] defendant's violent and aggressive tendencies, as well as his repeated history of committing physical abuse of all his children—not just [the named victims in the case]").

In *Cameron*, 291 Mich App at 605, the trial court admitted evidence of the defendant's prior abusive conduct towards the victim and another ex-girlfriend. Under the first inquiry, the Court found that the admitted evidence "did not stir such passion as to divert the jury from rational consideration of [the defendant's] guilt or innocence of the charged offenses," and that "the trial court minimized the prejudicial effect of the bad-acts evidence by instructing the jury that the issue in the case was whether [the defendant] committed the charged offense." *Id.* at 611-612. Under the second inquiry, the Court found that the evidence was relevant (1) to establish the victim's credibility, (2) to show that the defendant acted violently toward the victim and that his actions were not accidental, and (3) to show the defendant's propensity to commit acts of violence against women who were, or had been romantically involved with him. *Id.* at 612. The Court concluded that "[the defendant's] prior bad acts were relevant to the prosecutor's domestic violence charge under MCL 768.27b," and that "[a]ny prejudicial effect of admitting the bad-acts evidence did not substantially outweigh the probative value of the evidence[.]" *Cameron*, 291 Mich App at 612. Accordingly, "the trial court did not abuse its discretion when it allowed [the defendant's] prior-bad-acts evidence to be introduced under MCL 768.27b." *Cameron*, 291 Mich App at 612. See also *People v Meissner*, 294

[52]Effective March 17, 2019, 2018 PA 372 amended MCL 768.27b to include offenses involving sexual assault.

[53] Effective March 17, 2019, 2018 PA 372 amended MCL 768.27b to include offenses involving sexual assault.

[54]Formerly MCL 768.27b(5)(a). See 2018 PA 372.

Mich App 438, 452 (2011) (although different from the charged offense, the defendant's "prior acts of domestic violence illustrated the nature of defendant's relationship with [the victim] and provided information to assist the jury in assessing her credibility").

In *People v Pattison*, 276 Mich App 613, 615 (2007), the defendant was charged with four counts of first-degree criminal sexual conduct (CSC-I) for the alleged sexual abuse of his minor daughter that occurred repeatedly over two years while she lived with him. The Court of Appeals relied on MCL 768.27b[55] in determining that the prosecutor could introduce evidence of the defendant's other alleged sexual assaults against his ex-fiancee. *Pattison*, 276 Mich App at 615-616. The Court concluded that evidence of CSC-I against the defendant's ex-fiancee was admissible under MCL 768.27b because the evidence was "probative of whether he used those same tactics to gain sexual favors from his daughter." *Pattison*, 276 Mich App at 616. Having found the evidence admissible under MCL 768.27b, the Court did not review the evidence's admissibility under MRE 404(b). *Pattison*, 276 Mich App at 616.

Where the proposed testimony of a defendant's previous acts of domestic violence is highly relevant to the defendant's tendency to commit the crime at issue, it may be admissible under MCL 768.27b. *People v Railer*, 288 Mich App 213, 220-221 (2010). In *Railer*, the prosecution was permitted to call the defendant's former girlfriends to testify about the defendant's threats and physical abuse during their respective relationships with him. *Id.* at 220. The Court concluded that their testimony described "behavior [that] clearly meets the definition of 'domestic violence' under [MCL 768.27b], [behavior that] occurred within 10 years of the charged offense as required by MCL 768.27b(4), and [behavior that] would be highly relevant to show defendant's tendency to assault [the victim] as charged." *Railer*, 288 Mich App at 220.

[55] MCL 768.27b permits trial courts to "admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *Pattison*, 276 Mich App at 615. Note that *Pattison* was decided before MCL 768.27b was amended to include offenses involving sexual assault. See 2018 PA 372, effective March 17, 2019.

2.5 Habit or Routine Practice

A. Rule

"Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness." MRE 406.

B. Requirements

Evidence of habit or routine practice must demonstrate a pattern, show that something was done routinely, or that the action was executed innumerable times. *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 256 (1982). The testifying witness must have known about the routine procedure prior to testifying and must understand the steps involved in the practice. *Id*.

Evidence of the victim's lifelong fear of the dark, including the fact that she routinely avoided being alone in the dark, was admissible to rebut the defendant's claims that the victim's death occurred after he left her alone in the dark at their boathouse deck. *People v Unger*, 278 Mich App 210, 227 (2008). The Court stated that "a rational jury could have concluded that the victim would not have voluntarily stayed on the boathouse deck alone after dark and that defendant had therefore fabricated his account of the events leading up to the victim's death." *Id*.

2.6 Prior Accidents

Evidence of prior accidents is admissible to show a defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, as well as to show that a defect or dangerous condition in fact existed.[56] *Gregory v Cincinnati, Inc*, 202 Mich App 474, 479 (1993). "The requisite foundation for such admissibility is a showing of similarity of conditions and reasonable proximity in time." *Maerz v US Steel Corp*, 116 Mich App 710, 723 (1982).

2.7 Subsequent Remedial Measures

"When measures are taken that would have made an event less likely to occur, evidence of subsequent measures is not admissible to prove

[56] See Section 5.4 on negative evidence.

negligence or culpable conduct in connection with the event." MRE 407. "But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures." *Id.*

"The purpose of MRE 407 is to encourage, or at least not to discourage, people from taking steps in furtherance of added safety." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 189 (1999). However, evidence of subsequent repairs may be admissible if the following criteria are met:

> "(1) evidence of subsequent remedial action is otherwise relevant, (2) admission of the evidence would not offend policy considerations favoring encouragement of repairs, and (3) the remedial action is not undertaken at the direction of a party plaintiff so that it does not constitute a self-serving, out-of-court declaration by that party." *Denolf v Frank L Jursik Co*, 395 Mich 661, 669-670 (1976).[57]

In *Denolf*, after the plaintiff sustained injuries, a safety guard was installed on the truck lift that had injured the plaintiff's hand. *Denolf*, 395 Mich at 666. The jury was allowed to view the truck, and photos of the truck, with the altered lift. *Id.* The Court stated that MRE 407 "is primarily grounded in the policy that owners would be discouraged from attempting repairs that might prevent future injury if they feared that evidence of such acts could be introduced against them." *Denolf*, 395 Mich at 667. However, the Court concluded the exclusion was inapplicable in the case because "evidence of subsequent repairs was not introduced for the purpose of establishing the negligence of [defendant], which undertook the remedial action, nor did it prejudice [defendant] in any way. *Id.* at 669. The exclusionary rule "is confined to the context where (1) evidence of subsequent remedial action is otherwise relevant, (2) admission of the evidence would not offend policy considerations favoring encouragement of repairs, and (3) the remedial action is not undertaken at the direction of a party plaintiff so that it does not constitute a self-serving, out-of-court declaration by that party." *Id.* at 669-670.

In *Ellsworth*, plaintiff sought "to impeach defendant's witness with evidence that defendant renovated [its] sidewalks after plaintiff's fall. *Ellsworth*, 236 Mich App at 187. "[E]vidence of a subsequent remedial measure is admissible as impeachment when the opposing party has denied making a repair," and the impeachment evidence "may be either direct or circumstantial." *Id.* at 189. An objection to the impeachment evidence is not a prerequisite to admission of the evidence. *Id.* at 190 (holding the trial court erred in concluding plaintiff was required to

[57] *Denolf* was decided prior to the 1978 adoption of the Michigan Rules of Evidence, but the Court considered a rule similar in substance to MRE 407.

object to the evidence). *Ellsworth* involved an "extensive renovation project, [where] defendant replaced three thousand feet of sidewalk, which necessarily included the area where plaintiff fell," at least 7 months after plaintiff's accident. *Id.* "This was not a 'subsequent remedial repair' as described in MRE 407. The construction was too remote in time from plaintiff's accident and covered too large a territory to be considered a 'repair' to the accident site." *Ellsworth*, 236 Mich App at 190. "There was no evidence to suggest that this large-scale construction project was prompted by or otherwise related to plaintiff's fall;" thus, it was "not the sort of 'repair that may be used to impeach testimony that no repair was made after the plaintiff's accident." *Id.*

2.8 Settlements and Settlement Negotiations

"Evidence of the following is not admissible to either prove or disprove the liability for or the validity or amount of a disputed claim: (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations." MRE 408(a). "If this evidence is otherwise discoverable, it need not be excluded merely because it is presented during compromise negotiations. And it need not be excluded if admitted for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." MRE 408(b).

Defense counsel's "comment that 'the hospital's been dismissed' did not violate MRE 408" because the "observation that [the hospital] had been dismissed was accurate and, on its face, was not a statement about the existence or terms of a settlement–the hospital could have been 'dismissed' by stipulation or through summary disposition—or about any conduct related to the settlement. For the same reasons, the statement did not violate the trial court's prohibition in the settlement order against 'disclosure of the terms of the settlement to any person other than the parties, their attorneys, and appropriate court officials.'" *Carlsen Estate v Southwestern Mich Emergency Servs, PC*, 338 Mich App 678, 695 (2021) (noting "[t]here [was] simply . . . no merit to plaintiffs' allegation that the hospital's comment violated either MRE 408 or the trial court's order").

"Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried"; that privilege extends to statements made during the course of settlement negotiations where the statement is made after the commencement of and in context of the present litigation. *Oesterle v Wallace*, 272 Mich App 260, 264, 268 (2006).[58]

Although not expressly addressed by MRE 408, evidence of a settlement made by a party with a nonparty is inadmissible to prove liability. *Windemuller Electric Co v Blodgett Mem Med Ctr*, 130 Mich App 17, 23 (1983). In *Windemuller*, the Court found that admitting evidence of a settlement between the plaintiff and a third party constituted prejudicial error where the evidence went to a substantive issue in the case (the plaintiff's liability). *Id.* at 24. However, where a defendant-insurance agency "was not a party to the settlement or any part of the settlement process and was involved only to the extent of giving its approval pursuant to plaintiffs' policy, which explicitly excluded . . . coverage 'to any person who settles a bodily injury claim without [defendant's] written consent,'" evidence of its consent is not barred by MRE 408. *Chouman v Home-Owners Ins Co*, 293 Mich App 434, 439 (2011) (alteration in original; finding that the defendant's consent "was [not], itself, a compromise of a dispute defendant had with any party or nonparty" and thus, was not subject to exclusion under MRE 408[59]).

MRE 408 is not limited to precluding evidence of settlements and settlement negotiations only in the present litigation; it can also act to preclude such evidence from other cases when the evidence is relevant to the present litigation. See *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 621 (2010) ("the trial court incorrectly determined that MRE 408 lacks applicability to settlements 'in another case,' because the rule plainly does not take into account a 'prior action' exception").

2.9 Medical Expenses

"Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury." MRE 409.

2.10 Plea Discussions

"In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

> (1) a guilty plea that was later withdrawn or vacated;
>
> (2) a nolo contendere plea — except that, to the extent that evidence of a guilty plea would be admissible, evidence of a nolo contendere plea to a criminal charge may be admitted in

[58] See Section 1.9 for additional information on privilege.

[59] Ultimately, the *Chouman* Court concluded that this evidence was inadmissible under MRE 401 and MRE 403. *Chouman*, 293 Mich App at 439-440.

> a civil proceeding to defend against a claim asserted by the person who entered the plea;
>
> (3) a statement made during a proceeding on either of those pleas under MCR 6.302 or MCR 6.310, a comparable state procedure, or Fed R Crim P 11; or
>
> (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn or vacated guilty plea." MRE 410(a).

However, the court may admit a statement described in MRE 410(a)(3) or MRE 410(a)(4) "(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together" or "(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present." MRE 410(b).

A defendant may waive the protections provided by MRE 410, "as long as they are appropriately advised and as long as the statements admitted into evidence are voluntarily, knowingly, and understandingly made." *People v Stevens*, 461 Mich 655, 668-669 (2000). If a defendant injects the issue, he or she may not later claim reversible error based on the prosecutor's further questioning about the subject. *People v Knight*, 122 Mich App 584, 593 (1983).

Applicability. "MRE 410 applies when (1) the defendant has an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) that expectation is reasonable given the totality of the objective circumstances." *People v Smart*, 304 Mich App 244, 249 (2014) (quotation marks and citation omitted). "[MRE 410(a)(4)[60]] does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority. It only requires that the defendant's statement be made ['during plea discussions'] with [the] prosecuting attorney." *People v Smart*, 497 Mich 950 (2015) (overruling the statement in *People v Hannold*, 217 Mich App 382, 391 (1996), that an attorney for the prosecutor must be present). "Under such circumstances, it is helpful to examine whether the discussions with other persons occurred at the direction of a lawyer for the prosecuting authority." *People v Cowhy*, 330 Mich App 452, 463 (2019).

Waiver. While MRE 410(a)(1) "protects a defendant who pleads guilty but later decides to withdraw that guilty plea," this protection "can be

[60]The provision previously found in MRE 410(1) now appears in MRE 410(a)(1). See ADM File No. 2021-10, effective January 1, 2024.

waived." *People v Gash*, ___ Mich App ___, ___ (2024). In *Gash*, "[d]efendant signed a special consideration agreement with the prosecution in which he agreed to plead guilty in exchange for a lesser sentence." *Id.* at ___. "Under the language of the agreement, defendant consented to statements he made during his guilty plea being used against him in future proceedings, unequivocally waiving the protections afforded to him by MRE 410(a)(1)." *Gash*, ___ Mich App at ___. Accordingly, "after defendant withdrew his guilty plea and proceeded to trial, MRE 410(a)(1) no longer constrained the prosecution from bringing up defendant's guilty plea during trial." *Gash*, ___ Mich App at ___ (holding that "[i]t was thus reasonable for defense counsel to address defendant's guilty plea before the prosecution could" because it "allowed the defense to get ahead of the issue").

Statements made to social worker. Incriminating statements that the defendant made to a social worker in anticipation of sentencing, subsequent to entering a plea but prior to withdrawing it, were not subject to MRE 410 because defendant "did not have a subjective expectation to negotiate a plea, and even if he did, his expectation was not reasonable under the totality of the circumstances" because "the plea agreement had already been entered and [defendant] had pleaded guilty pursuant to it." *Cowhy*, 330 Mich App at 465-466 (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"; although not barred from admission under MRE 410, the Court held that the statements were protected by the psychologist-patient privilege[61]).

Statements made at sentencing. Inculpatory statements made by the defendant at sentencing and in a presentence-investigation report after entering a plea but prior to withdrawing it were not subject to MRE 410. *People v Erickson*, 339 Mich App 309, 319 (2021). There was no indication that the defendant believed that he was actively negotiating a plea agreement at the time the statements were made because the plea agreement had already been finalized and he offered the statements to request leniency in sentencing. *Id* at 319. "[E]ven if defendant did believe he was still negotiating the plea, that belief was not objectively reasonable given the totality of the circumstances . . . [because] the terms of the plea agreement were set forth at the plea hearing, and the court made very clear to defendant that the plea did not, in fact, encompass sentencing." *Id.* at 319-320.

Affidavit to withdraw plea. Where the record did not support under the totality of the circumstances that the defendant had a subjective

[61] "The psychologist-patient privilege [MCL 333.18237] also extends to social workers." *Cowhy*, 330 Mich App at 468 n 7. See Section 1.9 for information on privilege.

expectation to negotiate a plea when he "submitted his affidavit [containing inculpatory statements] in support of *withdrawing* his guilty plea," he was not engaged in plea discussions "with a lawyer for the prosecuting authority" and thus, his inculpatory statements were not precluded by MRE 410. *Cowhy*, 330 Mich App at 466; MRE 410(a)(4).[62]

Statements made to defendant's attorney. The defendant's inculpatory statements made to his attorney before he entered into a plea agreement "were used to inform [the attorney's] advice to [the defendant] regarding the plea." *Cowhy*, 330 Mich App at 467. Therefore, the statements were not protected by MRE 410 because they "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" and "there [was] nothing in the record to suggest that when [defendant] made the statements he had a subjective expectation to negotiate a plea with the prosecuting authority or that such an expectation would be reasonable under the totality of the circumstances." *Cowhy*, 330 Mich App at 467 (although defendant's statements to his attorney were not barred from admission under MRE 410, the Court held that they were protected by the attorney-client privilege[63]).

2.11 Statements Made to Individual or Individual's Family Involved in Medical Malpractice Actions

"A statement, writing, or action that expresses sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual and that is made to that individual or to the individual's family is inadmissible as evidence of an admission of liability in an action for medical malpractice." MCL 600.2155. MCL 600.2155 does not apply to "statement[s] of fault, negligence, or culpable conduct that [are] part of or made in addition to a statement, writing, or action described in [MCL 600.2155(1).]" MCL 600.2155(2).

2.12 Insurance Coverage

"Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if controverted — proving agency, ownership, or control." MRE 411. See also MCL 500.3030, which precludes reference to the insurer or the question of

[62]The provision previously found in MRE 410(4) now appears in MRE 410(a)(4). See ADM File No. 2021-10, effective January 1, 2024.

[63]See Section 1.9 for information on privilege.

carrying insurance during the course of a trial, except as otherwise provided by law.

"It has been repeatedly held that it is reversible error to intentionally interject the subject of insurance if the sole purpose is to inflame the passions of the jury so as to increase the size of the verdict. On the other hand, it is not reversible error if the subject is only incidentally brought into the trial, is only casually mentioned, or is used in good faith for purposes other than to inflame the passions of the jury." *Cacavas v Bennett*, 37 Mich App 599, 604 (1972) (internal citations omitted).

"References to the insurance coverage of either party during voir dire is presumptively improper. However, this presumption may be rebutted and any error regarded as harmless." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 411 (1994) (internal citations omitted), abrogated on other grounds *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004).[64] Offending counsel must overcome, "by a persuasive showing, a presumption that his remarks were prejudicially improper." *Kokinakes v British Leyland, Ltd*, 124 Mich App 650, 652-653 (1983).

Committee Tip:

MRE 407–MRE 411 serve societal policy goals easily gleaned from their text (e.g. society desires the repair of defective properties so a party may not be penalized, from an evidentiary proof standpoint, for having done so). But the protection in these rules is limited. Discerning the purpose for admission of these forms of evidence is crucial in determining to include or exclude the evidence. These rules—by no means—contain blanket prohibitions.

2.13 Polygraph

A. Admissibility of Polygraph Examination or Results at Trial

Evidence that a polygraph examination was taken or refused, or the results of a polygraph examination are not admissible in a criminal

[64]For more information on the precedential value of an opinion with negative subsequent history, see our note.

prosecution or a civil trial. *People v Barbara*, 400 Mich 352, 364 (1977); *People v Kahley*, 277 Mich App 182, 183 (2007).

The exclusion of polygraph evidence is based on the basic rationale that polygraphs have not gained the required degree of acceptance or standardization among scientists. *Barbara*, 400 Mich at 364.; *People v Ray*, 431 Mich 260, 265 (1988). Exclusion of polygraph results is also based "upon the judicial estimate that the trier of fact will give disproportionate weight to the results and consider the evidence as conclusive proof of guilt or innocence." *Ray*, 431 Mich at 265.

Notwithstanding this policy of exclusion, statements made by a defendant *before*, *during*, or *after* the administration of a polygraph examination are not excludable per se. *Ray*, 431 Mich at 268. "Current procedures designed to test the voluntariness of such statements are adequate to insure that a statement that is unreliable or obtained without a knowing and intelligent waiver of a defendant's rights will not be used at trial." *Id.*

The mere mention of a polygraph test may not require a mistrial. *People v Nash*, 244 Mich App 93, 98 (2000). The court should consider the following factors in determining whether mention of a polygraph is ground for a mistrial:

> "(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." *Nash*, 244 Mich App at 98 (quotation marks and citations omitted).

If evidence of a polygraph test is admitted or improper argument is made about it, the court should immediately instruct the jury to disregard the evidence and inform the jury of the unreliability of such tests. See *People v Ranes*, 63 Mich App 498, 501-502 (1975).

1. Mention of Polygraph Required Reversal

> When, during a bench trial, the prosecutor mentioned a defendant's polygraph examination, a copy of which was filed with the court, and the judge questioned the officer regarding the number of polygraph tests he had performed in the past, the conviction was reversed because the prosecutor's injection of the polygraph testing and results was unfairly prejudicial to the defendant's case, even though the trial court found it had not been influenced by this information. *People v Smith*, 211 Mich App 233, 234-235 (1995) (concluding that this was

unfairly prejudicial "because it provided supposedly scientific evidence of defendant's lack of credibility").

Referencing a key prosecution witness's polygraph during direct examination seriously affected the fairness of the trial and required a reversal. *People v Nash*, 244 Mich App 93, 95, 101 (2000) (defendant was prejudiced where "the reference to the polygraph test was brought out by the prosecutor, not as a matter of defense strategy, and . . . the key prosecution witness, who was involved in the crime and was the crucial witness against the defendant, gave a responsive answer to the prosecutor's question that was posed with the intent of bolstering the witness' credibility and was later repeated before the jury during deliberations"). *Id.*

2. Mention of Polygraph Did Not Require Reversal

"[R]eversible error does not exist where the polygraph reference is unsolicited, no mention is made of the results, and where the court gives a complete cautioning instruction." *People v Ranes*, 63 Mich App 498, 502 (1975). See Section 2.13(A) for information on cautionary instructions.

A witness's reference to conducting a "specialized interview" with the defendant was not considered improper or inadmissible because there was no specific reference to the fact that the interview was in fact a polygraph examination. *People v Triplett*, 163 Mich App 339, 342-344 (1987), remanded on other grounds 432 Mich 568 (1989).[65] In addition, another witness's testimony that was interrupted mid-sentence by the court before the witness could mention the polygraph results was neither improper nor inadmissible because there was no specific reference to the fact that the defendant had failed the polygraph examination. *Triplett*, 163 Mich App at 342-344 (furthermore, neither witness "deliberately attempted to inform the jury that defendant had failed his polygraph examination").

A police officer's testimony that the defendant refused to take a polygraph examination did not require reversal because the officer's reference was singular and brief; the prosecutor did not argue that the defendant's failure to take a polygraph examination was evidence of the defendant's guilt; the defendant himself testified that he asked to take a polygraph

[65]For more information on the precedential value of an opinion with negative subsequent history, see our note.

test but was never given one; and the defendant confessed to the crime. *People v Kahley*, 277 Mich App 182, 183-184 (2007).

B. Admissibility of Polygraph Examination or Results at Sentencing

"[A] trial judge should not broach the subject of polygraph examinations nor induce defendant to take the examination for sentencing purposes." *People v Towns*, 69 Mich App 475, 478 (1976). A defendant's presentence report should not contain the results of a polygraph examination unless the defendant consents to their inclusion, and a trial judge should not consider polygraph-examination results when sentencing a defendant. *People v Allen*, 49 Mich App 148, 151-152 (1973). The integrity of a judge who claims he or she "only relied on trial evidence in sentencing" is unquestioned, but "the danger of [the trial judge's] being influenced is too grave to ignore." *Towns*, 69 Mich App at 478. The defendant must be resentenced by a second judge with access only to a presentence investigation report that is void of any information regarding a polygraph test. *Id*. at 479.

C. Exception to Inadmissibility: Motions for New Trial[66] and to Suppress Evidence

Polygraph results may be admissible in support of a motion for new trial. *People v Barbara*, 400 Mich 352, 412 (1977). In addition, the court has discretion to admit polygraph results in support of a motion to suppress illegally seized evidence. *People v McKinney*, 137 Mich App 110, 114-117 (1984). In exercising its discretion to decide whether to admit polygraph evidence during a postconviction hearing for a new trial or in support of a motion to suppress, the evidence must meet the following conditions:

(1) the results are offered on the defendant's behalf;

(2) the test was taken voluntarily;

(3) the professional qualifications of the polygraph examiner must be approved;

(4) the quality of the polygraph equipment must be approved;

(5) the procedures employed must be approved;

[66]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1, for more information on postjudgment motions.

> (6) either the prosecutor or the court may obtain an independent examination of the subject by an operator of the court's choice, or the independent operator is permitted to review the original data with the original operator, or both;
>
> (7) the results must be considered only with regard to the general credibility of the subject;
>
> (8) any affidavits or testimony by the test operator must be a separate record and must not be used at a subsequent trial; and
>
> (9) the judge granting a new trial may not sit as trier of fact in the new trial. However, he or she may preside in a subsequent jury trial. A substitute judge can have no knowledge of the polygraph examination or its results. *McKinney*, 137 Mich App at 117.

See *People v Mechura*, 205 Mich App 481 (1994), for an example of proper use of polygraph evidence in the context of a motion for a new trial based on newly discovered evidence.

D. Right to Counsel

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4, for information on the right to counsel.

E. Defendant's Right to Polygraph

A defendant accused of committing a criminal sexual conduct offense has the right to request a polygraph examination. MCL 776.21(5). See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 6, for more information on polygraph tests in criminal sexual conduct cases.

F. Polygraph Examiners Privilege

There is a statutory privilege that applies to polygraph examiners. MCL 338.1728. Information obtained by a polygraph examiner during an examination conducted at the request of an attorney is subject to the attorney-client privilege. *In re Petition of Delaware*, 91 Mich App 399, 406-407 (1979). See Section 1.9 for information on privilege.

Chapter 3: Witnesses–Procedure and Testimony

3.1 Scope Note

This chapter discusses rules of evidence and procedure applicable to witnesses generally. This chapter also specifically discusses lay witness testimony. See Chapter 4 for a discussion of expert witnesses and scientific evidence. See Chapter 6 for a discussion of exhibits.

3.2 Witness Disclosure

A. Civil Case

1. Witness List

"Witness lists are an element of discovery." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628 (1993).[1] They serve the purpose of avoiding "'trial by surprise.'" *Id.*, quoting *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 778 (1987).

The parties must file and serve their witness lists within the time limits prescribed by the court in MCR 2.401(B)(2)(a). MCR 2.401(I)(1). The witness list must include the witness's name, address (if known), whether the witness is an expert, and his or her field of expertise. MCR 2.401(I)(1)(a)-(b). However, only a general identification is necessary if the witness is a records custodian "whose testimony would be limited to providing the foundation for the admission of records[.]" MCR 2.401(I)(1)(a).

2. Sanction for Failure to File Witness List

"The court may order that any witness not listed in accordance with [MCR 2.401] will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). "While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate." *Dean v Tucker*, 182 Mich App 27, 32 (1990). Just because a witness list was not timely filed does not in and of itself justify the imposition of such a sanction. *Id.*

[1]For additional information on discovery in a civil case, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 5.

The *Dean* Court referred to a nonexhaustive list of factors to consider when determining an appropriate sanction for a discovery violation:

> "(1) whether the violation was wilful or accidental;
>
> (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);
>
> (3) the prejudice to the [other party];
>
> (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice;
>
> (5) whether there exists a history of [the party] engaging in deliberate delay;
>
> (6) the degree of compliance by the [party] with other provisions of the court's order;
>
> (7) an attempt by the [party] to timely cure the defect[;] and
>
> (8) whether a lesser sanction would better serve the interests of justice." *Dean*, 182 Mich App at 32-33.

"Trial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses." *Pastrick v Gen Tel Co of Mich*, 162 Mich App 243, 245 (1987). The court may impose reasonable conditions on allowing the testimony of an undisclosed witness if there is no prejudice to the opposing party. *Id*. at 246 (concluding that the trial court employed reasonable conditions in allowing the prosecutor's undisclosed rebuttal witness to testify by giving the "defendants an opportunity to interview the undisclosed witness and to secure their own expert"). The Court also noted that a reasonable condition will normally include a reasonable time frame. *Id.* at 246 n 1.

B. Criminal Case

1. Discovery Under the Court Rule[2]

Upon request, a party must provide all other parties with the names and addresses of any lay or expert witnesses that may

[2]For additional information on discovery in a criminal case, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9.

be called at trial. MCR 6.201(A)(1).[3] Alternatively, the party may provide the other party with the witness's name and make the witness available for interview. *Id.* "[T]he witness list may be amended without leave of the court no later than 28 days before trial[.]" *Id.* But see MCL 780.758(2), which prohibits documents filed with the court from disclosing the address of victims in a criminal case.

"[A]bsent an applicable exception provided for in MCR 6.201, a prosecutor is required to produce unredacted police reports under MCR 6.201(B)(2)." *People v Jack*, 336 Mich App 316, 326 (2021). In *Jack*, the prosecutor "provided a redacted police report" that omitted "addresses, phone numbers, and birthdates of several witnesses who were also included on the prosecutor's witness list," arguing that "MCR 6.201(A)(1) allows a prosecuting attorney to redact witness contact information from police reports otherwise discoverable under MCR 6.201(B)[.]" *Jack*, 336 Mich App at 320, 322. However, "MCR 6.201(A)(1) and MCR 6.201(B)(2) are two separate subrules that deal with two distinct disclosure requirements. MCR 6.201(A)(1) exclusively concerns a party's obligation to provide a list of the names and addresses of all witnesses whom may be called at trial or, in the alternative, the party can provide the names of the witnesses and make them available for interviews. On the other hand, MCR 6.201(B)(2) concerns the prosecutor's obligation to provide police reports and interrogation records. The information required to be disclosed under [MCR 6.201(A)(1) and MCR 6.201(B)(2)] is separate and distinct, and the prosecution must comply with the separate requirements of each section of the court rule. *Jack*, 336 Mich App at 325-326 (noting "the prosecutor may request a protective order under MCR 6.201(E) or pursue a modification under MCR 6.201(I)" on remand).

If a party violates the discovery rules in MCR 6.201, the court has discretion to "order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances." MCR 6.201(J). "To be entitled to relief under MCR 6.201(J), a defendant must demonstrate that he or she was prejudiced by the discovery violation." *People v Dickinson*, 321 Mich App 1, 19 (2017)

[3] Effective May 1, 2020, MCR 6.201(A) is applicable to felonies and, in limited circumstances, to misdemeanors. See MCR 6.001(A); MCR 6.610(E)(1)-(2), amended by ADM File No. 2018-23. "MCR 6.201(A) only applies in misdemeanor proceedings . . . if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A)." MCR 6.610(E)(2).

(finding the defendant did not demonstrate prejudice where she failed to seek a continuance or other remedy as permitted under MCR 6.201(J) and was able to effectively cross-examine the witness and obtain testimony favorable to her defense despite not having a second police report in advance of trial). If the court finds that an attorney willfully violated MCR 6.201 or a discovery order, it may subject the attorney to an appropriate sanction. MCR 6.201(J).

Where the prosecution's failure to disclose a transcript of a witness's prior statements, given pursuant to an investigative subpoena, violated MCR 6.201(A)(2) but did not implicate the defendant's right to due process, the remedy fashioned by the trial court—precluding the prosecution from questioning the witness regarding the statements and allowing defense counsel to review the transcript before cross-examining the witness—did not constitute an abuse of discretion. *People v Jackson*, 292 Mich App 583, 591-592 (2011).

2. Statutory Duties of Prosecuting Attorney

A prosecutor has a statutory duty to disclose any potential witnesses, including res gestae witnesses, on the filed information. MCL 767.40a(1). "[T]he term [res gestae witness] embraces eyewitnesses to the corpus delicti of a crime. But where a person is present at the scene of an alleged crime, at the time of the alleged crime, has occasion to observe his surroundings, and sees no crime, he too must be considered a res gestae witness, whom the people are obliged by law to call as a trial witness. This is but one example of one of the parameters that define a res gestae witness: a witness whose testimony is reasonably necessary to protect the defendant against a false accusation." *People v Harrison*, 44 Mich App 578, 591 (1973) (citation omitted).

If additional res gestae witnesses become known, the prosecutor must continue to disclose their names. MCL 767.40a(2). A prosecutor must send the defendant a witness list no less than 30 days before trial. MCL 767.40a(3). However, "the prosecution [does not have] an affirmative duty to present the entire res gestae, or call at trial all of the witnesses who were present when a crime occurred." *People v Steanhouse*, 313 Mich App 1, 15 (2015) (quotation marks and citation omitted), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017).[4] Where "it [was] apparent that defendant was aware

[4]For more information on the precedential value of an opinion with negative subsequent history, see our note.

that [the potential witness] could be a res gestae witness" and "defendant implicated [the potential witness] in the [crime]," "omission [of the witness on the prosecutor's witness list] did not prejudice defendant, or violate his right to present a defense[.]" *Steanhouse*, 313 Mich App at 15 (internal citations omitted). Additionally, "[b]ecause [the potential witness] invoked his Fifth Amendment privilege against self-incrimination and refused to testify, neither the prosecution nor the defense could call [him] as a witness"; therefore, the prosecution did not "commit[] a plain error affecting defendant's substantial rights by failing to include [the potential witness] on the witness list as a res gestae witness, notifying the trial court of the need to inform [the potential witness] of his Fifth Amendment right against self-incrimination, and failing to call [him] as a witness." *Id*. at 16.

It is within the trial court's discretion whether "to permit the prosecutor to add or delete witnesses to be called at trial" pursuant to MCL 767.40a(4). *People v Callon*, 256 Mich App 312, 325-326 (2003) (finding the court did not abuse its discretion "by allowing the late endorsement of a critical prosecution witness where the witness was known to the defense, had been subjected to cross-examination at the preliminary examination, . . . no continuance was requested and no unfair prejudice resulted to defendant").

However, "the trial court's decision to allow removal of [an endorsed witness] from the prosecution's witness list without consideration of whether there was good cause to do so [as required under MCL 767.40a(4)] was an abuse of discretion[.]" *People v Everett*, 318 Mich App 511, 520 (2017). "[T]o remove [the witness's] name from the witness list, the prosecution was required to comply with MCL 767.40a(4)." *Everett*, 318 Mich App at 523-525 (concluding that the defendant failed to establish that he was prejudiced by the error where there was "nothing in the lower court record to suggest that the prosecutor lacked good cause for removing [the witness] from the prosecution's witness list" and there was "no indication of the testimony she would have offered" or whether the defendant "would have benefited from" it).

"[W]hen providing a defendant with the list of witnesses the prosecution 'intends to produce' at trial, a witness may not be 'endorsed in the alternative' as an 'and/or' witness." *Everett*, 318 Mich App at 522-523 (holding that the statute plainly requires a prosecutor to either endorse a witness that he or she intends to call under MCL 767.40a(3) or amend the witness list pursuant to MCL 767.40a(4) to add or remove a witness; the statute does not allow for an "in-between 'alternative' witness

who may or may not be produced on the whim of the prosecution").

"However, if the prosecutor fails to call a listed witness and has failed to delete that witness from its witness list, it may nonetheless be appropriate for the trial court to read [M Crim JI 5.12]." *People v Cook (On Remand)*, 266 Mich App 290, 293 n 4 (2005) (citation omitted). M Crim JI 5.12 instructs that the jury "may infer that [the] witness's testimony would have been unfavorable to the prosecution's case" where the prosecutor was responsible for the appearance of the missing witness. "[T]he propriety of reading [M Crim JI 5.12] will depend on the specific facts of that case." *People v Perez*, 469 Mich 415, 420-421 (2003). Instances that would justify the instruction include those where an endorsed witness has not been properly excused or where the prosecution has not provided the defense reasonable assistance securing a witness that would have been unfavorable to the prosecution. *Id*. at 420.

"If a prosecutor endorses a witness under [MCL 767.40a(3)], the prosecutor is obliged to exercise due diligence to produce that witness at trial." *People v Brown*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). "If a prosecutor fails to exercise due diligence to produce the witness, the jury should be issued a missing-witness instruction[.]" *Id*. at ___. "Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness." *Id*. at ___ (cleaned up). In *Brown*, "[o]n the last day of the prosecution's proofs, the prosecutor stated that he had been unable to secure the attendance of . . . two witnesses, who lived together." *Id*. at ___ (observing that a trial court may accept a licensed attorney's representation to the court when it has no reason to doubt the candor of that attorney). The prosecutor represented to the court that:

> "the police attempted to serve them at two different addresses on three different dates. The female witness had reported a change of address, but when the investigator attempted to serve the witnesses there, the investigator saw no cars and reported that the grass appeared overgrown. The prosecutor personally attempted to contact the female witness via the phone number provided for a previous trial eight separate times over three weeks. The phone number rang, was answered, and then was immediately hung up. The prosecutor attempted calling from different phone numbers. The prosecutor also attempted to use two jail systems to determine whether either

> witness was imprisoned and discovered that both had been arrested but were no longer in custody." *Id*. at ___.

The Court of Appeals rejected the defendant's argument "that the prosecutor could have sought to determine whether the female witness had a new phone number." *Id*. at ___ (noting that "the prosecution was not required to do everything possible to locate the witnesses"). "Additionally, it [was] reasonable to infer that the witness continued to have the same number because the phone rang, was picked up, and then was hung up, rather than going to voicemail or simply going unanswered." *Id*. at ___. Accordingly, the *Brown* Court held that "the trial court's decision to decline to issue a missing-witness instruction after determining that the prosecution exercised due diligence to secure the attendance of the witnesses did not fall outside the range of principled outcomes." *Id*. at ___.

Committee Tip:

Remember to balance the claimed wrong with an appropriate remedy; they should be commensurate. Possible remedies for not disclosing or providing a witness include allowing opposing counsel to interview the witness or continuing the trial for a day.

3.3 Sequestration of Witness

On its own motion or at the request of a party, "the court may order witnesses excluded [from the courtroom[5]] so that they cannot hear other witnesses' testimony." MRE 615. However, a party who is a natural person, a non-natural party's representative, or a person essential to presenting a party's claim or defense may not be excluded. *Id*. See also MCL 600.1420.

A victim of a crime has the right to attend the trial and all other proceedings related to that crime. Const 1963, art 1, § 24. However, if the victim is a witness, the court may, for good cause, sequester the victim until he or she first testifies. MCL 780.761; MCL 780.789 (juvenile

[5]For information on precluding a witness from testifying, see Section 1.8(A).

proceedings). The victim must not remain sequestered once he or she testifies. MCL 780.761; MCL 780.789.[6]

A. Violation of Sequestration Order

The trial court has discretion to exclude or allow the testimony of a witness that has violated a sequestration order. *People v Nixten*, 160 Mich App 203, 209-210 (1987). However, excluding a witness's testimony for violating a sequestration order "is an extreme remedy that should be sparingly used." *People v Meconi*, 277 Mich App 651, 654 (2008). Other possible remedies include holding the offending witness in contempt,[7] and allowing cross-examination of the witness concerning the violation. *Id*.

In *Meconi*, the trial court abused its discretion by excluding the victim's testimony for violating the sequestration order when the violation "resulted from an innocent mistake," and the victim "only heard short opening statements, not testimony[.]" *Meconi*, 277 Mich App at 654-655. Compare with *People v Allen*, 310 Mich App 328, 347 (2015), rev'd on other grounds 499 Mich 307 (2016),[8] where the trial court did not abuse its discretion by excluding the testimony of a witness who violated the court's sequestration order where its decision was based on the witness's violation of the sequestration order *and* defense counsel's violation of the court's scheduling order (counsel failed to provide notice of the witness).

3.4 Competency of Witness

"Every person is competent to be a witness unless: (a) the court finds, after questioning, that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully or understandably; or (b) [the MREs] provide otherwise."MRE 601. To be competent, the witness must have "the capacity and sense of obligation to testify truthfully and understandably." *People v Watson*, 245 Mich App 572, 583 (2001).[9]

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[6]For information on victim rights, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

[7]For information on contempt proceedings, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

[8]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[9] For information on the competency of a child witness, see Section 3.6(A).

3.5 Criminal Defendant's Right of Confrontation

A. Generally[10]

A criminal defendant has the right to confront the witnesses against them. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1. The Confrontation Clause of the Sixth Amendment is made applicable to the states through the Fourteenth Amendment. *Pointer v Texas*, 380 US 400, 403 (1965); *People v Sammons*, 191 Mich App 351, 356 (1991). The Confrontation Clause implicates two broad categories of cases: those involving the admission of out-of-court statements and those involving restrictions imposed by law or the trial court on the scope of cross-examination. *Delaware v Fensterer*, 474 US 15, 18 (1985). "By its straightforward terms, the Confrontation Clause directs inquiry into two questions: (1) Does the person in controversy compromise a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?" *People v Fackelman*, 489 Mich 515, 562 (2011).

The protections of the Confrontation Clause extend to pretrial entrapment hearings, *Sammons*, 191 Mich App at 362, and pretrial suppression hearings, *People v Levine*, 231 Mich App 213, 223 (1998), vacated on other grounds 461 Mich 172 (1999).[11] However, the protections do not apply at the preliminary examination. *People v Olney*, 327 Mich App 319, 330-331 (2019).

"A primary interest secured by the Confrontation Clause is the right of cross-examination." *People v Brown*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *Id.* at ___ (cleaned up) (observing that "[c]ross-examination is a valuable right of the accused to expose falsehoods and bring out the truth.") "An inability to understand a witness may interfere with a defendant's right to cross-examine a witness," such as an inadequate translation. *Id.* at ___. However, the Confrontation Clause guarantees only that a defendant has the opportunity for effective cross-examination; a defendant is not guaranteed an ideal cross-examination. *United States v Owens*, 484 US 554, 559 (1988) (holding a defendant's right to confrontation is satisfied when the defendant has the opportunity to explore matters such as a witness's poor eyesight, bias, and bad memory). Indeed, "the right of cross-

[10] For a discussion of confrontation issues in the context of hearsay exceptions, see Section 5.3(A).

[11] For more information on the precedential value of an opinion with negative subsequent history, see our note.

examination is not unfettered; it does not include a right to cross-examine witnesses about irrelevant issues and may bend to other legitimate interests of trial procedure or societal expectations." *Brown*, ___ Mich App at ___.

"[A] defendant's right to confront a witness in the context of the witness's assertion of her Fifth Amendment right does not arise unless there was substantial evidence put before the jury in the form of testimony or its functional equivalent." *People v Clark*, 330 Mich App 392, 395 (2019). Where "[t]he prosecutor never got the opportunity to ask [the witness] a question, . . . her assertion of a privilege was not associated with any questions that could serve as the functional equivalent of testimony." *Id*. at 429. Additionally, the prosecutor's indication during his opening statement that the witness would testify and implicate defendant in a murder did not amount to the functional equivalent of testimony "because the opening statement was separated in time from [the witness's] assertion of the privilege, because defense counsel responded to the prosecutor's summary in her opening statement, and because the trial court instructed the jury that the parties' opening statements were not evidence[.]" *Id*. at 429-430 ("[i]n the absence of evidence that the prosecutor knew that [the witness] would assert her privilege in front of the jury, defendant [could not] establish a plain evidentiary error").

B. Scope

The right of the accused to confront witnesses is a crucial element of the trial process and serves to protect the defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20. Accordingly, "[e]vidence directly implying the substance of a testimonial, out-of-court statement made by an unavailable witness and offered to prove its truth is inadmissible[.]" *People v Washington*, 344 Mich App 318, 333 (2022). "A witness may feel quite differently when he has to repeat his story looking at the man [or woman] whom he will harm greatly by distorting or mistaking the facts." *Coy v Iowa*, 487 US 1012, 1019 (1988) (quotation marks and citation omitted). In *Coy*, the defendant's right of confrontation was violated where a screen was placed between him and the complaining witnesses. *Id*. at 1020. In *People v Sammons*, 191 Mich App 351, 356, 366 (1991), the defendant's right of confrontation was violated when the trial court permitted a police informant to testify at an entrapment hearing while wearing a mask, and without disclosing his true identity, "[b]ecause the masking . . . precluded the trial judge from adequately observing the witness' demeanor while testifying."

"The purpose of the Confrontation Clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial."

People v Serges, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). "This confrontation is an important right of the defendant because it enables the trier of fact to judge the witnesses' demeanors." *Id*. at ___ (quotation marks and citation omitted) (observing that the Confrontation Clause protects a criminal defendant's "right physically to face those who testify against him"). "The Supreme Court's decision in *Coy*, 487 US at 1020-1022, does not mandate a conclusion that mask wearing during a pandemic violates the Confrontation Clause." *Serges*, ___ Mich App at ___. In *Serges*, "for safety reasons, the trial court gave defendant a choice between wearing a mask or sitting at a distance from his trial counsel," and "[d]efendant chose to wear a mask." *Id*. at ___, ___. Further, "the record indicate[d] that the witnesses removed their masks when they were on the stand and testifying," and "[w]hen defense counsel cross-examined the witnesses, he also removed his mask." *Id*. at ___, ___. "Defendant insist[ed] that, because he had to wear a mask, the witnesses were allowed to provide testimony without viewing him." *Id*. at ___. However, "[n]othing blocked the witnesses' view of defendant during trial in this case nor interfered with his view of the witnesses testifying. While defendant's nose and mouth were covered by a cloth mask, his eyes and upper face were visible." *Id*. at ___. "A cloth mask covering only part of defendant's face is not the same as a barrier to view. Defendant remained physically in the room with the witnesses, they could see him, he could see them, and they underwent cross-examination by his unmasked counsel." *Id*. at ___ (rejecting defendant's contention that "the 'face-to-face' confrontation guarantee cannot be fulfilled when a defendant is required to wear a mask").

Indeed, "face-to-face confrontation is not an indispensable element of the Confrontation Clause"—"[t]he right may be satisfied without face-to-face confrontation when denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *People v Brown*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). In *Brown*, the defendant contended that his Confrontation Clause rights were violated when a witness "was permitted to testify while wearing a face mask" because "the mask interfered with the jury's ability to assess [the witness's] credibility by covering part of his face and the mask made [the witness's] testimony difficult to understand." *Id*. at ___. However, the Court of Appeals concluded that "the face mask worn by [the witness] did not completely cover his face and apparently did not impair a viewing of [the witness's] expressions or the ability to assess his credibility." *Id*. at ___. Moreover, "the trial court took measures, including directing [the witness] to speak into the microphone and apparently shutting off the ventilation system, to improve the clarity of [the witness's] testimony for the parties and the jurors listening to the testimony."

Id. at ___ (noting that "[a]fter these measures were taken, there were no complaints of a continued inability to hear or understand [the witness's] answers to the questions posed"). Further, "defense counsel was not limited in his questioning" on cross-examination and "was allowed to cover questions and topics raised during direct examination." *Id*. at ___. Therefore, the *Brown* Court held that the defendant failed to demonstrate "that any error in his ability to hear some of [the witness's] answers affected the outcome of the lower court proceedings because there is no indication that defendant missed and was unable to respond to [the witness's] testimony in a manner that impaired his ability to cross-examine him." *Id*. at ___ (acknowledging another jurisdiction's statement that "protecting people against COVID-19 transmission was an important public policy interest," and noting that the witness in *Brown* "expressed his desire to continue wearing the mask in light of COVID-19").

"In allowing [a forensic analyst's] two-way, interactive video testimony [at trial] over the defendant's objection, the trial court violated the defendant's Confrontation Clause rights." *People v Jemison (Jemison I)*, 505 Mich 352, 366-367 (2020) (remanded to "determin[e] whether that violation was harmless beyond a reasonable doubt"). Where it was undisputed that the "evidence was testimonial," "[t]he defendant had a right to face-to-face cross-examination; [the witness] was available, and the defendant did not have a prior chance to cross-examine him." *Id*. at 366. Thus, "[t]he defendant's state and federal constitutional rights to confrontation were violated by the admission of [the witness's] two-way, interactive video testimony." *Id*. "[E]xpert witnesses called by the prosecution are witnesses against the defendant," and "[t]he prosecution *must* produce" witnesses against the defendant. *Id*. at 364 (further holding "expense is not a justification for a constitutional shortcut"). On remand, the Court of Appeals determined that the error was harmless and affirmed the conviction. See *People v Jemison (On Remand) (Jemison II)*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2020 (Docket No. 334024), p 8.

However, the right to confront witnesses is not absolute and may succumb to other compelling interests. *People v Kasben*, 158 Mich App 252, 255 (1987). For example, "the prohibitions [on questions regarding a victim's previous sexual conduct] in the rape-shield law will not deny a defendant's right of confrontation in the overwhelming majority of cases[.]" *People v Arenda*, 416 Mich 1, 13 (1982).

"[T]he Confrontation Clause does not prohibit the use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous

adversarial testing and thereby preserves the essence of effective confrontation." *Maryland v Craig*, 497 US 836, 857 (1990). In *Maryland*, the Court recognized an "important state interest in preventing trauma to child witnesses in child abuse cases," holding that the defendant's right of confrontation was not violated in a child sexual abuse case where the child victim testified outside the defendant's physical presence via one-way closed-circuit television. *Id*. at 856-857 ("where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal"). While not provided face-to-face, testimony given under oath that is subject to full cross-examination and is observed by the judge, jury, and defendant in real time, is in harmony with the Confrontation Clause. *Id*. at 857.[12]

In *People v Rose*, 289 Mich App 499, 516 (2010), the trial court did not violate the defendant's right to confrontation by permitting the child victim to testify with a witness screen, where the trial court found that the victim feared the defendant, that the witness screen was necessary to protect the child's welfare, that there was a high probability that testifying face-to-face with the defendant would cause psychological damage to the victim, and that having to testify face-to-face with the defendant may cause the victim to abstain from testifying altogether. Additionally, "aside from [the victim's] inability to see [the defendant], the use of the witness screen preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process." *Id*. at 516-517.

"In order to warrant the use of a procedure that limits a defendant's right to confront his accusers face to face, the trial court must first determine that the procedure is necessary to further an important state interest. The trial court must then hear evidence and determine whether the use of the procedure is necessary to protect the witness. In order to find that the procedure is necessary, the court must find that the witness would be traumatized by the presence of the defendant and that the emotional distress would be more than *de minimis*." *Rose*, 289 Mich App at 516 (internal citations omitted).

For more information on the use of two-way interactive video technology in certain proceedings or special protections for certain victims and witnesses, see Section 3.5(G).

[12]See *People v Jemison (Jemison I)*, 505 Mich 352, 365 (2020), noting that *Craig* was decided prior to *Crawford v Washington*, 541 US 36 (2004), and although *Crawford* did not overrule *Craig*, the Court indicated it "will apply *Craig* only to the specific facts it decided: a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection."

C. Removal of Defendant from Courtroom Due to Conduct

The Confrontation Clause guarantees the right of the defendant to be present at trial. *Illinois v Allen*, 397 US 337, 338 (1970). See also MCL 768.3. However, "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Allen*, 397 US at 343. "Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id*. Ordinarily, the defendant must be warned before he or she is removed from the courtroom, but a defendant may be removed without a warning when his or her behavior is aggressive and violent. *People v Staffney*, 187 Mich App 660, 664-665 (1990). See also *People v Buie (On Remand)*, 298 Mich App 50, 59 (2012) ("[a]lthough [the defendant] had a . . . history of acting out and disrupting [prior] proceedings," his removal from the courtroom following a single interruption of voir dire was not justified where he was also not "continually warned by the court to modify his behavior to avoid removal").

A defendant may waive his or her constitutional and statutory right to be present during trial. *People v Kammeraad*, 307 Mich App 98, 117-118 (2014) (finding "defendant did not waive his right to be present for trial through a voluntary relinquishment of the right when he asked to be removed from the courtroom" because "the record [did] not reflect that defendant was ever specifically informed of his constitutional right to be present"; notwithstanding, "defendant lost his right to be present because of his disorderly and disruptive behavior").

D. Unavailable Witness

The Confrontation Clause bars the admission of *testimonial* statements of an unavailable witness unless the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68 (2004).[13] "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *People v*

[13] *Crawford* overruled, in part, *Ohio v Roberts*, 448 US 56 (1980), which permitted admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability'" and fell within either a "firmly rooted hearsay exception" or showed "particularized guarantees of trustworthiness." *Roberts*, 448 US at 66. *Crawford* is not retroactive. *Whorton v Bockting*, 549 US 406, 409 (2007).

Chambers, 277 Mich App 1, 10-11 (2007) ("a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause").

1. Constitutional Unavailability

"A declarant is considered to be unavailable as a witness if the declarant:

> (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
>
> (2) refuses to testify about the subject matter despite a court order to do so;
>
> (3) testifies to not remembering the subject matter;
>
> (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
>
> (5) is absent from the trial or hearing, and
>
> > (A) the statement's proponent has not been able, by process or other reasonable means, to procure:
> >
> > > (i) the declarant's attendance, in the case of a hearsay exception under [MRE 804(b)(1)] or [MRE 804(b)(6)]; or
> > >
> > > (ii) the declarant's attendance or testimony, in the case of a hearsay exception under [MRE 804(b)(2)], [MRE 804(b)(3)], or [MRE 804(b)(4)]; and
> >
> > (B) in a criminal case, the proponent shows due diligence." MRE 804(a).

However, MRE 804(a) "does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying." *Id.*

"[A] declarant who appears at trial but claims memory loss is 'available' for purposes of the Confrontation Clause, even though [Michigan's] hearsay rules provide that a declarant is unavailable when the declarant ['testifies to not remembering the subject matter,'] MRE 804(a)(3)." *People v Sardy (On Remand)*, 318 Mich App 558, 565 (2017).[14] Accordingly, "the

Confrontation Clause does not place any constraints on the use of a prior testimonial statement, and . . . the Clause does not bar the admission of a prior testimonial statement 'so long as the declarant is present at trial to defend or explain it.'" *Id.* at 563, quoting *Crawford v Washington*, 541 US 36, 59 n 9 (2004). In *Sardy (On Remand)*, 318 Mich App at 565-566, a Confrontational Clause violation occurred where "[a]lthough defendant was able to cross-examine the victim at the preliminary examination, defendant was not given the opportunity to cross-examine her *at trial* relative to the CSC-II charges, . . . [and t]he jury was not presented with cross-examination testimony regarding the fact that the victim could no longer recall or remember the substance of the claims she had made at the time of the preliminary examination"; thus defendant was deprived "of the opportunity to potentially undermine entirely the charges of CSC-II."

2. Testimonial and Nontestimonial Statements

"A statement is testimonial if it was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Washington*, ___ Mich ___, ___ (2024) (cleaned up). Importantly, "the standard requires courts to consider the foreseeability—based on the context at the time the statement was made—of whether the statement would later be used at trial." *Id.* at ___. The United States Supreme Court has declined to delineate a comprehensive definition of "testimonial," but has provided the following examples of testimonial and nontestimonial statements:

Testimonial:

- formal police interrogations,
- prior testimony,
- plea allocutions, and
- depositions.

Nontestimonial:

- casual remarks to acquaintances,
- off-hand, overheard remarks,

[14]For information on unavailable witness, see Section 3.5(D).

- statements in furtherance of a conspiracy,
- statements unwittingly made to informants, and
- business records. *Crawford v Washington*, 541 US 36, 51-52, 56-58 (2004).

Following *Crawford*, the Court clarified the definition of "testimonial statement" in *Davis v Washington*, 547 US 813 (2006). The Court held that whether hearsay evidence constitutes a "testimonial statement" requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis*, 547 US at 826. "Statements are nontestimonal 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*." *Id*. at 822 (emphasis added). "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the *primary purpose* of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. (emphasis added). In *Davis*, the Court concluded that statements made to a 911 operator were nontestimonial because they described events "as they were actually happening," in an "ongoing emergency." *Id*. at 827. But in the companion case of *Hammon v Indiana*, the Court concluded that statements made to the police at a crime scene were testimonial because they were made during the course of an investigation of past criminal conduct and there was no ongoing emergency. *Id*. at 826-832.

Subsequently, the United States Supreme Court expounded on the "primary purpose test" noting "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan v Bryant*, 562 US 344, 358 (2011). "One additional factor is the informality of the situation and the interrogation." *Ohio v Clark*, 576 US 237, 245 (2015) (quotation marks and citation omitted). However, the Michigan Supreme Court "has soundly rejected application of the 'primary purpose' test outside of an emergency context." *Washington*, ___ Mich at ___ (noting that "while *Davis* employed a primary purpose inquiry to determine whether statements made to the police in the very specific context of an *ongoing emergency* were testimonial, *Davis* did not mandate that this was the exclusive test to be applied generally in Confrontation Clause cases") (cleaned up). Indeed, "nothing in *Davis* replaced the controlling standard in *Crawford* to determine whether a statement is 'testimonial'

when made outside of an emergency context." *Washington*, ___ Mich at ___, n 5. See *People v Fackelman*, 489 Mich 515, 558-559 (2011) (although the primary purpose test "obviously makes sense in the context for which it was specifically designed, emergency circumstances in which there is often ambiguity concerning the objectives or purposes of the declarant's utterances[,] . . . [i]t is utterly unclear how a court would apply the 'primary purpose' test outside the *Davis* context to a case in which no emergency is alleged").

To determine whether statements made by a victim of sexual abuse to a Sexual Assault Nurse Examiner (SANE) are testimonial or nontestimonial in nature, the court "must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *People v Spangler*, 285 Mich App 136, 154 (2009). The *Spangler* Court set forth a nonexhaustive list of factual indicia helpful to making an admissibility determination under the Confrontation Clause. See *id*. at 155-156. See also *People v Garland*, 286 Mich App 1, 11 (2009), discussed in Section 3.5(D)(2)(b), finding that statements made to a SANE were nontestimonial under the facts of the case.

a. Examples of Testimonial Statements

Report and affidavit of laboratory analyst. An unsworn forensic laboratory report in which a laboratory analyst certified that he had tested the defendant's blood-alcohol concentration (BAC), and that the BAC was well above the threshold for the crime of aggravated driving while intoxicated, was created solely for an evidentiary purpose and was therefore testimonial. *Bullcoming v New Mexico*, 564 US 647, 651-652, 663-664 (2011). Accordingly, "[t]he [defendant's] right [was] to be confronted with the analyst who made the certification, unless that analyst [was] unavailable at trial, and the [defendant] had an opportunity, pretrial, to cross-examine that particular scientist"; the in-court "surrogate testimony" of a scientist who did not sign the report or perform or observe the test was not sufficient to satisfy the requirements of the Confrontation Clause. *Id.* at 652, 661-662. See also *Melendez-Diaz v Massachusetts*, 557 US 305, 307-308, 311, 329 (2009) (the affidavits of state laboratory analysts stating that material seized by police and connected to the

defendant was a certain quantity of drugs constituted testimonial hearsay and could not be admitted as evidence unless the analysts who authored the affidavits testified at trial or the defendant had the opportunity to previously cross-examine them regarding the affidavits); *People v Payne*, 285 Mich App 181, 196, 198 (2009) (the admission of a nontestifying DNA analyst's laboratory reports violated the defendant's Sixth Amendment right to confrontation because the witnesses who actually testified concerning the laboratory reports "had not personally conducted the testing, had not personally examined the evidence collected from the victims, and had not personally reached any of the scientific conclusions contained in the reports"; the laboratory reports constituted testimonial hearsay absent a showing that the DNA analyst was unavailable to testify and that the defendant had a prior opportunity for cross-examination).[15]

Codefendant's confession. A nontestifying codefendant's formal, Mirandized confession to authorities is testimonial. *Samia v United States*, 599 US ___, ___ (2023). In *Samia*, the United States Supreme Court held that "altering a nontestifying codefendant's confession not to name the defendant, coupled with a limiting instruction, was enough to permit the introduction of such confessions at least as an evidentiary matter." *Id.* at ___. Accordingly, the introduction of a nontestifying codefendant's "altered confession" — which "did not directly inculpate the defendant" — "coupled with a limiting instruction did not violate the Confrontation Clause." *Id.* at ___.

Autopsy report. A statutorily-mandated autopsy report prepared by two nontestifying medical examiners was testimonial, and its admission violated the defendant's Sixth Amendment right to confrontation. *People v Lewis*, 490 Mich 921 (2011) (however, "the admission of the report was not outcome determinative").

Medical report of psychiatrist. A non-testifying psychiatrist's out-of-court medical report that "memorialized defendant's medical history and the events that led to his admittance to the hospital, provided [an] all-important diagnosis, and outlined a plan for

[15] MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See Section 4.9 for more information on forensic laboratory reports and certificates.

treatment" constituted a testimonial statement that was used as substantive evidence of the defendant's sanity in violation of his Sixth Amendment right of confrontation. *People v Fackelman*, 489 Mich 515, 518-519, 532, 564 (2011). In *Fackelman*, two testifying expert witnesses disagreed as to whether the defendant was legally insane at the time of the crimes, which was the sole issue at trial. *Id*. at 521, 538. The defendant's expert witness testified that in making his determination that the defendant was legally insane, he relied in part on a report prepared by a hospital psychiatrist regarding the defendant's psychiatric condition two days after the incident; however, the report was neither authenticated nor admitted as evidence, and the defendant did not elicit testimony regarding the psychiatrist's diagnosis. *Id*. at 536-541. On cross-examination, the prosecutor revealed the hospital psychiatrist's diagnosis of "'major depression, single episode, . . . severe, without psychosis'"; the prosecutor subsequently referred to the report in his examination of the prosecution's expert witness, who testified that she agreed with the diagnosis. *Id*. at 522-523.

The Michigan Supreme Court held that the report, which was made following the defendant's arrest and "expressly focused on defendant's alleged crime and the charges pending against him," constituted testimonial evidence because it "was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Fackelman*, 489 Mich at 532, 533, quoting *Crawford v Washington*, 541 US 36, 52 (2004). Moreover, "the prosecutor's improper introduction and repeated use of [the] diagnosis that defendant was not, in fact, experiencing psychosis fully rendered the [psychiatrist] a witness against defendant." *Fackelman*, 489 Mich at 530. Because the diagnosis "provided a tiebreaking expert opinion" by "the only expert unaffiliated with either party . . . [and] the only doctor who had personal knowledge concerning [the] dispositive issue," its use at trial constituted plain error requiring reversal of the defendant's convictions. *Id*. at 538, 564.

Expert forensic report. The admission of expert testimony based on a report prepared by non-testifying forensic analysts violated the defendant's Sixth Amendment right to confrontation because "the testing . . was performed in anticipation of a criminal trial, after the medical examiner's original findings had

been challenged." *People v Dendel (On Second Remand)*, 289 Mich App 445, 468 (2010). Specifically, "[t]he medical examiner did not merely delegate to the . . . laboratory an ordinary duty imposed by law: he sought from the lab specific information to investigate the possibility of criminal activity. Under th[o]se circumstances, any statements made in relation to th[e] investigation took on a testimonial character." *Id.*[16]

Evidence implicitly introducing unavailable witness's testimonial statement. "[A] defendant's constitutional right of confrontation may be violated when a trial witness's testimony introduces the substance of an out-of-court, testimonial statement by an unavailable witness." *People v Washington*, ___ Mich ___, ___ (2024). In *Washington*, the "[d]efendant drove across the border from Michigan into Canada without paying the toll," and a Canadian customs agent "arrested defendant and brought him back to the American side of the bridge" where an American customs agent "took custody of defendant and a bulletproof vest." *Id.* at ___. Subsequently, the "[d]efendant was charged with being a violent felon in possession of body armor." *Id.* at ___. The American officer testified that he and the Canadian officer met on the American side of the bridge and, based on communications between them, the American officer took custody of defendant and took possession of the body armor at the same time. *Id.* at ___. The American officer "acknowledged that defendant was not wearing the vest when he took defendant into custody and that he had no direct knowledge as to whether defendant ever possessed the vest." *Id.* at ___.

The *Washington* Court "conclud[ed] that [the Canadian Officer's statement] was testimonial." *Id.* at ___ ("The context in which [the Canadian officer] made his statement would lead a reasonable person in his position to believe the statement would be available for use at a later trial.") The Canadian officer's out-of-court statement was "that defendant possessed the bulletproof vest when [the Canadian officer] encountered him." *Id.* at ___. "[A]n important factor is that the statement was made to . . . a law enforcement officer." *Id.* at ___. "Another important factor suggesting that a reasonable person in [the Canadian officer's] position would believe his statement

[16] MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See Section 4.9 for more information on forensic laboratory reports and certificates.

would be available for use at a later trial is that [the Canadian officer] made the statement while turning custody of defendant over to [the American officer] after having arrested defendant for engaging in criminal activity." *Id*. at ___. "And, because there was no ongoing emergency, even if [the Canadian officer] subjectively intended for his statement to be used for a different, non-trial purpose, that does not bear on whether a reasonable person in his position would have foreseen that his statement would be available for use at a later trial." *Id*. at ___. Accordingly, the *Washington* Court held that the defendant's constitutional right of confrontation was violated "because [the American officer's] testimony clearly implied that [the Canadian officer] made a testimonial statement asserting that defendant possessed a bulletproof vest." *Id*. at ___.

Victim's statements to neighbor and police officer. A crime victim's statements to a neighbor and a police officer were improperly admitted because they constituted testimonial statements for purposes of the Confrontation Clause and the defendant had not had an opportunity to cross-examine the victim. *People v Walker*, 273 Mich App 56, 64 (2006). In *Walker*, after the defendant beat the victim and threatened to kill her, the victim jumped from a second-story balcony and ran to a neighbor's house, where the neighbor called 911. *Id*. at 59-60. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. *Id*. at 60. The victim did not appear for trial, but her statements were admitted under the excited utterance exception to the hearsay rule.[17] *Id*. Like the United States Supreme Court in *Davis v Washington*, 547 US 813 (2006), the *Walker* Court determined that the content of the 911 call was nontestimonial evidence properly admitted at trial because the operator's questioning "was directed at eliciting further information to resolve the present emergency and to ensure that the victim, the neighbor, and others potentially at risk . . . would be protected from harm while police assistance was secured." *Walker*, 273 Mich App at 64.

The *Walker* Court further concluded that "[u]nlike those in the 911 call, the victim's statement recorded in writing by her neighbor and [her] statements to the police at the scene [we]re more akin to the statements in [*Hammon v*

[17]For information on the excited utterance exception to the hearsay rule, see Section 5.3(B).

Indiana, 547 US 813 (2006), a companion case to *Davis*], which the *Davis* Court found inadmissible under the Confrontation Clause." *Walker*, 273 Mich App at 64. The Court explained:

> "As in *Hammon*, in which the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, the police questioning in this case first occurred in the neighbor's home, and there is no indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and [her] oral statements to the police recounted how potentially criminal past events began and progressed. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely what the officer[s] *should* have done.' Accordingly, the victim's written statement and her oral statements to the police are inadmissible." *Walker*, 273 Mich App at 65 (citations omitted; fifth and sixth alterations in original), quoting *Davis*, 547 US at 830.

Serologist's notes and laboratory reports. A nontestifying serologist's notes and laboratory report are testimonial statements under *Crawford*. *People v Lonsby*, 268 Mich App 375, 378 (2005). In *Lonsby*, a crime laboratory serologist, who did not analyze the physical evidence, testified regarding analysis that was performed by another serologist. *Id*. at 380-381. The testimony included theories on why the nontestifying serologist conducted certain tests, as well as her notes regarding the tests. *Id*. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be

available for use at a later trial[.]'" *Lonsby*, 268 Mich App at 377-378, 391-393 (alteration in original), quoting *Crawford*, 541 US at 51-52 (finding that because the serologist would clearly expect that her notes and laboratory report would be used for prosecutorial purposes, the information satisfied *Crawford*'s definition of a *testimonial statement*).

b. Examples of Nontestimonial Statements

Child's statements to a teacher. Statements by a preschool student to his teacher identifying the defendant as the person who caused his injuries were not testimonial because they were "clearly . . . not made with the primary purpose of creating evidence for [the defendant's] prosecution." *Ohio v Clark*, 576 US 237, 246 (2015). Thus, their admission during trial, even though the child was not available for cross-examination, did not violate the Confrontation Clause. *Id.* The Court explained that statements to individuals who are not law enforcement officers, such as teachers, "are much less likely to be testimonial than statements to law enforcement officers," further noting that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause" *Id.* at 246, 247-248 ("declin[ing] to adopt a categorical rule excluding [statements to persons other than law enforcement officers] from the Sixth Amendment's reach"). The Court further noted that the statements were made "in the context of an ongoing emergency involving suspected child abuse," and "the immediate concern was to protect a vulnerable child who needed help." *Id.* at 246-247. There was "no indication that the primary purpose of the conversation was to gather evidence for [the defendant's] prosecution," and "[a]t no point did the teachers inform [the child who made the statements] that his answers would be used to arrest or punish his abuser." *Id.* at 247. Finally, the child who made the statements "never hinted that he intended his statements to be used by the police or prosecutors." *Id.*[18]

Match of a DNA sample to a database profile. The Confrontation Clause was not violated by a forensic specialist's testimony "that a DNA profile produced by an outside laboratory, [using semen from vaginal swabs taken from the victim,] . . . matched a profile produced by

[18] See Section 3.6 for discussion of child witnesses.

the state police lab using a sample of [the] petitioner's blood[;] . . . that [the outside laboratory] provided the police with a DNA profile[; and that] . . . notations on documents admitted as business records[indicated] that, according to the records, vaginal swabs taken from the victim were sent to and received back from [the outside laboratory]." *Williams v Illinois*, 567 US 50, 56-58 (2012) (plurality opinion) (opinion by Alito, J.). Noting that, "[u]nder settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true," the *Williams* plurality concluded that "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Id.* at 57-58. The forensic expert's testimony did not run afoul of the Confrontation Clause where she "did not testify to the truth of any other matter concerning [the outside laboratory,] . . . made no other reference to the [outside laboratory's] report, which was not admitted into evidence and was not seen by the trier of fact, . . . did [not] . . . testify to anything that was done at the [outside] lab, and she did not vouch for the quality of [its] work." *Id.* at 71.[19]

In addition, the *Williams* plurality expressed the view that, "even if the report produced by [the outside laboratory] had been admitted into evidence, there would have been no Confrontation Clause violation," because the report "was produced before any suspect was identified, . . . [and] was sought not for the purpose of obtaining evidence to be used against [the] petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." *Williams*, 567 US at 58.

Statements prior to death. Pre-death statements made by a gunshot victim to police officers identifying and describing his shooter and the location of the shooting were nontestimonial and their admission at the defendant's trial did not violate the Confrontation Clause because "the circumstances of the interaction between [the victim] and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.'"

[19] MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See Section 4.9 for more information on forensic laboratory reports and certificates.

Michigan v Bryant, 562 US 344, 348-349, 378 (2011), quoting *Davis v Washington*, 547 US 813, 822 (2006). In *Bryant*, the Court found that "there was an ongoing emergency . . . where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." *Bryant*, 562 US at 374 (declining to "decide precisely when [an] emergency end[s]"). The Court additionally found that the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency where the questions the police asked the victim were precisely the type of questions necessary to allow them to assess the situation, the threat to their own safety, and possible danger to the victim and the public. *Id*. at 374-378.

A decedent's statements identifying his assailant to the police during the hectic minutes shortly after the fatal shooting took place were admissible as nontestimonial statements under *Crawford v Washington*, 541 US 36 (2004). *People v Taylor*, 275 Mich App 177, 181-182 (2007).

A victim's statements to friends, coworkers, and the defendant's relatives in the weeks before her death were not testimonial statements and their admission did not violate the defendant's right of confrontation. *People v Bauder*, 269 Mich App 174, 180-187 (2005), abrogated on other grounds by *People v Burns*, 494 Mich 104, 112 (2013).[20]

DataMaster Logs. Admitting DataMaster logs reflecting that a particular DataMaster machine was tested by an operator who verified its accuracy and certified that it was in proper working order without calling the operator to testify about his tests would not violate a defendant's right to confrontation because the DataMaster logs are nontestimonial. *People v Fontenot*, 333 Mich App 528, 536 (2020), vacated in part on other grounds ___ Mich ___ (2022).[21] Specifically, the "logs were created before defendant's breath test to prove the accuracy of the DataMaster machine; they were not created for the purpose of prosecuting defendant specifically." *Id*. at 535.

[20]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[21]For more information on the precedential value of an opinion with negative subsequent history, see our note.

"Furthermore, the DataMaster logs were created as part of the Michigan State Police's normal administrative function of assuring that the DataMaster machine produces accurate results," and the machine "would have been checked for proper functioning even if defendant had not been tested with it." *Id*. at 535-536. Accordingly, the logs reflecting the test results were nontestimonial where the primary purpose of the test "was to comply with administrative regulations and to ensure [the machine's] reliability for future tests—not to prosecute defendant specifically." *Id*. at 536 (citation omitted).

Proof of mailing. A certificate generated by the Michigan Department of State (DOS) "to certify that it had mailed a notice of driver suspension to a group of suspended drivers" was not testimonial because "the creation of a certificate of mailing, which is necessarily generated *before* the commission of any crime, is a function of the legislatively authorized administrative role of the DOS independent from any investigatory or prosecutorial purpose"; therefore, it could be admitted, for the purpose of proving the notice element of the charged offense, driving while license revoked or suspended, MCL 257.904(1), "without violating the Confrontation Clause." *People v Nunley*, 491 Mich 686, 689-690 (2012).

Conversation with a family member. A witness's testimony "about private conversations that she had with her sister," which "left the impression that [her sister, who was unavailable to testify due to asserting the Fifth Amendment,] admitted that she alone killed the victim or that some man other than defendant was involved" were not testimonial in nature of their context. *People v Clark*, 330 Mich App 392, 432-433 (2019).

Datamaster breath-test results. The admission of Datamaster breath-test results did not violate the defendant's constitutional right of confrontation, because "the original Datamaster ticket, showing the breath-test procedures and defendant's specific alcohol level, [did not] amount[] to testimonial hearsay within the meaning of *Crawford*[, 541 US at 36]." *People v Dinardo*, 290 Mich App 280, 290 (2010). The Court held that "while the Datamaster ticket showed facts relevant to the ultimate issue of defendant's guilt, the ticket was neither a testimonial statement nor hearsay because it was not the statement of a witness or a declarant." *Id*. at 294. "Instead, the Datamaster ticket was generated by a machine, following an entirely automated process that did not rely

on any human input, data entry, or interpretation." *Id*. The Court directed that "[b]ecause the Datamaster ticket was not a testimonial hearsay statement, [the police officer who administered the test] will be permitted to testify regarding the breath-test results [on remand]." *Id*. Further, the Court directed that "because the contemporaneously prepared [written report] constitutes a recorded recollection pursuant to MRE 803(5), [the officer] will be permitted to read its contents into evidence at trial [on remand]." *Dinardo*, 290 Mich App at 294.[22]

Statements to a SANE. Statements made by a sexual abuse victim to a SANE were nontestimonial because "under the totality of the circumstances of the complainant's statements, an objective witness would reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency," and "the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against defendant." *People v Garland*, 286 Mich App 1, 11 (2009). Specifically, because the victim did not have any outwardly visible signs of physical trauma, "the victim's statements to the nurse were reasonably necessary for her treatment and diagnosis[.]" *Id*.

Ongoing emergency. The lengthy sequence of events following a 73-year-old victim's rape and robbery qualified as an ongoing emergency during which the statements made by the victim (who died before trial) constituted nontestimonial evidence. *People v Jordan*, 275 Mich App 659, 661-663 (2007). In *Jordan*, immediately after the early morning assault, the victim ran out of her house in her nightgown yelling for help. *Id*. at 661. The owner/operator of a nearby service station responded to the victim's screams and called 911. *Id*. The police arrived 45 minutes later and although the victim told the service station owner/operator that she had been raped, she failed to tell the police about the rape when she was initially questioned. *Id*. The victim's friend arrived at the scene after the police left, but the victim did not mention the rape. *Id*. After learning of the rape by talking with the service station owner/operator, the friend took the victim

[22] MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See Section 4.9 for more information on forensic laboratory reports and certificates.

to the police station where she told the police about the rape. *Id*. at 661-662. "Because all statements by the victim were necessary to resolving the ongoing emergency, the statements were nontestimonial." *Id*. at 664-665.

3. Forfeiture By Wrongdoing

MRE 804(b)(6) sets forth the forfeiture-by-wrongdoing doctrine:

> "A statement offered against a party that wrongfully caused—or encouraged—the declarant's unavailability as a witness, and did so intending that result."

While the doctrine provides a basis for a hearsay exception,[23] it also is an exception to the right to confrontation; "the constitutional question will often go hand-in-hand with the evidentiary question[.]" *People v Burns*, 494 Mich 104, 111, 114 (2013). "Insofar as it applies to the Sixth Amendment['s Confrontation Clause], . . . the forfeiture doctrine requires that the defendant must have specifically intended that his wrongdoing would render the witness unavailable to testify." *Id*. at 111. The plain language of MRE 804(b)(6) incorporates this specific intent requirement. *Burns*, 494 Mich at 114.

The doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant's wrongful act has caused a witness to be unavailable to testify at trial; rather, "the 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." *Burns*, 494 Mich at 115 (2013) (holding that evidence that "during the alleged [sexual] abuse defendant instructed [the child-victim] 'not to tell' anyone and warned her that if she told, she would 'get in trouble'" did not "satisf[y] the causation element of MRE 804(b)(6)").[24] See also *People v Roscoe*, 303 Mich App 633, 640-641 (2014) ("[t]he trial court's admission of the victim's . . . statement [identifying the defendant as his assailant] violated both the rules of evidence and defendant's right to confront the witness because the trial court failed to make a factual finding that defendant had the requisite specific intent" to procure the witness's

[23] See Chapter 5 for more information on hearsay.

[24] "Although not required by [the] court rules, . . . trial courts [should] make findings of fact on the record for each of the three elements required by MRE 804(b)(6)." *Burns*, 494 Mich App at 118 n 42.

unavailability; however, "because the erroneous admission of the evidence was not outcome determinative[in light of ample other evidence of the defendant's guilt], reversal [was] not warranted").

"[T]he trial court did not abuse its discretion by admitting [a witness's] prior statements under the forfeiture-by-wrongdoing rule in MRE 804(b)(6)," where there was "evidence of defendants' . . . attempts to pressure [the witness], including: (1) visits from [co-defendant'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 [co-defendant] and [defendant]." *People v Caddell*, 332 Mich App 27, 68 (2020). Additionally, defendants' "wrongdoing with regard to [the witness] occurred during the investigation and prosecution of the case, which allowed a strong inference of intent to cause [the witness's] unavailability." *Id*.

Because the forfeiture-by-wrongdoing doctrine "applies . . . when the defendant, *or an intermediary*, engage[] in conduct specifically designed to prevent a witness from testifying," the trial court's admission of an unavailable witness's recorded interviews did not violate the defendant's right of confrontation where the defendant conveyed to the witness a note containing "language that could be construed as threatening" and that "reflect[ed] an effort specifically designed to prevent [the witness] from testifying"). *People v McDade*, 301 Mich App 343, 354-355 (2013) (emphasis added).

The decision to admit statements under the forfeiture-by-wrongdoing rule is reviewed for an abuse of discretion, while the trial court's factual findings are reviewed for clear error. *Caddell*, 332 Mich App at 66.

4. Impeachment

An unavailable witness's former testimonial statement may be admitted to impeach a witness without violating the Confrontation Clause according to *Crawford v Washington*, 541 US 36 (2004). *People v McPherson*, 263 Mich App 124, 134 (2004). For example, in *Tennessee v Street*, 471 US 409, 411 (1985), the defendant testified in his own defense, claiming that his confession was coerced and was derived from an accomplice's testimony. The prosecution was allowed to introduce the accomplice's testimony at trial, and the defendant argued that his right of confrontation was violated because he did not have the opportunity to cross-examine the accomplice. *Id.* at 410-412. However, the United States Supreme Court held that

introduction of the accomplice's confession "for the legitimate, nonhearsay purpose of rebutting [the defendant's] testimony that his own confession was a coerced 'copy' of [the accomplice's] statement" did not violate the defendant's right of confrontation. *Id*. at 417. Similarly, in *McPherson*, 263 Mich App at 131, 134, the defendant argued that the admission of an accomplice's statement that implicated the defendant (the testimony was elicited by the prosecutor from the defendant on cross-examination) violated his right of confrontation. The Court concluded that because the prosecutor's question was intended to impeach the defendant's statement that the accomplice was the gunman, its admission did not violate the defendant's right of confrontation. *Id*. at 134.

The case of *Hemphill v New York*, 595 US ___, ___ (2022), considered "whether the admission of [a] plea allocution under New York's rule in *People v Reid*[, 19 N. Y. 3d 382 (2012),] violated [defendant's] Sixth Amendment right to confront the witnesses against him." "In *Reid*, New York's highest court held that a criminal defendant could open the door to evidence that would otherwise be inadmissible under the Confrontation Clause if the evidence was reasonably necessary to correct a misleading impression made by the defense's evidence or argument." *Hemphill*, 595 US at ___ (cleaned up). The defendant in *Hemphill* "pursued a third-party culpability defense by blaming [another individual] for the shooting" that defendant was charged with. *Id*. at ___. Due to unavailability, the State was allowed to introduce a transcript of the other individual's plea allocution to a separate charge pursuant to *Reid* upon a finding by the trial court that defendant had opened the door to the evidence and "the evidence was reasonably necessary to correct a misleading impression made by the defense's evidence and argument." *Hemphill*, 595 US at ___ (cleaned up).

Notably, the Court's analysis in *Hemphill* focused on a New York rule established in the *Reid* case, which is not binding precedent in Michigan. The *Hemphill* Court acknowledged "that the Sixth Amendment leaves States with flexibility to adopt reasonable procedural rules governing the exercise of a defendant's right to confrontation," but it concluded that the door-opening principle established in *Reid* was "a substantive principle of evidence that dictates what material is relevant and admissible in a case." *Hemphill*, 595 US at ___. Because the *Reid* "principle requires a trial court to determine whether one party's evidence and arguments, in the context of the full record, have created a 'misleading impression' that requires correction with additional material from the other side," it

violates *Crawford* and the "purpose of the Confrontation Clause [to] bar judges from substituting their own determinations of reliability for the method the Constitution guarantees." *Hemphill*, 595 US at ___. "The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by the trial court." *Id.* at ___ (concluding that "[t]he trial court's admission of unconfronted testimonial hearsay [(under the *Reid* rule)] over [defendant's] objection, on the view that it was reasonably necessary to correct [defendant's] misleading argument, violated that fundamental guarantee").[25]

E. Joint Trial Issues

1. Scope of Testimony

A defendant's Sixth Amendment right of confrontation is violated when his or her nontestifying codefendant's statements—which implicate the defendant—are introduced at their joint trial. *Bruton v United States*, 391 US 123, 126 (1968). This is referred to as a *Bruton* error. However, the admissibility of an *unavailable* codefendant's *nontestimonial* statement against interest is governed by MRE 804(b)(4)[26] (hearsay exception for statements against the declarant's interest), not the Confrontation Clause. *People v Taylor*, 482 Mich 368, 370 (2008), overruling *People v Poole*, 444 Mich 151 (1993), to the extent that *Poole* held that this type of statement is governed by both MRE 804(b)(4)[27] and the Confrontation Clause. See Chapter 5 for more information on hearsay exceptions.

A *Bruton* error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *People v Pipes*, 475 Mich 267, 276-277 (2006). Where a *Bruton* error is unpreserved, it is subject to review for "'plain error that affected substantial rights.'" *Pipes*, 475 Mich at 278, quoting *People v Carines*, 460

[25]The Court further dismissed the State's assertion "that the *Reid* rule is necessary to safeguard the truth-finding function of courts because it prevents the selective and misleading introduction of evidence," noting that "[e]ven as it has recognized and reaffirmed the vital truth-seeking function of a trial, the Court has not allowed such considerations to override the rights the Constitution confers upon criminal defendants," nor has the Court "held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense." *Hemphill*, 595 US at ___.

[26]The provision previously found in MRE 804(b)(3) now appears in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

[27]The provision previously found in MRE 804(b)(3) now appears in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

Mich 750, 774 (1999). Under this standard, even where a nontestifying codefendant's statement was improperly admitted at a joint trial, the other codefendant's self-incriminating statement may be properly admitted against that codefendant and may be considered to determine whether the error was harmless. *Pipes*, 475 Mich at 280.

2. Curing Defects

"Joint trials with a single jury present a special problem" because "[s]ome evidence may be admissible as to one defendant but violate a codefendant's confrontation right" if the evidence is testimonial. *People v Bruner*, 501 Mich 220, 227 (2018). "When that is the case, a court must either exclude the testimony or take measures to eliminate the confrontation problem." *Id*. "What measures are sufficient depends on the context and content of the evidence." *Id*. "If, for example, a witness's testimony can be redacted to eliminate reference to the codefendant's existence, that witness will not have borne testimony against the codefendant in any Sixth Amendment sense." *Id*. at 227-228. However, merely redacting the codefendant's name and replacing it with a blank, the term "deleted," or some other symbol still points too directly at a jointly tried codefendant and violates the Confrontation Clause. *Gray v Maryland*, 523 US 185, 192 (1998); *Bruner*, 501 Mich at 228 n 2.

Sometimes the court can avoid a Sixth Amendment violation "by instructing the jury to consider testimony against one defendant, but not the other." *Bruner*, 501 Mich at 228. "Since [courts] presume juries follow their instructions, the result of a limiting instruction can often be as effective as excluding or redacting the testimony." *Id*. "But other times evidence is too compelling for a jury to ignore even with a limiting instruction." *Id*. "[L]imiting instructions are categorically inadequate to protect against evidence that a nontestifying defendant confessed and implicated a codefendant in that confession." *Id*. "In such a case, the confrontation problem persists as if no instruction had been given at all." *Id*.

In *Bruner*, "the admission at a joint trial with a single jury of an unavailable witness's prior testimony about a codefendant's confession violated the defendant's constitutional right to confrontation, notwithstanding the redaction of the defendant's name and the reading of a limiting instruction to the jury." *Bruner*, 501 Mich at 223. "The defendant had no opportunity to cross-examine the witness, and because of the substance of the witness's testimony—the codefendant's

confession that implicated the defendant—was so powerfully incriminating, the limiting instruction and redaction were ineffective to cure the Confrontation Clause violation." *Id.* (reversing the judgment of the Court of Appeals and remanding for consideration of whether the prosecution established that the error was harmless beyond a reasonable doubt).

The Confrontation Clause "does not provide a freestanding guarantee against the risk of potential prejudice that may arise inferentially in a joint trial." *Samia v United States*, 599 US ___, ___ (2023). In *Samia,* the Court concluded that the Confrontation Clause does not bar "the admission of a nontestifying codefendant's confession where (1) the confession has been modified to avoid directly identifying the nonconfessing codefendant and (2) the court offers a limiting instruction that jurors may consider the confession only with respect to the confessing codefendant." *Id.* at ___. The United States Supreme Court "precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly." *Id.* at ___. Accordingly, "the Clause was not violated by the admission of a nontestifying codefendant's confession that did not directly inculpate the defendant and was subject to a proper limiting instruction." *Id.* at ___ (noting it would not have been feasible to further modify the nontestifying codefendant's confession to make it appear that he had acted alone).

Committee Tip:

Bruner *issues are often complex and demanding of intricate analysis. If possible, they are best determined before trial. The court should address these issues in that fashion if practical.*

F. Interpreters and the Language Conduit Rule

Under the "language conduit" rule, "an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter's statements are regarded as the statements of the declarant without creating an additional layer of hearsay"; thus, where a defendant has a full opportunity to cross-examine the declarant, he or she has no additional constitutional right to confront the interpreter. *People v Jackson*, 292 Mich App 583, 595-597 (2011). In *Jackson*, 292 Mich App at 587, 593-594, a hospitalized

shooting victim was questioned by a police officer. Because the victim was unable to speak at the time of the interview, he answered the questions by either squeezing the hand of an attending nurse (to indicate "yes") or not (to indicate "no"). *Id.* at 593-594. The Court stated that the following factors should be examined when determining whether statements made through an interpreter are admissible under the language conduit rule:

> "(1) whether actions taken after the conversation were consistent with the statements translated, (2) the interpreter's qualifications and language skill, (3) whether the interpreter had any motive to mislead or distort, and (4) which party supplied the interpreter." *Jackson*, 292 Mich App at 596.

Concluding that none of these factors militated against application of the language conduit rule, the Court held that although the victim's nonverbal answers qualified as testimonial statements, the defendant did not have a constitutional right to confront the nurse, "because what she was reporting were the statements actually made by [the victim]." *Jackson*, 292 Mich App at 596-597. Because he "had a full opportunity to cross-examine" the victim, the defendant's Confrontation Clause rights were satisfied. *Id.* at 597.

G. Taking Testimony by Use of Audio and Video Technology

1. Use of Videoconferencing Technology in Certain Proceedings

Except as otherwise provided in MCR 2.407, the use of videoconferencing in criminal proceedings is governed by MCR 6.006. MCR 6.006(A)(1). "The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court. MCR 6.006(D).

A court may allow the use of videoconferencing technology by any participant in any criminal proceeding, at the request of any participant, or sua sponte. MCR 6.006(A)(2). The court must "consider constitutional requirements, in addition to the factors contained in MCR 2.407," "[w]hen determining whether to utilize videoconferencing technology." MCR 6.006(A)(3). See also M Crim JI 5.16, which addresses witness testimony introduced via video rather than in-person:

> "The next witness, [*identify witness*], will testify by videoconferencing technology. You are to judge the witness's testimony by the same standards as any other witness, and you should give the witness's testimony the same consideration you would have given it had the witness testified in person. If you cannot hear something that is said or if you have any difficulty observing the witness on the videoconferencing screen, please raise your hand immediately."

MCR 6.006 "does not supersede a participant's ability to participate by telephonic means under MCR 2.402." MCR 6.006(A)(4).

Cases cognizable in the circuit court. Videoconferencing may be used in circuit court to conduct any non-evidentiary or trial proceeding. MCR 6.006(B)(1). The use of videoconferencing is the preferred mode for:

> "(a) initial arraignments on the information;
>
> (b) pretrial conferences;
>
> (c) motions pursuant to MCR 2.119; and
>
> (d) pleas." MCR 6.006(B)(2).

It is presumed that parties, witnesses, and other participants will appear in-person for all other proceedings. MCR 6.006(B)(3). The use of videoconferencing may not be used in bench or jury trials, or any proceeding where the testimony of witnesses or evidence may be presented, "except in the discretion of the court after all parties have had notice and an opportunity to be heard on the use of videoconferencing technology." MCR 6.006(B)(4).

MCR 6.006 does not prevent "a defendant who otherwise has the right to appear in person, from demanding to physically appear in person for any proceeding." MCR 6.006(B)(5). The presiding judge and any attorney of record for the participant must appear in person with the participant if "there is a demand to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood[.]" *Id.*

Cases cognizable in district and municipal courts. Videoconferencing is the "preferred mode for conducting arraignments and probable cause conferences for in-custody defendants." MCR 6.006(C)(1). It is presumed that parties,

witnesses, and other participants will appear in-persona for all other criminal proceedings. MCR 6.006(C)(2).

"Notwithstanding any other provision of these rules and subject to constitutional rights, the use of videoconferencing technology shall not be used in evidentiary hearings, bench trials or jury trials, or any criminal proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court." MCR 6.006(C)(3). District courts may use videoconferencing to take testimony from any witness in a preliminary examination if the defendant is either present in the courtroom or has waived the right to be present, notwithstanding anything herein to the contrary. MCR 6.006(C)(4).

The following cases address the use of two-way interactive video technology before MCR 6.006(E) was added to the court rule and prior to complete replacement of MCR 6.006(A)-(C). See ADM File No. 2020-08, effective September 1, 2022. It is unclear if any of the Courts' analyses would be impacted by the addition of the new subrule and rewording of MCR 6.006(A)-(C).

"In allowing [a forensic analyst's] two-way, interactive video testimony [at trial] over the defendant's objection, the trial court violated the defendant's Confrontation Clause rights" and MCR 6.006(C). *People v Jemison (Jemison I)*, 505 Mich 352, 366-367 n 9 (2020) (vacating the Court of Appeals analysis that "the MCR 6.006(C) error [was] interchangeable with a Confrontation Clause violation" and remanding to "determin[e] whether [the Confrontation Clause] violation was harmless beyond a reasonable doubt"). On remand, the Court of Appeals determined that the error was harmless and affirmed the conviction. See *People v Jemison (On Remand) (Jemison II)*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2020 (Docket No. 334024), p 8.

Where the defendant failed to object on the record to the use of two-way interactive video technology to present the testimony of an examining physician and a DNA expert, and where defense counsel stated that she would leave the issue of the admission of the video testimony to the trial court's discretion, the defendant waived his constitutional right of confrontation and "consent[ed]" to the use of the video technology within the meaning of MCR 6.006(C)(2).[28] *People v Buie*, 491 Mich 294,

[28] Effective January 1, 2017, ADM File No. 2013-18 amended MCR 6.006(C) to refer to "videoconferencing technology" rather than "two-way interactive video technology[.]" Effective September 1, 2022, ADM File No. 2020-08 replaced the language of former MCR 6.006(C).

297-298, 316, 318-319 (2012). For additional information on waiver, see Section 3.5(I).

Turning to MCR 6.006(C), the *Buie* Court concluded that the defendant "consent[ed]" to the video testimony within the meaning of MCR 6.006(C)(2) and that the trial court did not abuse its discretion in finding that "good cause" was shown for the use of video technology. *Buie*, 491 Mich at 318-320. "[I]f either the defendant or [defense] counsel objects, the 'party' cannot be said to have consented[under MCR 6.006(C)(2); h]owever, as with the Confrontation Clause, for the defendant's objection to be valid, it must be made on the record." *Buie*, 491 Mich at 319. Additionally, contrary to the defendant's argument, the Court held that "the use of 'good cause' in MCR 6.006(C) [does not] import[] the constitutional standard from [*Maryland v Craig*, 497 US 836, 845-846, 850-852 (1990),] for dispensing with confrontation, to wit, that the 'cause' be 'necessary to further an important public policy' or 'state interest'"; rather, video testimony may be admitted under MCR 6.006(C) if there is "a satisfactory, sound or valid reason," and "there is no need to identify a corresponding state interest[.]" *Buie*, 491 Mich at 319 (quotation marks and citation omitted). Because "both parties apparently consented to the use of video testimony, the trial court did not [abuse its discretion] by concluding that convenience, cost, and efficiency were sound reasons for using video testimony." *Id*. at 320.

A trial court's decision to admit video testimony under MCR 6.006(C) is reviewed for an abuse of discretion. *Buie*, 491 Mich at 319-320.

2. Expert Testimony

MCL 600.2164a(1) specifically permits the use of video communication equipment for the purpose of presenting expert testimony at trial. If the court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." *Id*.[29]

"In allowing [a forensic analyst's] two-way, interactive video testimony [at trial] over the defendant's objection, the trial

[29] See Section 4.1(C) for additional discussion of expert testimony via video communication equipment.

court violated the defendant's Confrontation Clause rights." *People v Jemison (Jemison I)*, 505 Mich 352, 366-367 (2020) (remanded to "determin[e] whether that violation was harmless beyond a reasonable doubt"). On remand, the Court of Appeals determined that the error was harmless and affirmed the conviction. See *People v Jemison (On Remand) (Jemison II)*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2020 (Docket No. 334024), p 8.

3. Special Protections for Certain Victim-Witnesses[30]

MCL 600.2163a affords certain victim-witnesses special protections in prosecutions and proceedings involving specified offenses. MCL 600.2163a(1)(g).[31] These special protections include the use of videorecorded statements or closed-circuit television in presenting the victim-witness's testimony. See MCL 600.2163a(8); MCL 600.2163a(20).[32]

In prosecutions of adult offenders, a videorecorded statement may be used in court only for one or more of the following purposes:

> "(a) It may be admitted as evidence at all pretrial proceedings, except that it cannot be introduced at the preliminary examination instead of the live testimony of the witness.
>
> (b) It may be admitted for impeachment purposes.
>
> (c) It may be considered by the court in determining the sentence.
>
> (d) It may be used as a factual basis for a no contest plea or to supplement a guilty plea." MCL 600.2163a(8).[33]

"A videorecorded deposition may be considered in court proceedings only as provided by law." MCL 600.2163a(9).

"If, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be

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[30] See Section 3.6 for discussion of child witnesses. For additional discussion of special protections for certain victims and witnesses, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 5.

[31] Section 17b of the Juvenile Code, MCL 712A.17b, affords similar protections, but does not apply to vulnerable adults. See MCL 712A.17b(1)(e).

[32] See also MCL 712A.17b(5); MCL 712A.17b(16).

[33] In juvenile proceedings, a videorecorded statement "shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(5).

psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in subsections [MCL 600.2163a](3), [MCL 600.2163a](4), [MCL 600.2163a](17), and [MCL 600.2163a](19),[34] the court must order that the witness may testify outside the physical presence of the defendant by closed circuit television or other electronic means that allows the witness to be observed by the trier of fact and the defendant when questioned by the parties." MCL 600.2163a(20). See also MCL 712A.17b(16), which contains substantially similar language and is applicable during the adjudication stage of a juvenile proceeding.

H. Use of Support Person or Support Animal

"The court must permit a witness who is called upon to testify to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony." MCL 600.2163a(4). Note that the definition of *witness* is limited to certain child witnesses, witnesses with a developmental disability, and vulnerable adults. See MCL 600.2163a(1)(g). "The court must also permit a witness who is called upon to testify to have a courtroom support dog and handler sit with, or be in close proximity to, the witness during his or her testimony." *Id.*

"A notice of intent to use a support person or courtroom support dog is only required if the support person or courtroom support dog is to be utilized during trial and is not required for the use of a support person or courtroom support dog during any other courtroom proceeding." MCL 600.2163a(5). "A notice of intent . . . must be filed with the court and must be served upon all parties to the proceeding," and "[t]he notice must name the support person or courtroom support dog, identify the relationship the support person has with the witness, if applicable, and give notice to all parties that the witness may request that the named support person or courtroom support dog sit with the witness when the witness is called upon to testify during trial." *Id.*

"A court must rule on a motion objecting to the use of a named support person or courtroom support dog before the date when the witness desires to use the support person or courtroom support dog." MCL 600.2163a(5). "[I]t is within the trial court's inherent authority to control its courtroom and the proceedings before it to

[34] These subsections allow, under limited circumstances, the use of dolls or mannequins, the presence of a support person, the presence of a courtroom support dog (and the dog's handler), the exclusion of all unnecessary persons from the courtroom, and the placement of the defendant as far from the witness stand as is reasonable. MCL 712A.17b contains similar provisions.

allow a witness to testify accompanied by a support animal." *People v Johnson*, 315 Mich App 163, 178 (2016), citing MCL 768.29; MRE 611(a).[35] A trial court is not required to make findings of good cause or necessity before allowing the use of a support animal. *Johnson*, 315 Mich App at 187. However, "as a practical matter it will be the better practice for a trial court to make some findings regarding a decision to use or not use a support animal," and "the court should consider the facts and circumstances of each individual witness to determine whether the use of the support animal will be useful to the expeditious and effective ascertainment of the truth." *Id.* at 187, 189.

The use of a support dog to accompany a young victim of sexual abuse and another young witness (the victim's brother) when they testified "did not implicate the Confrontation Clause because it did not deny defendant a face-to-face confrontation with his accuser[.]" *Johnson*, 315 Mich App at 187 (noting that "the victim and the victim's brother testified on the witness stand without obstruction, . . . the presence of the dog did not affect the witnesses' *competency* to testify[or] . . . the oath or affirmation given to the witnesses, the witnesses were still subject to cross-examination, and the trier of fact was still afforded the unfettered opportunity to observe the witnesses' demeanor").

"[A] fully abled adult witness may not be accompanied by a support animal or support person while testifying." *People v Shorter*, 324 Mich App 529, 542 (2018).[36] "[T]here is a fundamental difference between allowing a support animal to accompany a child witness, as in *Johnson*, and allowing the animal to accompany a fully abled adult witness[.]" *Id.* at 538.

I. Waiver

"The Confrontation Clauses of our state and federal constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him." *People v Buie*, 491 Mich 294, 304 (2012). However, "[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel." *Id.* at 306.

In *Buie*, the defendant failed to object on the record to the use of two-way interactive video technology[37] to present the testimony of an examining physician and a DNA expert, and defense counsel

[35]The *Johnson* case was decided before 2018 PA 282, which amended MCL 600.2163a(4) to include the use of a courtroom support dog.

[36]The *Shorter* case was decided before 2018 PA 282, which amended MCL 600.2163a(4) to include the use of a courtroom support dog.

stated that she would leave the issue of the admission of the video testimony to the trial court's discretion. *Buie*, 491 Mich at 297-298, 316. The Michigan Supreme Court held that, under these circumstances, the defendant had waived his right of confrontation under the state and federal constitutions. *Id.* at 297, 310-318. "[W]here the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record." *Id.* at 313. Although defense counsel stated at trial that the defendant "'wanted to question the veracity of these proceedings,'" that statement did not constitute an objection because (1) it was not phrased as an objection, (2) the defendant effectively acquiesced to the use of two-way interactive technology when his counsel stated that she would leave it to the court's discretion whether to use the technology, (3) the defendant made no complaints on the record when the court proceeded to explain how the technology worked, (4) the first remote witness testified via two-way interactive technology without further complaint, and (5) there was no complaint made before the testimony of the second remote witness. *Id.* at 316-317.[38]

Committee Tip:

It may be advisable for the court to formalize counsel's unknown position by asking "are you objecting or aren't you?"

J. Standard of Review

Whether a defendant has been denied his or her right to confrontation is a constitutional question reviewed de novo on appeal. *People v Beasley*, 239 Mich App 548, 557 (2000). "[T]he trial court's factual findings [are reviewed] for clear error." *People v Buie*, 491 Mich 294, 304 (2012). Preserved Confrontation Clause violations are subject to harmless-error analysis. See *Delaware v Van Arsdall*, 475 US 673, 682 (1986). Unpreserved Confrontation Clause violations

[37] Effective January 1, 2017, ADM File No. 2013-18 amended MCR 6.006(C) to refer to "videoconferencing technology" rather than "two-way interactive video technology[.]" Effective September 1, 2022, ADM File No. 2020-08 replaced the language of former MCR 6.006(C).

[38] The *Buie* Court additionally held that, under these circumstances, the defendant "consent[ed]" to the use of the video technology within the meaning of MCR 6.006(C)(2). *Buie*, 491 Mich at 318-320. Effective September 1, 2022, ADM File No. 2020-08 replaced the language of MCR 6.006{(C)(2) that the *Buie* court considered.

are subject to review for "'plain error that affected substantial rights.'" *People v Pipes*, 475 Mich 267, 278 (2006), quoting *People v Carines*, 460 Mich 750, 774 (1999).

Committee Tip:

Care should be taken to ensure counsel articulates the basis for any objection: i.e, *confrontation violation, rules of evidence, or under the court rules.*

3.6 Child Witness

A. Competency

A child is competent to testify as a witness unless "the court finds, after questioning, that the [child] does not have sufficient physical or mental capacity or sense of obligation to testify truthfully or understandably; or [the MREs] provide otherwise." MRE 601. "For a witness who is a [young] child, a promise to tell the truth takes the place of an oath to tell the truth." M Crim JI 5.9.

B. Sexual Act Evidence

In criminal and delinquency proceedings only, a child's (declarant) statement describing sexual acts performed on or with the defendant or accomplice is admissible, if it corroborates the declarant's testimony during the same proceeding and:

> "(1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance;
>
> (4) the statement is introduced through the testimony of someone other than the declarant; and

> (5) the proponent of the statement makes known to the adverse party the intent to offer it and its particulars sufficiently before the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." MRE 803A(1)–(5).[39]

Only the declarant's first corroborative statement is admissible under MRE 803A. However, a statement that is inadmissible under MRE 803A because it is a subsequent corroborative statement is not precluded from being admitted via another hearsay exception. *People v Katt*, 468 Mich 272, 294-297 (2003) (finding that the statement was admissible under the residual hearsay exception).[40]

C. Custody Proceedings

The scope of an in camera interview of a child is limited to determining the child's preference and should not cover other best interest of the child factors. *In re HRC*, 286 Mich App 444, 451-452 (2009); MCR 3.210(C)(5). The rules of evidence do not apply to in camera proceedings regarding a child's custodial preference. MRE 1101(b)(6).

In child-custody proceedings, a trial court must take testimony in open court on any issues regarding a child's abuse or mistreatment. *Surman v Surman*, 277 Mich App 287, 302 (2007). According to the *Surman* Court:

> "[A]lthough courts should seek to avoid subjecting children to the distress and trauma resulting from testifying and being cross-examined in court, concerns over the child's welfare are outweighed when balanced against a parent's due process rights." *Id.* at 302.[41]

3.7 Credibility of Witness

In criminal cases, "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" because "'jurors [are] the judges of the credibility of testimony offered by witnesses.'" *People v Musser*, 494 Mich 337, 348-349 (2013), quoting *United States v Bailey*, 444 US 394, 414 (1980). "Such comments

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[39] See also MCR 3.972(C), which applies to child protective proceedings and contains a rule similar to MRE 803A.

[40] Provisions previously found in MRE 803(24) now appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

[41] See Section 3.5(G) on using closed-circuit television as a means to protect a child from the trauma of courtroom testimony and/or the defendant's presence in the courtroom.

have no probative value, because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *Musser*, 494 Mich at 349 (quotation marks and citations omitted).

A. Comment on Witness's Credibility by Interrogator or Interviewer

"A witness may not comment on or vouch for the credibility of another witness." *People v Lowrey*, 342 Mich App 99, 109 (2022). "Furthermore, a witness may not opine about the defendant's guilt or innocent in a criminal case." *Id*. at 109 (cleaned up). "Nevertheless, a police officer may testify about his or her perceptions during the course of an investigation of whether a defendant was being truthful." *Id*. at 109. In *Lowrey*, a detective "unambiguously expressed the opinion that defendant was lying to him" and "cloaked his opinion in a veneer of artificial credibility by citing certain interviewing techniques[.]" *Id*. at 111. Although the detective "never stated that he believed defendant actually committed the crime" and "did not directly comment on the defendant's testimony at trial," his testimony "was clearly relevant" because the defendant's "incriminating concessions during the interview had a significant tendency to make facts at issue more probable." *Id*. at 111, 112. Further, "it was important for the jury to understand the nature of [his] interviewing techniques, including why [he] had asked certain questions and to give context to defendant's answers." *Id*. at 111.

It is "permissible for an interviewing officer to recount what he or she told an interviewee, including a statement of disbelief."*Lowrey*, 342 Mich App at 113. "However, there is a subtle yet important distinction between testifying that 'I told him I did not believe him as part of an interviewing technique,' versus testifying that 'I believe he was lying on the basis of my experience and training'" — the "latter clearly violates the prohibition against experts commenting on the truthfulness of a defendant's confession." *Id*. at 113. The *Lowrey* Court found that the detective's "testimony clearly strayed beyond the bounds of permissibility" when "the prosecutor stressed how [the detective's] conclusions were all based on an ostensibly scientific method" "after attempting to have [the detective] admitted as an expert[.]" *Id*. at 113. While "a witness's opinion of another witness's credibility has no probative value," "such an opinion is not necessarily unfairly prejudicial." *Id*. at 115. Despite its concerns, the *Lowrey* Court did not "conclude that [the detective's] testimony was improper in its entirety or that the errors in his testimony were outcome-determinative." *Id*. at 113. The Court held that "defendant's own admissions, along with the other evidence admitted at trial, [was] sufficient to establish that the

errors in [the detective's] testimony were not, in this particular case, outcome-determinative." *Id.* at 115.

There is no "bright-line rule for the automatic exclusion of" statements made by an interrogator or interviewer "that comment on another person's credibility[.]" *People v Musser*, 494 Mich 337, 353 (2013). Rather, where such evidence is offered "for the purpose of providing context to a defendant's statements, the [evidence is] only admissible to the extent that the proponent of the evidence establishes that the interrogator's statements are relevant to their proffered purpose." *Id.* at 353-354. See also MRE 401. "Accordingly, an interrogator's out-of-court statements must be redacted if that can be done without harming the probative value of a defendant's statements." *Musser*, 494 Mich at 356. In addition, even if the evidence is deemed relevant, it may still be excluded under MRE 403, "and, upon request, must be restricted to their proper scope under MRE 105." *Musser*, 494 Mich at 354. In *Musser*, 494 Mich at 359-362, the trial court abused its discretion in admitting two interrogators' statements to the jury because the statements were irrelevant and not probative to providing context to the defendant's statements. Many of the statements "could have been easily redacted without harming the probative value of defendant's statement." *Id.* at 361. See also *People v Tomasik*, 498 Mich 953, 953 (2015) (holding that the trial court erred in "admitting the recording of the defendants interrogation" because "nothing of any relevance was said during the interrogation, . . . and thus [it] was not admissible evidence").

B. Comment on Witness's Credibility by CPS Worker

The trial court abused its discretion by allowing a witness to comment on or vouch for the credibility of another witness; specifically, the court allowed a CPS worker to testify that "based on her investigation, she found that [the victim's] allegations had been substantiated," and "there was no indication that [the victim] was coached or being untruthful." *People v Douglas*, 496 Mich 557, 570, 583 (2014) (quotation marks and alteration omitted). For the same reason, the trial court abused its discretion when it allowed an expert forensic interviewer to testify that the victim "had not been coached" and was "being truthful[.]" *Id.* at 570. However, there was no plain error affecting substantial rights where an officer testified as an expert "that *there [was] no indication* that [the] child victim was coached" on redirect examination after defense counsel pursued a line of questioning suggesting that the victim had been coached on cross-examination.[42] *People v Sardy*, 313 Mich App 679, 723 (2015), vacated in part on other grounds 500 Mich 887 (2016).[43] The *Sardy* Court explained:

> "We initially note that it is unclear from *Douglas* whether the Court found problematic the testimony regarding coaching or whether the main or sole concern was the testimony about the victim's truthfulness (or perhaps a combination thereof). Defendant makes no claim here that the officer ever opined at trial that the victim was telling the truth. In our view, giving an opinion that there was no indication that a child CSC victim was coached based on forensic-interview training, experience, education, and the totality of the circumstances, MRE 702 and MRE 703, is not the equivalent of opining that the victim was credible or telling the truth. Indeed, we believe that there is also a distinction between testifying that a child victim had not been coached, like the definitive conclusion made by the forensic interviewer in *Douglas*, 496 Mich at 570, 583, and testifying that *there is no indication* that a child victim was coached, as opined by the officer in this case. Additionally, defendant opened the door to the question whether there was any indication of coaching." *Sardy*, 313 Mich App at 722-723.

The Court further held that even if *Douglas* requires the conclusion that the officer's testimony was inadmissible, the defendant failed to demonstrate plain error affecting substantial rights; accordingly, reversal was unwarranted. *Sardy*, 313 Mich App at 723.

C. Witness Comment on a Child's Assertion of Sexual Abuse

"[E]xpert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity." *People v Thorpe*, 504 Mich 230, 235 (2019). Additionally, "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *Id.* See also *People v Del Cid (On Remand)*, 331 Mich App 532, 542 (2020) (holding that "an

[42]Defense counsel initially objected to the officer's testimony on the basis that the officer was not an expert; however, after the prosecution laid a foundation for purposes of allowing the officer to respond to the question about whether there was any indication of coaching, the officer was permitted to testify without further objection. *Sardy*, 313 Mich App at 721. Accordingly, the defendant's argument on appeal that the testimony was inadmissible because it vouched for the victim's credibility was unpreserved, and therefore, reviewed for plain error affecting substantial rights. *Id.* at 721-722.

[43]For more information on the precedential value of an opinion with negative subsequent history, see our note.

examining physician's testimony diagnosing a child-complainant with 'possible sexual abuse' is inadmissible without corroborating physical evidence"; the admission of such evidence constitutes a plain error requiring reversal).

"An expert is not permitted to testify that the particular child victim's behavior is consistent with that of a sexually abused child because such information comes too close to testifying that the particular child is a victim of sexual abuse." *People v Muniz*, 343 Mich App 437, 446 (2022) (quotation marks and citation omitted). In *Muniz*, the Court of Appeals concluded that an expert witness did not improperly vouch for the complainant's credibility because he "never compared his general information about the behavior of abuse victims with specific behavior of the complainant." *Id*. at 446. The *Muniz* Court observed that "general information about abuse victim's conduct" which "happened to be consistent with the complainant's postincident behavior does not constitute vouching." *Id*. at 447. The Court noted that the expert "testified that he had not met the complainant or read the police report or forensic interview," "made no references to the victim's allegations, her disclosure of information, or any other aspects of this case," "and at no time . . . offer[ed] any opinion or statement that could be reasonably understood as vouching for the complainant[.]" *Id*. at 447. The *Muniz* Court further held that the examining physician did not improperly vouch for the complainant's testimony where she "gave no testimony respecting whether the complainant had been sexually abused," "did not provide any diagnosis," including whether "the complainant [was] a probable or actual victim of pediatric sexual abuse," "gave no opinion regarding the complainant's statements, and testified that she directed follow-up care for testing for sexually transmitted disease infection from contact with bodily fluids." *Id*. at 450, 451.

"[T]estimony by a police officer witness improperly vouched for the [child] complainant's credibility and improperly commented on the defendant's guilt" where the detective "testified that the complainant's demeanor during her interview was consistent with that of a typical child sexual assault victim and that, given his specialized training, the complainant's testimony 'seemed authentic to [him].'" *People v Hawkins*, 507 Mich 949 (2021) (third alteration in original). The detective also improperly testified "that he tried but was unable to find inconsistencies in the complainant's allegations, stating, '[I]f I can't prove that [the abuse] didn't happen, then there's a good possibility that it did,' seemingly shifting the burden of proof to defendant to prove his innocence," and "also testified that, on the basis of his investigation, he found defendant's suggestion that the complainant made up the abuse allegations to get her father's attention to be '[n]ot true.'" *Id*. (alterations in original). The

Hawkins Court concluded "that, but for [a] deficiency in defense counsel's performance [to object to the testimony], there [was] a reasonable probability that the outcome of the trial would have been different" if the detective's testimony had been excluded. *Id*.

See Section 4.3(B) for further discussion, as well as information on sexually abused child syndrome.

D. Use of Religious Beliefs/Opinions to Impair or Enhance Witness's Credibility

"While evidence of religious matters may be relevant in certain narrow contexts, . . . if testimony about religious beliefs or opinions is offered to impair or enhance credibility, then that testimony must be excluded." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 709 (2018). See also MCL 600.1436 and MRE 610. The Court declined to impose a rule of automatic reversal as set forth in *People v Hall*, 391 Mich 175 (1974) and its progeny, which have extended a limited rule of automatic reversal to certain criminal cases in which a witness gives testimony regarding the defendant's or the victim's religious beliefs or opinions. *Nahshal*, 324 Mich at 722. Rather, the *Nahshal* Court concluded that *Hall* and its progeny are limited to the criminal context and instead applied *Sibley v Morse*, 146 Mich 463 (1906), which concluded that in civil actions, prejudice must be shown before reversal of a jury verdict is warranted. *Nahshal*, 324 Mich at 715-717 (no prejudice was found in *Nahshal* because the Court concluded that the record demonstrated it was more probable than not that the admission of the improper testimony was not outcome determinative).

Committee Tip:

This would be a useful time to ask the proponent of religious beliefs/opinion testimony to articulate the purpose of admission of the evidence in question.

3.8 Examination & Cross-Examination

Only one attorney for a party is permitted to examine a witness, unless otherwise ordered by the court. MCR 2.507(C).

A. Control by Court

"The court must exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

> (1) make those procedures effective for determining the truth;
>
> (2) avoid wasting time; and
>
> (3) protect witnesses from harassment or undue embarrassment." MRE 611(a).

"The court must exercise reasonable control over the appearance of parties and witnesses so as to:

> (1) ensure that the fact-finder can see and assess their demeanor; and
>
> (2) ensure their accurate identification." MRE 611(b).

B. Direct Examination

1. Presentation Order

Generally, in a civil case, the plaintiff must introduce its testimony first, unless otherwise ordered by the court. MCR 2.507(B). However, a defendant must present his or her evidence first if:

> "(1) the defendant's answer has admitted facts and allegations of the plaintiff's complaint to the extent that, in the absence of further statement on the defendant's behalf, judgment should be entered on the pleadings for the plaintiff, and
>
> (2) the defendant has asserted a defense on which the defendant has the burden of proof, either as a counterclaim or as an affirmative defense." MCR 2.507(B).

Note that this rule may apply to criminal proceedings provided that it meets the criteria in MCR 6.006(D).

Committee Tip:

While unlikely to be employed in a criminal case, the court might receive the testimony of expert

witnesses as in a prearranged order in civil cases, and especially in domestic cases.

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2. Leading Questions

Leading questions are only permissible on direct examination "as necessary to develop a witness's testimony." MRE 611(d)(1).

Civil case. "[R]eversal may be predicated on the use of leading questions only where prejudice or a pattern of eliciting inadmissible testimony exists." *In re Susser Estate*, 254 Mich App 232, 239-240 (2002) (finding reversal was not required when the plaintiff asked leading questions of an elderly and infirm witness only to the extent necessary to develop her testimony) (quotation marks and citation omitted).

Criminal case. "[A] prosecutor has considerable leeway to ask leading questions to child witnesses." *People v Johnson*, 315 Mich App 163, 199-200 (2016). "In order to demonstrate that reversal is warranted for the prosecution asking leading questions, it is necessary to show some prejudice or patterns of eliciting inadmissible testimony." *Id.* at 200 (holding that the prosecutor's use of leading questions was necessary to develop the victim's testimony where the victim was six years old at the time of trial and was clearly "distraught" and frequently asked for clarification or did not understand the questions) (quotation marks and citation omitted).

C. Cross-Examination

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(c). "A party is free to contradict the answers that he has elicited from his adversary or his adversary's witness on cross-examination regarding matters germane to the issue. As a general rule, however, a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters." *People v Vasher*, 449 Mich 494, 504 (1995). Impeachment may be proper when the collateral matter "closely bear[s] on defendant's guilt or innocence[.]" *Id.*

1. Limiting Cross-Examination

Cross-examination may be limited under certain circumstances, MRE 611, such as to protect witnesses from harassment or undue embarrassment. MRE 611(a). Specifically,

"MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault. The court must balance the criminal defendant's right to self-representation with the State's important interest in protecting child sexual abuse victims from further trauma." *People v Daniels*, 311 Mich App 257, 269-271 (2015) (holding that the "trial court wisely and properly prevented defendant from personally cross-examining [his children regarding their testimony that he sexually abused them,] to stop the children from suffering harassment and undue embarrassment," following "a motion hearing at which [the court] heard considerable evidence that defendant's personal cross-examination would cause [the children] significant trauma and emotional stress") (quotation marks and citations omitted). The defendant's right to self-representation was not violated under these circumstances where the defendant was instructed "to formulate questions for his [children], which his advisory attorney then used to cross-examine them." *Id*. at 269-270.

The trial court may also limit cross-examination regarding matters not testified to on direct examination. MRE 611(c). The trial court did not abuse its discretion in limiting the plaintiff's cross-examination of the defendant's expert witness about issues that were "marginally relevant to the case as a whole but which [were] beyond the scope of the witness' testimony on direct examination." *Beadle v Allis*, 165 Mich App 516, 522-523 (1987).

2. Leading Questions

Generally, a court should allow leading questions on cross-examination. MRE 611(d)(1)(A).However, the court is not always required to allow them. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 517-518 (2004).

MRE 611(d)(1)(B) permits leading questions "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." The adverse party statute (MCL 600.2161) allows a party to "call[] the opposite party, or his agent or employee, as a witness with the same privileges of cross-examination and contradiction as if the opposite party had called that witness." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 26 (2005). Neither MRE 611 nor MCL 600.2161 is violated if the court, in exercising its discretion under MRE 611(a), requires the cross-examination of the adverse party

during the adverse party's case-in-chief. *Linsell*, 266 Mich App at 26.

D. Redirect Examination

The scope of redirect examination is left to the discretion of the trial court. *Gallaway v Chrysler Corp*, 105 Mich App 1, 8 (1981). "In general, redirect examination must focus on matters raised during cross-examination." *Id*. However, "this general rule does not equate to an entitlement to elicit any and all testimony on such topics. *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291 (2006). Indeed, MRE 104(a) requires the court to decide any question about whether evidence is admissible, "regardless of whether the questioning at issue is properly within the scope of examination." *Detroit*, 273 Mich App at 291.

E. Recross-Examination

Generally, recross-examination is governed by the same principles as cross-examination. See *People v Jackson*, 108 Mich App 346, 348-349 (1981).

On recross-examination, the parties may inquire into new matters not covered during cross-examination where the new matters are in response to matters introduced during redirect examination. *People v Goddard*, 135 Mich App 128, 138 (1984), rev'd on other grounds 429 Mich 505 (1988).[44]

F. Nonresponsive Answer

"[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting a mistrial." *People v Haywood*, 209 Mich App 217, 228-229 (1995) (holding that "improper comments by the victim's father were not grounds for a mistrial" where the "witness was not in a position to know that his testimony was improper," "the prejudicial effect of the witness' statement was lessened because he did not refer to defendant as the cause of the victim's injury," and "because [the comments] were not elicited by the prosecutor's questioning"). "A motion for mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Beesley*, 337 Mich App 50, 54 (2021) (quotation marks and citation omitted). "The proper analysis for a motion for mistrial depends principally, if not exclusively, on whether a defendant has

[44]For more information on the precedential value of an opinion with negative subsequent history, see our note.

been prejudiced by an irregularity or error." *Id*. at 55. "While . . . police witnesses (and all witnesses) have an obligation not to venture into forbidden areas of testimony, the key point is in regards to testimony which is 'forbidden.' An area of testimony is only 'forbidden' if the court rules it inadmissible. While many things, including a defendant's criminal history, are generally inadmissible, there are exceptions for all such rules." *Id*. at 57-58 (citation omitted) (suggesting "that it would be a good practice for a trial court ruling on the admissibility of testimony to instruct the prosecutor to inform the officer regarding what has been ruled inadmissible prior to an officer's testimony," and that it is error to create "a blanket assumption that a police officer will in all instances know precisely what has been ruled admissible and what has been ruled 'forbidden').

Committee Tip:

Seldom will a lone, stray answer compel a mistrial.

G. Correction of Witness Testimony

The prosecution has a duty to correct false testimony of witnesses. *People v Smith*, 498 Mich 466, 470 (2015). This duty applies "especially when that testimony conveys to the jury an asserted confession from the defendant." *People v Brown*, 506 Mich 440, 446 (2020). "When credibility is a dominant consideration in ascertaining guilt or innocence, other independent evidence apart from the testimony of the defendant and the victim is particularly vital to the fact-finding process. And false testimony simply undermines the jury's ability to discern the truth in these circumstances." *Id*. at 453. Notwithstanding, "[i]n some cases, a new trial will not be warranted given the sheer strength of the truthful evidence relative to the false testimony." *Id*.

In *Brown*, the detective, who interviewed defendant regarding the victim's allegations of sexual assault, "asked defendant if the truth was 'somewhere in the middle'" of the victim's allegations and his claim of innocence, to which the defendant gave no verbal or nonverbal response. *Brown*, 506 Mich at 447. At trial, the detective "testified that defendant said that the truth . . . was actually 'somewhere in the middle.'" *Id*. "Therefore, the prosecutor elicited false testimony from the detective on direct examination." *Id*. During cross-examination, the detective "never admitted that he

was mistaken," and "simply stated that it was 'possible' he was wrong and agreed that his testimony 'could be incorrect.'" *Id.* at 448-449. "Instead of correcting the record and having [the detective] concede that defendant never made any such admission," the prosecutor stated he could rely on the previous testimony and the police report. *Id.* at 449. However, the detective's "testimony on direct and cross-examination was contradictory, and the police report was patently false. Thus, the redirect examination did nothing to correct the record and, indeed, further suggested that the prosecutor believed that [the detective] initially told the truth and that defendant made the admission during the interview." *Id.* at 449-450. "[T]he prosecutor's failure to correct the testimony and instead rely on that testimony in questioning is especially problematic because it reinforced the deception of the use of false testimony and thereby contributed to the deprivation of due process." *Id.* at 450 (quotation marks, alterations, and citation omitted). The prosecutor's actions "left it to the jury to decide if defendant made self-incriminatory statements during the interview. Leaving this kind of false testimony for the jury to assess on its own is highly prejudicial," and likely "affected the jury's verdict, one ultimately resting on the credibility of the victim and the defendant." *Id.* at 454 (vacating defendant's conviction and remanding for a new trial).

In *Smith*, "the prosecution breached a duty to correct the substantially misleading, if not false, testimony of a key witness about his formal and compensated cooperation in the government's investigation," where, "[g]iven the overall weakness of the evidence against the defendant and the significance of the witness's testimony, . . . there [was] a reasonable probability that the prosecution's exploitation of the substantially misleading testimony affected the verdict." *Smith*, 498 Mich at 470. "Due process required that the jury be accurately apprised of the incentives underlying the testimony of this critical witness," and "[c]apitalizing on [the witness]'s testimony that he had no paid involvement in the defendant's case [was] inconsistent with a prosecutor's duty to correct false testimony"; because "there [was] a 'reasonable likelihood' that the false impression resulting from the prosecutor's exploitation of the testimony affected the judgment of the jury, . . . the defendant [was] entitled to a new trial." *Id.* at 480, 483, 487.

H. Judicial Impartiality and Questioning

A trial court is vested with broad discretion over the administration of trial proceedings. *People v Taylor*, 252 Mich App 519, 522 (2002). See also MCL 768.29; MRE 611(a). For information on judicial bias and impartiality, see the Michigan Judicial Institute's *Judicial Disqualification in Michigan* publication.

"The court may examine a witness regardless of who calls the witness." MRE 614(b). However, "[a] judge should avoid questions that are intimidating, argumentative, or skeptical. Hostile questions from a judge are particularly inappropriate when the witnesses themselves have done nothing to deserve such heated inquiry." *People v Stevens*, 498 Mich 162, 175 (2015) (citation omitted). See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 7, and *Criminal Proceedings Benchbook, Vol. 1*, Chapter 12, for additional information on judicial questioning during trial.

3.9 Impeachment of Witness—Bias, Character, Prior Convictions, Prior Statements

A. Ways to Impeach a Witness

Subject to any conditions described in the applicable rules of evidence, there are four classic ways to impeach a witness:

- Interest or bias,[45] see MRE 611(c);
- Character for truthfulness or untruthfulness[46]—MRE 608(a) (reputation or opinion evidence), and MRE 608(b) (evidence of specific instances of conduct);
- Evidence of a criminal conviction,[47] MRE 609; and
- Prior statements,[48] MRE 613, MRE 801(d)(1), and MRE 806.

A statement contained in a published treatise, periodical, or pamphlet is only admissible to impeach an expert witness on cross-examination if "the publication is on a subject of history, medicine, or other science or art" and "is established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice." MRE 707. A statement from a qualified publication "may be read into evidence but must not be received as an exhibit." *Id*.

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[45] See Section 3.9(C).

[46] See Section 3.9(D).

[47] See Section 3.9(E). Note that impeachment by contradiction is governed by MRE 404(b) as other acts evidence where the prosecution attempts to admit the *defendant's* prior conviction to impeach by contradiction a *witness*' testimony. *People v Wilder*, 502 Mich 57, 63-64 (2018). See Section 2.4 for more information on admission of other-acts evidence.

[48] See Section 3.9(F) and Section 3.9(G).

Committee Tip:

MRE 707 is a rule of allowance and limitation as to the format of the evidence.

B. Collateral Matters

"It is a well-settled rule that a witness may not be impeached by contradiction on matters which are purely collateral. What is a collateral matter depends upon the issue in the case. . . . The purpose of the [collateral matters] doctrine is closely related to the goals of the prejudice rule, MRE 403, and generally the same factors which are employed to determine whether evidence is inadmissible under 403 are used to determine whether extrinsic evidence should be allowed for impeachment purposes." *Cook v Rontal*, 109 Mich App 220, 229 (1981) (citations omitted).

"[T]here are three kinds of facts that are not considered to be collateral. The first consists of facts directly relevant to the substantive issues in the case. The second consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true." *People v Guy*, 121 Mich App 592, 604-605 (1982).

C. Witness Bias

Generally, the court has broad discretion to allow questioning designed to show bias, prejudice, or interest on the part of a witness. *Detroit/Wayne Co Stadium Auth v Drinkwater*, *Taylor & Merrill*, *Inc*, 267 Mich App 625, 653 (2005). The Michigan Supreme Court explained witness bias as follows:

> "'Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which

> might bear on the accuracy and truth of a witness' testimony.'" *People v Layher*, 464 Mich 756, 763 (2001), quoting *United States v Abel*, 469 US 45, 52 (1984).

There is no specific rule of evidence that covers this form of impeachment, but MRE 401 (relevancy) and MRE 611 (mode of examining witnesses) seem applicable. Interest or bias is always relevant to a witness's credibility and MRE 611(c) states that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." *Layher*, 464 Mich at 764. "[I]t is always permissible upon cross-examination of an adverse witness to pursue facts that may bear on a witness's bias." *Detroit/Wayne Co Stadium Auth*, 267 Mich App at 653.

Committee Tip:

While not contained in a particular rule, bias is strong evidence. Indeed, it is noted in MRE 408 and MRE 411 as a reason to allow otherwise inadmissible evidence to be properly used.

"[A] trial court may allow inquiry into prior arrests or charges for the purpose of establishing witness bias where, in its sound discretion, the trial court determines that the admission of evidence is consistent with the safeguards of the Michigan Rules of Evidence." *Layher*, 464 Mich at 758. In *Layher* (a case involving criminal sexual conduct), the defendant's lead witness had been previously arrested for and acquitted of criminal sexual conduct charges. *Id.* at 760. The Court concluded that evidence of the witness's prior arrest was relevant because its admission "supports the inference that [the witness] would color his testimony in favor of defendant." *Id.* at 765.

D. Character

"Evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait." MRE 404(a)(1).[49] However, MRE 404(a)(3) permits a witness's credibility to be attacked or supported through reputation testimony, opinion testimony, or inquiry into specific instances of conduct, as permitted by MRE 608, which states:

[49] See Section 2.3 on character evidence.

"(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under [MRE 609], extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about."

1. MRE 608(a) Examples

It is error for a court to allow character testimony that goes "beyond [the witness's] reputation for truthfulness and encompasse[s] [the witness's] overall 'integrity.'" *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 102 (2009) (finding, however, that the error was harmless).

Where a party attacks a witness's credibility, but not the witness's character for truthfulness, the opposing party may not present evidence to bolster the witness's truthful character. *People v Lukity*, 460 Mich 484, 490-491 (1999). In *Lukity*, the defense counsel asserted during his opening statement that the complainant had emotional problems which affected her ability to describe the alleged sexual assaults. *Id.* at 490. Before the complainant testified, the trial court allowed the prosecution to present testimony from several other witnesses as to the complainant's truthful character. *Id.* at 488-489. The Michigan Supreme Court concluded that the defendant's opening statement did not implicate MRE 608(a), and the trial court abused its discretion in admitting evidence of the complainant's truthful character where her truthful character had never been attacked. *Lukity*, 460 Mich at 491.

2. MRE 608(b) Examples

Where a witness was not called as a character witness and did not testify on direct examination about the plaintiff's truthfulness or untruthfulness, the defendant was not permitted to cross-examine the witness about specific instances of the plaintiff's conduct for the purpose of impeaching the plaintiff. *Guerrero v Smith*, 280 Mich App 647, 655 (2008). In *Guerrero*, the plaintiff testified about his limited marijuana use, and thereafter, defense counsel cross-examined one of the plaintiff's witnesses in an effort to impeach the plaintiff's testimony regarding his marijuana use. *Id.* at 654. The Michigan Court of Appeals concluded that the witness's testimony should not have been admitted because it did not satisfy the technical requirements of MRE 608(b)(2). *Guerrero*, 280 Mich App at 654. The Court stated:

> "Before specific instances concerning another witness's character for truthfulness or untruthfulness may be inquired into on cross-examination, the witness subject to cross-examination must already have testified on direct examination regarding the other witness's character for truthfulness or untruthfulness." *Guerrero*, 280 Mich App at 654-655.

E. Prior Criminal Conviction

Under MRE 609, a witness's character for truthfulness may be attacked on cross-examination by evidence of a criminal conviction only if it has been elicited from the witness or established by public record and the following conditions are met:

> "(1) the crime contained an element of dishonesty or false statement; or
>
> (2) the crime contained an element of theft; and
>
> > (A) in the convicting jurisdiction, the crime was punishable by imprisonment for more than one year or by death; and
> >
> > (B) the court determines that the evidence has significant probative value on character for truthfulness and — if the witness is the defendant in a criminal trial — that the probative value outweighs any prejudicial effect." MRE 609(a).

See also MCL 600.2158.

1. Use

Crimes involving elements of dishonesty or false statement. Evidence of a witness's prior criminal conviction is automatically admissible if it contains an element of dishonesty or false statement. *People v Allen*, 429 Mich 558, 605 (1988). See also *People v Snyder (After Remand)*, 301 Mich App 99, 105 (2013).

Crimes involving elements of theft. Evidence of a witness's prior conviction of a crime containing an element of theft "may be admissible if certain conditions are met." *Snyder (After Remand)*, 301 Mich App at 105. See also MRE 609(a)(2). "Which conditions need be met are in part a function of whether the witness is the defendant." *Snyder (After Remand)*, 301 Mich App at 105. "As a first step, regardless of whether the witness is the defendant, the court is required to determine that the proffered prior theft crime conviction has 'significant probative value on the issue of credibility[.]'" *Snyder (After Remand)*, 301 Mich App at 105, quoting MRE 609(a)(2)(B).

Determining probative value and prejudicial effect. If the witness is the defendant in a criminal trial, the court must also decide whether "the probative value outweighs any prejudicial effect." MRE 609(a)(2)(B). "In determining probative value, the court must consider only the age of the conviction and the degree to which it indicates character for truthfulness." MRE 609(b). "[I]n general, theft crimes are minimally probative on the issue of credibility, or, at most, are moderately probative of veracity." *Snyder (After Remand)*, 301 Mich App at 106 (cleaned up) (holding that a two-year-old prior conviction did not have significant probative value of credibility[50]).

"Regarding the age of the conviction, as a general matter, the older a conviction, the less probative it is." *Snyder (After Remand)*, 301 Mich App at 106. Evidence of a conviction is not admissible under MRE 609 "if more than ten years have passed since the date of the conviction or of the witness's release from the confinement for it, whichever is later." MRE 609(c).

[50] Typically, where the defendant is the witness, courts must also determine whether the probative value of the evidence outweighs its prejudicial effect. See MRE 609(A)(2)(b). However, if "a prior conviction is not significantly probative of credibility, the prejudicial-effect inquiry is unnecessary because the prior conviction has already failed to meet one of the rule's requirements." *Snyder (After Remand)*, 301 Mich App at 109-110 (concluding that the prejudicial effect inquiry was unnecessary because "evidence of defendant's prior larceny conviction [was] not of significant probative value on the issue of his credibility").

When considering prejudicial effect, "the court must consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify." MRE 609(b). As the similarity of charges and the importance of the defendant's testimony to the decisional process increases, so does the prejudicial effect. *Allen*, 429 Mich at 606.

"The court must articulate, on the record, the analysis of each factor." MRE 609(b).

"[I]t is error to cross-examine a defendant about the duration and details of prior prison sentences to test his credibility." *People v Lindberg*, 162 Mich App 226, 234 (1987). The rationale for this rule is that only a defendant's prior conduct is relevant to his credibility, not the punishment for the conduct. *Id*.

"[T]here can be no error until a defendant testifies and the prior-conviction impeachment evidence is actually introduced[.]" *People v McDonald*, 303 Mich App 424, 431, 439 (2013) ("[b]y choosing not to testify defendant waived his argument that the trial court erred when it ruled that a prior conviction would be admissible for impeachment purposes should he take the stand and testify"). However, when a defendant waives the opportunity to testify due to defense counsel's incorrect advice that a prior conviction could be used as impeachment evidence, such conduct could constitute ineffective assistance of counsel. See *People v Perkins*, 141 Mich App 186, 191 (1985).

Evidence of a defendant's prior criminal conviction can be introduced in a subsequent civil case based on the same conduct as long as it does not violate MRE 403. *Waknin v Chamberlain*, 467 Mich 329, 333-335 (2002). "Where a civil case arises from the same incident that resulted in a criminal conviction, the admission of evidence of the criminal conviction during the civil case is prejudicial for precisely the same reason it is probative. That fact does not, without more, render admission of evidence of a criminal conviction *unfair*, i.e., substantially more prejudicial than probative." *Id.* at 336 (finding the trial court improperly excluded evidence of a prior conviction as being prejudicial without also weighing whether the prejudice was unfair).

Committee Tip

The heavy lifting here is classifying the prior conviction as either one containing an element of dishonesty or false statement, or instead, an element of theft. The latter requires additional consideration for admission under MRE 609(a)(2).

2. Notice of Intent to Impeach Defendant

The burden is not on the prosecutor in all cases to initiate a ruling regarding the use of a defendant's prior convictions before the defendant testifies. *People v Nelson*, 234 Mich App 454, 463 (1999). However, a request for a prior ruling is the prudent course, especially if admitting the prior conviction is discretionary. See MRE 609(b).

3. Jury Instructions

Civil. M Civ JI 5.03, Impeachment by Prior Conviction of Crime.

Criminal. M Crim JI 3.4, Defendant—Impeachment by Prior Conviction.

4. Standard of Review

The decision whether to allow impeachment by evidence of a prior conviction is within the trial court's sound discretion and will not be reversed absent abuse of that discretion. *People v Coleman*, 210 Mich App 1, 6 (1995). However, "[t]he erroneous admission of evidence of a prior conviction is harmless error where reasonable jurors would find the defendant guilty beyond a reasonable doubt even if evidence of the prior conviction had been suppressed." *Id*. at 7.

F. Prior Statements

While examining a witness about their prior statement, the examining party is not required to show or disclose the contents of the witness's prior statement, unless requested by an adverse party's attorney or the witness. MRE 613(a).

For information regarding the use of depositions or interrogatories at trial, see Section 3.12.

1. Prior Consistent Statements

"As a general rule, neither party in a criminal trial is permitted to bolster a witness' testimony by seeking the admission of a prior consistent statement made by that witness." *People v Lewis*, 160 Mich App 20, 29 (1987). However, the statement is not considered hearsay and may be admissible where the statement "is consistent with the [witness's] testimony and is offered to rebut an express or implied charge that the [witness] recently fabricated it or acted from a recent improper influence or motive in so testifying[.]" MRE 801(d)(1)(B). "A prior consistent statement is admissible to rehabilitate the witness following impeachment by a prior inconsistent statement or . . . when there is a question as to whether the prior inconsistent statement was made." *Palmer v Hastings Mut Ins Co*, 119 Mich App 271, 273-274 (1982) (internal citations omitted).

Four elements must be established before admitting a prior consistent statement: "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." *People v Jones*, 240 Mich App 704, 707, 712 (2000) (the motive mentioned in elements (2) and (4) must be the same motive) (quotation marks and citation omitted). Consistent statements made after the motive to fabricate arises constitute inadmissible hearsay. *People v McCray*, 245 Mich App 631, 642 (2001).

Prior consistent statements may be admitted through a third-party if the requirements of MRE 801(d)(1)(B) are met. See *Jones*, 240 Mich App at 706-707; *People v Mahone*, 294 Mich App 208, 214 (2011) (the victim's statement to her coworker, made before the victim would have had a motive to falsify, was properly admitted through the coworker's testimony).

Committee Tip:

Challenges that the court must consider usually arise under the third prong of Jones.

2. Prior Inconsistent Statements

"When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement. The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *People v Jenkins*, 450 Mich 249, 256 (1995). However, where the substance of the prior inconsistent statement goes to a central issue in the case, admission of the statement is improper because it violates MRE 801 (hearsay rule). *People v Stanaway*, 446 Mich 643, 692-693 (1994). "[P]rior unsworn statements of a witness are mere hearsay and are generally inadmissible as substantive evidence." *People v Lundy*, 467 Mich 254, 257 (2002). Accordingly, prior inconsistent statements cannot be admitted to prove the truth of the matter asserted unless a recognized hearsay exception applies. *People v Steanhouse*, 313 Mich App 1, 29 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017)[51]. "Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." MRE 613(b). However, MRE 613(b) "does not apply to an opposing party's statement under [MRE 801(d)(2)]." MRE 613(b).

Generally, evidence of a prior inconsistent statement of the witness may be used to impeach a witness, even if it tends to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682 (1997). However, a prior inconsistent statement should not be admitted when "(1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Id.* at 683 (noting that this analysis is very

[51]For more information on the precedential value of an opinion with negative subsequent history, see our note.

narrow, and concluding that the facts did not support a finding of inadmissibility "because there was other relevant testimony from the witness for which his credibility was relevant").

a. Foundation

When seeking to admit a prior inconsistent statement, a proper foundation for the statement must be laid. *Barnett v Hidalgo*, 478 Mich 151, 165 (2007). To introduce impeachment testimony, the witness to be impeached must be asked whether he or she made the first statement, then asked whether he or she made the later, inconsistent statement. *Id*. at 165.

b. Constitutional Considerations

Even where a defendant's prior inconsistent statement was elicited in violation of the Sixth Amendment, admission of the statement is generally permitted when it is offered as impeachment testimony. *Kansas v Ventris*, 556 US 586, 594 (2009). In *Ventris*, 556 US at 588-589, the defendant was charged with murder and aggravated robbery, testifying at trial that his codefendant committed the crimes. The prosecution attempted to present testimony from an informant, planted in the defendant's jail cell by police officers, that the defendant admitted to robbing and shooting the victim. *Id* at 589. The United States Supreme Court disagreed with the Kansas Supreme Court's conclusion that the informant's testimony was inadmissible for any reason, including impeachment, instead concluding:

> "Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of 'the traditional truth-testing devices of the adversary process,' is a high price to pay for vindication of the right to counsel at the prior stage.
>
> On the other side of the scale, preventing impeachment use of statements taken in violation of *Massiah*[52] would add little appreciable deterrence. Officers have significant incentive to ensure that they and their informants comply with the

[52] *Massiah v United States*, 377 US 201, 206 (1964), guarantees a defendant's Sixth Amendment right to counsel during interrogation by law enforcement officers or their agents.

> Constitution's demands, since statements lawfully obtained can be used for all purposes rather than simply for impeachment. And the *ex ante* probability that evidence gained in violation of *Massiah* would be of use for impeachment is exceedingly small. An investigator would have to anticipate both that the defendant would choose to testify at trial (an unusual occurrence to begin with) *and* that he would testify inconsistently despite the admissibility of his prior statement for impeachment." *Ventris*, 556 US at 593, quoting *Harris v New York*, 401 US 222, 225 (1971) (citation omitted).

c. Examples

In medical malpractice cases, when an expert's trial testimony is not consistent with statements appearing in the expert's affidavit of merit, the affidavit of merit constitutes a prior inconsistent statement and is admissible at trial for impeachment purposes. *Barnett v Hidalgo*, 478 Mich 151, 164-167 (2007).

Where a witness's "police statement implicating defendant in [a crime] was admissible only to impeach [the witness's] trial testimony, the prosecution's use of the statement as substantive evidence of defendant's guilt, and the trial court's instruction[that the jury could consider prior inconsistent statements as substantive evidence], constituted plain error." *People v Steanhouse*, 313 Mich App 1, 29-30 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017)[53] (nevertheless concluding that "in light of the extensive evidence admitted at trial linking defendant to the [crime], . . . these errors did not prejudice defendant").

The trial court erred in admitting a hearsay statement as impeachment testimony where "the *content* of the [hearsay] statement . . . was [not] needed to impeach [the declarant's] testimony that he did not make such a statement," and "there was no other testimony from [the witness] that made his credibility relevant to the case." *People v Shaw*, 315 Mich App 668, 685 (2016). The declarant was the complainant's brother, whose

[53]For more information on the precedential value of an opinion with negative subsequent history, see our note.

testimony "had little, if any, probative value," and "[a] review of the [declarant's] testimony leaves little doubt that the prosecution's purpose in calling him as a witness was to have him describe the incident later described by [the officer who offered the impeachment testimony]." *Id.* at 682-683. The complainant's brother was asked on direct examination if he remembered telling the police about a fight between his mother and the defendant. *Id.* at 682. The complainant denied remembering the fight and stated that he did not remember telling the police about it. *Id.* The prosecution then called an officer as an impeachment witness who described the altercation between the defendant and the complainant's mother that the complainant's brother allegedly reported to the officer. *Id.* at 683. The Court held that "the prosecutor improperly used an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial," and the impeachment testimony should not have been admitted. *Id.* at 685 (quotation marks and citation omitted). Further, the Court found that the content of the statement offered as impeachment evidence also violated MRE 404(b) and MRE 403. *Shaw*, 315 Mich App at 688.

d. Impeachment of Hearsay Declarants

"When a hearsay statement — or a statement described in [MRE 801(d)(2)(C), MRE 801(d)(2)(D), or MRE 801(d)(2)(E)] — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if declarant had testified as a witness." MRE 806. Evidence of the declarant's inconsistent statement or conduct may be admitted, "regardless of when it occurred or whether the declarant had an opportunity to explain or deny it." *Id.* However, "[i]f the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination." *Id.*

Evidence that may be admissible under MRE 806 "is still subject to the balancing test under MRE 403[.]" *People v Blackston*, 481 Mich 451, 461 (2008).

G. Evidence of Defendant's Silence

"[T]he use for impeachment purposes of a defendant's prior statement, including omissions, given during contact with the

police, prior to arrest or accusation, does not violate the defendant's constitutional rights as guaranteed under the Fifth and Fourteenth Amendments or the Michigan Constitution." *People v Cetlinski*, 435 Mich 742, 746-747 (1990). However, if a defendant's silence is attributable to invocation of the Fifth Amendment privilege against self-incrimination or to reliance on *Miranda*[54] warnings, admission of evidence of that silence is error. *People v McReavy*, 436 Mich 197, 201 (1990). "The evidentiary issue should be analyzed as a party admission under MRE 801(d)(2)(A)." *McReavy*, 436 Mich at 201.

A prosecutor may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest." *Doyle v Ohio*, 426 US 610, 611 (1976). "[U]se of the defendant's post-arrest silence in this manner violates due process," and is commonly referred to as a "*Doyle* error." *Id.*; *McReavy*, 436 Mich at 202 n 2. However, an arrested defendant's post-*Miranda* silence may be used against the defendant if he or she "testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Doyle*, 426 US at 619 n 11. See also *People v Boyd*, 470 Mich 363, 374 (2004).

"[A] defendant's post-arrest, post-*Miranda* silence cannot be used to impeach a defendant's exculpatory testimony, or as direct evidence of defendant's guilt in the prosecutor's case-in-chief[.]" *People v Shafier*, 483 Mich 205, 213-214 (2009) (citation omitted). This is because "'there is no way to know after the fact whether [the defendant's post-arrest, post-*Miranda* silence] was due to the exercise of constitutional rights or to guilty knowledge.'" *Id.* at 214, quoting *McReavy*, 436 Mich at 218. The "defendant's rights under *Doyle* were violated when the trial court erroneously allowed the prosecution to use defendant's post-arrest, post-*Miranda* silence against him." *People v Borgne*, 483 Mich 178, 181 (2009) (but finding "that the error did not amount to plain error affecting defendant's substantial rights"), aff'd 485 Mich 868 (2009). "[I]n some circumstances a single reference to a defendant's silence may not amount to a violation of *Doyle* if the reference is so minimal that 'silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference[.]'" *Shafier*, 483 Mich at 214-215, quoting *Greer v Miller*, 483 US 756, 764-765 (1987).

[54] *Miranda v Arizona*, 384 US 436 (1966). See Section 3.13 for discussion of self-incrimination.

3.10 Rule of Completeness

"If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time." MRE 106.

Committee Tip:

The policy behind the rule is two-fold: (a) to avoid matters being taken out of context, resulting in false or misleading impressions; and (b) to provide the opposing attorney an opportunity to cure any prejudice created by a lack of context through later introduction of missing evidence.

"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." *People v Clark*, 330 Mich App 392, 421-423 (2019) (MRE 106 was not implicated where "the officers failed to record a few moments of [a] second interrogation, . . . nothing prevented defendant from eliciting testimony from the police officers to fill in the gaps created by the failure to record defendant's entire interview," and there was no assertion "that the video at issue had been altered in any way").

However, "MRE 106 does not automatically permit an adverse party to introduce into evidence the rest of a document once the other party mentions a portion of it. Rather, MRE 106 logically limits the supplemental evidence to evidence that 'ought in fairness to be considered contemporaneously with it.'" *People v Herndon*, 246 Mich App 371, 411 n 85 (2001), quoting MRE 106.

"[T]he rule of completeness only pertains to the admissibility of writings or recorded statements[.]" *People v Solloway*, 316 Mich App 174, 201 (2016) (holding that MRE 106 was irrelevant where the defendant argued that the failure to admit the actual testimony of two witnesses whose testimony was excluded as hearsay violated the rule of completeness).

Committee Tip:

While not often coming up when MRE 106 is in play, the admissibility of the rest and remainder

evidence may have to satisfy other rules of evidence to be admissible.

3.11 Refreshing Recollection

A. Writing or Object Used to Refresh a Witness

MRE 612 permits the use of a writing or an object to refresh a witness's memory either while testifying or before testifying, "if practicable and the court decides that justice requires the party to have those options at the trial, hearing, or deposition in which the witness is testifying." MRE 612(a).

MRE 612(b) provides guidance on the production and use of a writing or object:

> "An adverse party is entitled to have the writing or object produced, to inspect it, to cross-examine the witness about it, and to introduce in evidence — for its bearing on credibility only unless otherwise admissible under [the MREs] — any portion that relates to the witness's testimony. If the producing party claims that the writing or object includes unrelated matter, the court must examine it in camera, remove any unrelated portion, and order that the rest be delivered to the adverse party. Any portion removed over objection must be preserved for the record."[55]

The court may issue any appropriate order if a writing or object is not produced or delivered as ordered. MRE 612(c). However, "if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or, — if justice so requires — declare a mistrial." *Id.*

B. Method of Refreshing Recollection of Witness

Before refreshing a witness's recollection with a writing, "the proponent must show that (1) the witness's present memory is inadequate, (2) the writing could refresh the witness's present memory, and (3) reference to the writing actually does refresh the

[55]Before declaring a mistrial, the court must give each defendant and the prosecutor an opportunity (on the record) to comment on the propriety of the order, and to state whether that party consents, objects, or has alternative suggestions. MCR 6.417.

witness's present memory." *Genna v Jackson*, 286 Mich App 413, 423 (2009).

In *People v Favors*, 121 Mich App 98, 107-108 (1982), during a criminal sexual conduct trial, the juvenile complainant recalled only part of her description of the defendant's apartment, even after reviewing her prior statement. The prosecutor further attempted to refresh her memory by reading the prior statement into evidence. *Id.* at 108. The Court of Appeals held that this method of refreshing recollection was improper, stating:

> "Where the memory of a witness is to be refreshed, it is not necessary and is often highly prejudicial to permit the jury to hear the substance of the statement to be employed. Where memory or recollection is being refreshed, the material used for that purpose is not substantive evidence. Rather, the material is employed to simply trigger the witness's recollection of the events. That recollection is substantive evidence and the material used to refresh is not. The substance of the statement used to refresh is admissible only at the instance of the adverse party." *Favors*, 121 Mich App at 109 (citation omitted).

Committee Tip:

It would be prudent to require the proponent to take away the refreshing document or object after the witness acknowledges that his or her memory has been refreshed.

C. Introducing a Past Recorded Recollection[56]

A writing may be used to refresh a witness's memory under MRE 612, but if the memory is not refreshed and the writing qualifies as a recorded recollection under MRE 803(5), it may be read into evidence or received as an exhibit if offered by an adverse party.

[56] Recorded recollection is a hearsay exception with its own foundational requirements. See Section 5.3(B)(5).

3.12 Depositions & Interrogatories

A. Use of Depositions at Trial

Ordinarily, depositions are considered hearsay. *Shields v Reddo*, 432 Mich 761, 766 (1989). However, there are exceptions such as MRE 803(18) (deposition testimony of an expert) and MRE 804(b)(2) (deposition testimony when the declarant is unavailable). Depositions are admissible subject to the rules of evidence. MCR 2.308(A).

The party seeking admission of a deposition bears the burden of proving admissibility under the rules of evidence, and admission is at the discretion of the court. *Lombardo v Lombardo*, 202 Mich App 151, 154 (1993). If it is used at trial, the deposition "shall not be filed with the court, but must be submitted to the judge and made an exhibit under MCR 2.518 or MCR 3.930" (concerning receipt and return or disposal of exhibits). MCR 2.302(H)(1)(b).

"Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read." MCR 2.513(F). See M Civ JI 4.11, which provides for instructions to the jury when a summary of a deposition is read.

B. Use of Interrogatories at Trial

"The answer to an interrogatory may be used to the extent permitted by the rules of evidence." MCR 2.309(D)(3).

The decision whether to admit interrogatories at trial is reviewed for an abuse of discretion. *DaFoe v Mich Brass & Electric Co*, 175 Mich App 565, 568 (1989). "A trial judge does not abuse his discretion by refusing to admit interrogatories at trial which have already been answered by testimony, or which are irrelevant to the issues." *Id.*

3.13 Self-Incrimination

"No person . . . shall be compelled in any criminal case to be a witness against himself[.]" US Const, Am V; see also Const 1963, art 1, § 17. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Pennsylvania v Muniz*, 496 US 582, 588 n 5 (1990). A person's Fifth Amendment privilege against self-incrimination applies in both criminal and civil proceedings. *Phillips v Deihm*, 213 Mich App 389, 399-

400 (1995). "The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Id*.

The right against self-incrimination protects a person from incriminating himself or herself for a crime already committed. *People v Bassage*, 274 Mich App 321, 325 (2007). Because a defendant commits a current crime when he or she decides to present false testimony (perjury), the Fifth Amendment does not apply to the perjured testimony. *Id*. at 326. The Court explained:

> "The bedrock for this principle is, we hope, unsurprising: providing false information is a course of action not authorized by the Fifth Amendment. Thus, although he was never informed of his right against self-incrimination, defendant, by providing false testimony, took a course of action that the Fifth Amendment gave him no privilege to take. If the citizen answers the question, the answer must be truthful. Accordingly, we hold that the prosecutor had no obligation to advise defendant of his Fifth Amendment right against self-incrimination, because that right was not implicated by defendant's decision to commit perjury." *Bassage*, 274 Mich App at 325-326 (quotation marks, alteration, and citations omitted).

A. Trial Court Procedures

If the court determines that it is necessary to advise the witness of his or her Fifth Amendment rights, the advice should be given outside the presence of the jury. *People v Avant*, 235 Mich App 499, 512-517 (1999). A trial court must follow an established procedure when it discovers that a potential witness plans to invoke a testimonial privilege. *People v Paasche*, 207 Mich App 698, 709 (1994).[57]

B. Civil Cases

"[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." *Phillips v Deihm*, 213 Mich App 389, 400 (1995).

[57] See Section 1.9(B)(2) for a detailed discussion of this procedure.

1. Individuals

"[A] defendant in a civil action may assert the privilege against self-incrimination in the answer to the complaint when he or she believes that responding to particular paragraphs or allegations in the complaint calls for an incriminating response." *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 384 (2011). However, "[a] defendant must answer the allegations in the complaint that he or she can and make a specific claim of privilege to the rest. A defendant's proper invocation of the privilege in an answer will be treated as a specific denial." *Id*. at 387.

By invoking the Fifth Amendment, a person cannot be forced to answer any question that would "furnish a link in the chain of evidence needed to prosecute[.]" *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 677 (2011) (quotation marks and citation omitted). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id*. at 677-678 (quotation marks and citation omitted). "A court should bar a claim of privilege under the Fifth Amendment only when the answer cannot possibly be incriminating." *Id*. at 678 (the trial court's order that defendants either produce a software program or submit affidavits denying possession of the program violated the Fifth Amendment privilege against compelled self-incrimination because compliance with the order might have "furnish[ed] a link in the chain of evidence needed to prosecute").

2. Organizations

Organizations are not generally protected by the Fifth Amendment privilege against self-incrimination. *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 679 (2011). In addition, "the custodian of an organization's records may not refuse to produce the records even if those records might incriminate the custodian personally," if the custodian holds the records in a representative capacity. *Id*. at 679-680. However, if the custodian holds the records in a personal capacity, the Fifth Amendment privilege applies. *Id*. at 681. In *PCS4LESS, LLC*, the Court of Appeals identified a three part test a court may use to determine whether the privilege against self-incrimination may be used "to prevent the production of an organization's documents:

> 1. Are the documents the records of the organization rather than those of the individual who has possession of them?
>
> 2. Does the custodian hold the records in a representative, rather than a personal, capacity?
>
> Assuming affirmative answers, in the case of a corporation the inquiry is ended because of the special nature of the corporate form and the state's reservation of visitatorial powers over corporations. In the case of non-corporate organizations, however, a third question arises:
>
> 3. Does the organization have an established institutional identity which is recognized as an entity apart from its individual members?" *PCS4LESS, LLC*, 291 Mich App at 681 (holding that the trial court's order for a corporation to either produce a software program or submit an affidavit denying possession of the program did not violate the Fifth Amendment privilege against compelled self-incrimination because the privilege does not apply to organizations) (quotation marks and citation omitted).

C. Criminal Cases[58]

The privilege against self-incrimination is not waived by a defendant's guilty plea, and remains available at sentencing. *Mitchell v United States*, 526 US 314, 325 (1999).

"'Use' immunity protects a witness only from the prosecutorial use of compelled testimony. A witness granted 'use' immunity may still be prosecuted for a crime in which he was involved and to which his immunized testimony relates." *People v Jones*, 236 Mich App 396, 399 n 1 (1999). That is, while a coerced confession is inadmissible in a criminal trial, it does not bar prosecution. *Kastigar v United States*, 406 US 441, 461 (1972).

1. Invoking Privilege

The privilege against self-incrimination "is held by the witness. However, the . . . constitutional privilege against self-

[58]This subsection discuss a witness or suspect invoking the privilege against self-incrimination before (or when no) *Miranda* warnings have been given. See Section 3.14 for information on a defendant invoking the privilege *after* being informed of his or her *Miranda* rights.

incrimination must not be asserted by a witness too soon, that is, where there is no reasonable basis for a witness to fear incrimination from questions which are merely preliminary." *People v Dyer*, 425 Mich 572, 578-579 (1986). "Thus, 'a trial court may compel a witness to answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness.'" *People v Steanhouse*, 313 Mich App 1, 19-20 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017),[59] quoting *Dyer*, 425 Mich at 579. A witness had a reasonable basis to fear incrimination from questioning where the defendant's statements to police, theory of the case, and testimony at trial indicated that the witness "may have been intimately associated with the criminal transaction or involved in the commission of the crimes," and the prosecutor was "unable to predict whether charges would be brought against [the witness] after he testified[.]" *Steanhouse*, 313 Mich App at 20.

When a testifying witness asserts his or her Fifth Amendment privilege, prejudice may result to the defendant because the jury may illogically infer guilt. *People v Poma*, 96 Mich App 726, 731 (1980). For this reason, it is improper to call a witness knowing he or she will assert the Fifth Amendment privilege. *People v Paasche*, 207 Mich App 698, 708-709 (1994). The *Poma* Court explained how to avoid prejudice and protect the defendant's right to a fair trial:

> "When the court is confronted with a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken. The court should first hold a hearing outside the jury's presence to determine if the intimate witness has a legitimate privilege[.] . . . This determination should be prefaced by an adequate explanation of the self-incrimination privilege so the witness can make a knowledgeable choice regarding assertion. . . . We do not believe that the burden of comprehending the privilege should rest with witnesses; the responsibility of informing must be the court's." *Poma*, 96 Mich App at 732 (citations omitted).

A criminal suspect generally must "expressly invoke the privilege against self-incrimination in response to [noncustodial police questioning] . . . in order to benefit from

[59]For more information on the precedential value of an opinion with negative subsequent history, see our note.

it," because "[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege."[60] *Salinas v Texas*, 570 US 178, 181, 188 (2013) (plurality opinion). Accordingly, where "[the defendant] voluntarily answered the [noncustodial] questions of a police officer who was investigating a murder[, b]ut . . . balked when the officer asked whether a ballistics test would show that the shell casings found at the crime scene would match [the defendant's] shotgun," the prosecution's argument at trial "that [the defendant's] reaction to the officer's question suggested that he was guilty" did not violate the Fifth Amendment privilege against self-incrimination, because the petitioner had failed to expressly invoke the privilege. *Id.* at 181.

2. Admissibility of Statements

Generally, a defendant's statement is admissible as nonhearsay under MRE 801(d)(2), or under the statement against interest exception to the hearsay rule, MRE 804(b)(4), if the declarant is unavailable as defined in MRE 804(a). A defendant may be unavailable to testify by exercising their constitutional right to remain silent.

MRE 410(a) precludes the admission of statements made during plea discussions or in connection with a plea that was withdrawn or vacated.[61] However, a defendant's voluntary testimony at a prior proceeding, including a guilty plea proceeding involving an unrelated crime, is generally admissible, "absent an indication that the prior testimony was given under compulsion." *People v Plato*, 114 Mich App 126, 134-135 (1981).

A statement can also be used for impeachment under MRE 613(b), the rule governing the use of a prior inconsistent statement when the statement is offered to prove inconsistency, and not to show the truth of the matter asserted. See *People v Jenkins*, 450 Mich 249, 256 (1995) (witness's claim

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[60] "[T]wo exceptions [apply] to the requirement that witnesses invoke the privilege[against self-incrimination:] . . . First, . . . a criminal defendant need not take the stand and assert the privilege at his own trial, [and] . . . [s]econd, . . . a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary." *Salinas v Texas*, 570 US 178, 184 (2013) (plurality opinion).

[61] "[MRE 410(a)(4)] does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority." *People v Smart*, 497 Mich 950, 950 (2015). Indeed, MRE 410(a)(4) only requires that the defendant's statement be made "during plea discussions" with the prosecuting attorney. See Section 2.10 for more information on MRE 410 and the admissibility of plea discussions.

that he did not remember making prior inconsistent statement was sufficient foundation for the prosecution to introduce extrinsic evidence of prior statement to impeach witness, but not to prove the contents of the statement); *People v Steanhouse*, 313 Mich App 1, 29-30 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017)[62] (holding that where a witness's "police statement implicating defendant in [a crime] was admissible only to impeach [the witness's] testimony, the prosecution's use of the statement as substantive evidence of defendant's guilt, and the trial court's instruction[that the jury could consider prior inconsistent statements as substantive evidence], constituted plain error," but nevertheless concluding that "in light of the extensive evidence admitted at trial linking defendant to the [crime], . . . these errors did not prejudice defendant").

Committee Tip:

Confusion sometimes emerges when a prior out-of-court inconsistent statement is attempted to be used to show inconsistency and as substantive evidence. The latter purpose is allowed but only if there is a basis under the rules to overcome hearsay or other objections.

D. Child Protective Proceedings

"[A] parent's constitutional right against compelled self-incrimination bars a court in child protective proceedings from requiring that parent, as a condition of reunification, to admit to having abused an unrelated child." *In re Blakeman*, 326 Mich App 318, 331 (2018). "The privilege may be invoked when criminal proceedings have not been instituted or even planned." *Id*. at 332. In *Blakeman*, compulsion existed even where "respondent initially waived his Fifth Amendment right, testified at the trial, and was then later compelled to retract his claim of innocence and incriminate himself." *Id*. at 335.[63]

[62]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[63]See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 11, for additional discussion of self-incrimination in child protective proceedings.

3.14 Confessions

A. Corpus Delicti Rule

"[G]enerally speaking, the corpus delicti of an offense is the body of the wrong or injury." *People v Modelski*, 164 Mich App 337, 341 (1987). "The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Washington*, ___ Mich ___, ___ (2024) (quotation marks and citation omitted). "Specifically, the rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury." *Id*. at ___ (quotation marks and citation omitted)."However, proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." *Id*. at ___(cleaned up). "It is sufficient to show that the crime was committed by *someone*." *Id*. at ___ (quotation marks and citation omitted).

"Once this showing has been made, a defendant's confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances." *People v Ish*, 252 Mich App 115, 117 (2002) (cleaned up). Accordingly, "it is not necessary that the prosecution present independent evidence of every element of the offense before a defendant's confession may be admitted." *Ish*, 252 Mich App at 117.

"The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of the injury before such statements may be admitted as evidence." *People v Burns*, 250 Mich App 436, 438 (2002). Proof beyond a reasonable doubt is unnecessary. *Modelski*, 164 Mich App at 341-342 ("the prosecutor established the corpus delicti of a homicide by showing that [the victim] could not be located and ha[d] not been heard from since her sudden disappearance and by showing that defendant had a motive to kill her, his deteriorating marriage and his claim of infidelity, and by showing that defendant's actions suggest[ed] that he had murdered [the victim]").Notably, "the *corpus delicti* rule is confined to confessions." *Washington*, ___ Mich at ___ (cleaned up), quoting *People v Porter*, 269 Mich 284, 289 (1934) (expressly distinguishing confessions from admissions). A confession is "an acknowledgment, in express terms, by a party in a criminal case, of the truth of the crime charged, by the very force of the definition logically excludes: first, acts of guilty conduct; second, exculpatory statements; third, admission of subordinate facts that do not constitute guilt . . . ." *Washington*, ___

Mich at ___ n 13, quoting *Porter*, 269 Mich at 290 (quotation marks omitted). "There must be some distinctive feature, showing guilt, in the fact acknowledged, and all other statements than those directly stating the fact of guilt are without the scope of the rule affecting the use of confessions." *Washington*, ___ Mich at ___ n 13, quoting *Porter*, 269 Mich at 290-291 (quotation marks omitted). "Hence, the third ground of exclusion is that *the admission of subordinate facts*, *not directly involving guilt*, *do not constitute a confession*." *Washington*, ___ Mich at ___ n 13, quoting *Porter*, 269 Mich at 290-291 (quotation marks omitted).

The *Porter* Court held that "'defendant's exclamation and statements were not part of a confession nor did they, of themselves, amount to a confession of guilt. They were *merely admissions*, *which needed other facts to give them convicting force*, *and therefore were admissible on the* corpus delicti.'" *Washington*, ___ Mich at ___, quoting *Porter*, 269 Mich at 291. Similarly, in *Washington*, "Defendant's statement included only one of the two elements of the charged crime: the fact that defendant possessed body armor." *Washington*, ___ Mich at ___ ("An admission of one, but not of all, the essential elements of the crime is not a confession.") (cleaned up). "He did not admit that he was a violent felon, which would have been necessary to make his statements a confession." *Id*. at ___ (holding that the *corpus delicti* rule did "not apply to defendant's admissions that he possessed the bulletproof vest").

When the corpus delicti of the underlying crime is established, admission of a defendant's confession to being an accessory after the fact requires no independent evidence showing that the principal was assisted after committing the crime; "the *corpus delicti* of accessory after the fact is the same as the *corpus delicti* of the underlying crime itself." *People v King*, 271 Mich App 235, 237 (2006). See also *People v Williams*, 422 Mich 381, 388-392 (1985), for a discussion of the history and development of the corpus delicti rule.

Committee Tip:

Care should be taken not to conflate the accused's confession with other statements by the accused.

The trial court's decision regarding application of the corpus delicti rule is reviewed for an abuse of discretion. *Burns*, 250 Mich App at 438.

B. *Miranda* Requirements

1. Required Warnings

Miranda warnings are required when a defendant is subject to custodial interrogation. See *People v Elliott*, 494 Mich 292 (2013). For more information on custodial interrogations, see Section 3.14(E).

"[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v Arizona*, 384 US 436, 479 (1966).

"Unless the person in custody has been given the required warnings and still waives his rights, no evidence obtained as a result of interrogation can be used against him. A person in custody may waive his rights if the waiver is made voluntarily, knowingly, and intelligently."[64] *People v Clark*, 330 Mich App 392, 416 (2019) (quotation marks and citations omitted).

Right to remain silent. *Miranda* warnings are not defective merely because a suspect is not more specifically advised they may exercise the right to remain silent at any point during the interrogation. *People v Mathews*, 324 Mich App 416, 429 (2018).

Right to an attorney. "[A]dvice that a suspect has 'the right to talk to a lawyer before answering any of [the law enforcement officers'] questions,' and that he can invoke this right 'at any time . . . during th[e] interview,' satisfies *Miranda*." *Florida v Powell*, 559 US 50, 53 (2010) (second and third alteration in original). Because "[t]he first statement communicated that [the defendant] could consult with a lawyer before answering any particular question, and the second statement confirmed that [the defendant] could exercise that right while the interrogation was underway," the United States Supreme Court held that "[i]n combination, the two warnings reasonably conveyed [the defendant's] right to have an attorney present, not only at the outset of interrogation, but at all times." *Id.* at 62.

Contrast with *Mathews*, 324 Mich App at 438, which holds that "a warning preceding a custodial interrogation is deficient

[64] See Section 3.14(D)(2) for information on voluntary, knowing, and intelligent waivers.

when the warning contains only a broad reference to the 'right to an attorney' that does not, when the warning is read in its entirety, reasonably convey the suspect's right to consult with an attorney and to have an attorney present during the interrogation."

2. Major Felony Recordings

There is no due process requirement under either the United States Constitution or the Michigan Constitution that an electronic recording be made when a defendant is informed of his or her *Miranda* rights, *People v Geno*, 261 Mich App 624, 627-628 (2004), or that a defendant's statement be recorded by audio or visual means, *People v Fike*, 228 Mich App 178, 183-186 (1998). However, "[a] law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony shall make a time-stamped, audiovisual recording of the entire interrogation. A major felony recording shall include the law enforcement official's notification to the individual of the individual's Miranda rights." MCL 763.8(2).

"[Q]uestioning a suspect in a police station, by itself, [cannot] provide a legal basis for a finding that a person is in custody." *People v Barritt*, 325 Mich App 556, 569 n 4 (2018) (finding, however, that the defendant was in custody based on the Court's review of the totality of the circumstances).[65]

"The requirement in [MCL 763.8] to produce a major felony recording is a directive to departments and law enforcement officials and not a right conferred on an individual who is interrogated." MCL 763.10. In addition:

> "Any failure to record a statement as required under [MCL 763.8] or to preserve a recorded statement does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible. However, unless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under

[65] See Section 3.14(E) for additional discussion of the *Barritt* case.

> interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement." MCL 763.9.

"With MCL 763.8, the Legislature codified its preference for recorded statements. With MCL 763.9, the Legislature set forth the remedy for violating the prior section–a jury instruction. The Legislature did not codify an exclusionary rule for the part of the interrogation that was recorded," and the Court of Appeals refused to create one. *People v Clark*, 330 Mich App 392, 424 (2019) (the trial court did not err "by not instructing sua sponte the jury in accordance with MCL 763.9," where it was assumed that a missing minute or so of the defendant's interrogation fell within MCL 763.8, because "the absent instruction did not affect defendant's substantial rights").

C. Invoking *Miranda* Rights

1. Invoking the Right to Silence

"If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. Any statements that occur after that point are deemed to be the product of compulsion." *People v Clark*, 330 Mich App 392, 416 (2019) (quotation marks and citations omitted).

The defendant must clearly invoke the *Miranda* rights. See *People v Williams*, 275 Mich App 194, 197-200 (2007) (defendant's refusal to write out the first statement he made to the police did not constitute an invocation of his right to silence).

2. Invoking the Right to Counsel

"The assertion of the right to counsel during a custodial interrogation is a per se invocation of the right to remain silent." *People v Clark*, 330 Mich App 392, 416 (2019). Accordingly, "an accused, . . . [who has] expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v Arizona*, 451 US 477, 484-485 (1981).[66] See

[66]See Section 3.14(D)(7) for information on reinitiating contact by defendant.

also *Clark*, 330 Mich App at 416. "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver[67] of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 US at 484.

The request for counsel must be unambiguous. *Davis v United States*, 512 US 452, 459 (1994). The suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." *Id*.

3. Violation of Right to Counsel

Confessions obtained in violation of the Sixth Amendment right to counsel are generally inadmissible. *People v Gonyea*, 421 Mich 462, 478 (1984).

Where "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" and the suspect has been taken into custody for interrogation, any statement elicited by the police cannot be used against the defendant unless he or she was given an opportunity to consult with counsel and was advised of his or her right to remain silent, because such a situation constitutes a denial of the assistance of counsel in violation of the Sixth Amendment. *Escobedo v Illinois*, 378 US 478, 490-491 (1964).

"[S]tatements taken in violation of a defendant's right to counsel, if voluntary, may be [admissible] for impeachment purposes although they could not have been used in the prosecutor's case-in-chief." *People v Stacy*, 193 Mich App 19, 24-25 (1992) (quotation marks and citation omitted). To use a confession deliberately elicited following arraignment in its case-in-chief, the prosecution must prove that police obtained a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel before they interrogated the accused. *Patterson v Illinois*, 487 US 285, 292-293 (1988). See Section 3.14(D) for more information on valid waiver of *Miranda* rights, including the right to counsel.

[67] See Section 3.14(D) for more information on valid waivers of *Miranda* rights.

4. Violation of Privilege Against Self-Incrimination[68]

Confessions obtained in violation of a defendant's Fifth Amendment privilege against compulsory self-incrimination are not admissible. *Miranda v Arizona*, 384 US 436, 474-477 (1966); *People v Hill*, 429 Mich 382, 394-395 (1987).

The following subsections discuss *Miranda* issues in detail.

D. Waiver of Miranda Rights

1. Burden of Proof

When a defendant contends that his or her confession was involuntary, the prosecution must make an affirmative showing that *Miranda* warnings were given prior to the custodial interrogation and that a waiver was properly obtained before the defendant's statements may be admitted in the prosecution's case-in-chief. *Miranda v Arizona*, 384 US 436, 444 (1966); *People v Arroyo*, 138 Mich App 246, 249-250 (1984). In *Miranda*, 384 US at 444-445, the Court held that the prosecution must present evidence that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and rights to consult with counsel and to have counsel present during a custodial interrogation. If the defendant claims that he or she did not validly waive *Miranda* rights, the prosecution has the burden of proving by a preponderance of the evidence that there was a voluntary, knowing, and intelligent waiver of those rights. *Colorado v Connelly*, 479 US 157, 168 (1986); *People v Daoud*, 462 Mich 621, 634 (2000). The court must examine the totality of the circumstances surrounding the interrogation when evaluating the validity of a purported waiver of *Miranda* rights. *Fare v Michael C*, 442 US 707, 724-725 (1979).

See Section 3.14(F) for information on motions to suppress.

2. Voluntary, Knowing, and Intelligent Waiver – Generally

A suspect may waive his or her *Miranda* rights. *Moran v Burbine*, 475 US 412, 421 (1986). However, the defendant's waiver must be *voluntary*, *knowing*, and *intelligent*. *People v Howard*, 226 Mich App 528, 538 (1997).[69] There is a distinction between determining whether a defendant's waiver of his or

[68] See Section 3.13 for general information on the privilege against self-incrimination.

her *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowing and intelligent. *People v Garwood*, 205 Mich App 553, 555 (1994). A valid waiver of *Miranda* rights requires a showing that the waiver was voluntarily made—the result of the defendant's uncoerced choice—and that the waiver was knowing and intelligent–made with complete awareness of the rights waived and the consequences of waiving those rights. *Id.* at 556. See also *Moran*, 475 US at 421.

"Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* rights. Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation." *People v Abraham*, 234 Mich App 640, 644-645 (1999) (internal citations omitted). See also *People v Tierney*, 266 Mich App 687, 707 (2005) ("the analysis must be bifurcated, i.e., considering (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent").

"[T]he failure of police to inform a suspect of an attorney's efforts to contact him does not invalidate[, under the Self-Incrimination Clause of the Michigan Constitution, Const 1963, art 1, § 17,] an otherwise 'voluntary, knowing, and intelligent' *Miranda*[70] waiver." *People v Tanner*, 496 Mich 199, 249 (2014). Rather, "'[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the [*Miranda*] waiver is valid as a matter of law.'" *Tanner*, 496 Mich at 211, 256, quoting *Moran*, 475 US at 422-423 (concluding "that the United States Supreme Court's interpretation of the Self–Incrimination Clause of the Fifth Amendment in *Moran* [that '[e]vents occurring outside of the presence of the suspect and entirely unknown to him . . . have no bearing on' the validity of a *Miranda* waiver] constitutes the proper interpretation of [Const 1963, art 1, § 17] as well").

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[69] "A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony shall make a time-stamped, audiovisual recording of the entire interrogation. A major felony recording shall include the law enforcement official's notification to the individual of the individual's Miranda rights." MCL 763.8(2). See Section 3.14(B)(2) for discussion of major felony recordings.

[70] 384 US 436 (1966).

3. Factors For Determining a Voluntary Waiver

For a confession to be voluntary, the totality of the circumstances must demonstrate that the confession was "the product of a free and deliberate choice rather than intimidation, coercion, or deception," or that the defendant's will was "overborne and his capacity for self-determination critically impaired[.]" *People v Ryan*, 295 Mich App 388, 397 (2012) (quotation marks and citation omitted); *People v Cipriano*, 431 Mich 315, 334 (1988) (question marks and citation omitted). "When the voluntariness of a confession is challenged, the burden is on the people to demonstrate voluntariness by a preponderance of the evidence." *People v Stewart*, ___ Mich ___, ___ (2023) (quotation marks and citation omitted).

Where the use of involuntary statements at trial violates a defendant's constitutional right to due process, the "defendant's conviction may only stand if the prosecutor can prove that the error was harmless beyond a reasonable doubt[.]" *Stewart*, ___ Mich at ___. "Reversal is required if the average jury would have found the prosecution's case significantly less persuasive without the erroneously admitted testimony." *Id.* at ___ (quotation marks and citation omitted) (holding defendant was entitled to a new trial because "the use of [involuntary] statements at trial violated defendant's constitutional rights, and the prosecution ha[d] not proved that their admission at trial was harmless beyond a reasonable doubt").

In *Cipriano*, 431 Mich at 334, the Michigan Supreme Court identified the following factors as relevant to determining whether a defendant's statement was voluntary:[71]

> (1) the age of the accused;
>
> (2) the accused's lack of education or intelligence level;
>
> (3) the extent of the accused's previous experience with the police;
>
> (4) the repeated or prolonged nature of the questioning;
>
> (5) the length of detention before the accused gave the statement;

[71] Known as the "*Cipriano* factors."

(6) lack of any advice to the accused regarding his or her constitutional rights;

(7) an unnecessary delay in bringing the accused before a magistrate before the accused gave the confession;

(8) whether the accused was injured, intoxicated, drugged, or ill when he or she gave the statement;

(9) whether the accused was deprived of food, sleep, or medical attention;

(10) whether the accused was physically abused; and

(11) whether the accused was threatened with abuse. *Cipriano*, 431 Mich at 334.

Mental incompetence. A defendant's mental incompetence alone does not render a defendant's confession involuntary; for a confession to be involuntary, evidence of police misconduct or coercion must exist. *Colorado v Connelly*, 479 US 157, 164 (1986). While psychological interrogation tactics may make a suspect's mental condition more significant, mental illness by itself and apart from its relation to official coercion should never decide the question of voluntariness. *Id.* On numerous occasions, the United States Supreme Court has referred to the education and IQ of a suspect in finding that he or she was highly susceptible to coercion and that the police overpowered the suspect's will in obtaining an incriminating statement. See *Culombe v Connecticut*, 367 US 568, 620 (1961) (involving a defendant with an intelligence quotient of 64 and the mental age of a 9-year-old); *Spano v New York*, 360 US 315, 316, 321-322 (1959) (involving a foreign-born defendant with a junior high education who was described as "emotionally unstable"); *Payne v Arkansas*, 356 US 560, 562 n 4 (1958) (involving a 19-year-old with a fifth-grade education who was described as "mentally dull" and "slow to learn").

Misrepresentation of evidence. "The fact that the police lie to a suspect about the evidence against him or her does not automatically render an otherwise voluntary statement involuntary." *People v Perkins*, 314 Mich App 140, 155 (2016), vacated in part on other grounds by *People v Perkins*, unpublished order of the Court of Appeals, issued February 12, 2016 (Docket Nos. 323454; 323876; 325741) and *People v Hyatt*, 316 Mich App 368 (2016).[72] "Instead, misrepresentation by the police is just one factor to be considered; the focus remains the totality of the circumstances." *Perkins*, 314 Mich

App at 155-156 (holding that where the totality of the circumstances demonstrated that the defendant's statement to police was voluntary, he was not entitled to suppression of the statement on the ground that the investigating officer "lied to him about what evidence existed in the case").

Age of defendant. "[T]he mere fact that defendant was 17 years old and inexperienced in the criminal justice system [did] not mean that he was 'peculiarly susceptible to an appeal to his conscience' or 'unusual[ly] susceptib[le] . . . to a particular form of persuasion'" within the meaning of *Rhode Island v Innis*, 446 US 291, 302 (1980). *People v White*, 493 Mich 187, 203 (2013) (third and fourth alterations in the original). The *Innis* Court concluded "that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Innis*, 446 US at 300-301. "*Miranda* refers . . . to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 US at 301.

Promise of leniency. "[A] statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of leniency and that promise caused the defendant to confess." *People v Conte*, 421 Mich 704, 712 (1984). To determine whether a promise of leniency exists requires an analysis of "whether the defendant reasonably understood the official's statements to be a promise of leniency." *Id.* To determine whether the officer's promise of leniency caused the defendant to confess requires an analysis of whether the defendant relied on the promise when he or she decided to offer inculpatory evidence and whether, in fact, the promise of leniency prompted the defendant to make the incriminating statements. *Id.* "While general observations regarding leniency . . . will not render a statement involuntary, express or implied assurances that cooperation will aid the interrogee's defense or result in a lesser sentence may do so." *Stewart*, ___ Mich at ___ ("promises of leniency remain only one factor to be considered within the totality-of-the-circumstances analysis").

In *Stewart*, a police officer proposed that they quickly go through paperwork and then proceeded to ask defendant general questions although defendant "was still attending secondary school and living with family," and "made repeated

[72]For more information on the precedential value of an opinion with negative subsequent history, see our note.

requests to call his mother[.]" *Stewart*, ___ Mich at ___. The "defendant's age and its attendant characteristics [were] relevant" to the Court's analysis, and conclusion that "defendant's age made him more susceptible to suggestions from law enforcement and less likely to engage in reasoned decision-making." *Id*. at ___ (clarifying that its "decision does not create a bright-line rule that any statement by an 18-year-old to law enforcement is involuntarily given").

In addition to the *Cipriano* factors, courts "must also address any other factual circumstances, psychological effects, and coercive tactics employed by the officers that may have contributed to an overbearing of the defendant's free will." *Stewart*, ___ Mich at ___. In this regard, "one such tactic employed by law enforcement was the officers' repeated and specific references to leniency." *Id*. at ___. The *Stewart* Court stated that police officers "heavily implied" to defendant that "you control your own destiny" and "emphasized that it was defendant's cooperation that determined . . . a lesser sentence." *Id*. at ___ (noting the "transcript reflects that defendant took these statements as an assurance"). "Given that the officers continued to make these implications of leniency, their limited qualifying language was not sufficient to undo the implications' coercive effect." *Id*. at ___ (the impact of the officers' promise of leniency was compounded by the fact that "the officers also lied to defendant about the extent of the evidence against him" and "the overall tone of the interrogation was combative"). While "the length of the interrogation . . . was not excessively long," defendant was "advised of his constitutional rights," did not "allege that he was injured intoxicated, or drugged," and denied "that he was physically abused" in *Stewart*, "[t]he totality of the circumstances of defendant's interrogation—including his age, the timing of the interrogation [during early morning hours with an inference that defendant was sleep deprived], the officers' references to leniency, the officers' use of falsehoods, and the officers' overall tone and use of language—created an environment in which defendant's free will was overborne and the statements he gave were involuntary." *Stewart*, ___ Mich at ___.

4. Determining a Knowing and Intelligent Waiver

"In contrast to the voluntary prong, determining whether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior." *People v Daoud*, 462 Mich 621, 636 (2000). "To knowingly waive *Miranda*[73] rights, a suspect need not

understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him." *People v Cheatham*, 453 Mich 1, 28 (1996). Rather, "*Miranda* requires that the accused be advised of his rights so that he may make a rational decision, not necessarily the best one or one that would be reached only after long and painstaking deliberation." *Id*. (alteration and citation omitted). "Lack of foresight is insufficient to render an otherwise proper waiver invalid." *Id*. at 29.

"To establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Cheatham*, 452 Mich at 29. "The test is not whether the defendant made an intelligent decision in the sense that it was wise or smart to admit his participation in the crime, but whether his decision was made with the full understanding that he need say nothing at all and that he might then consult with a lawyer if he so desired." *Id*. (alterations and citation omitted).

The trial court's factual findings regarding a defendant's knowing and intelligent waiver of *Miranda* rights are reviewed for clear error. *Daoud*, 462 Mich at 629.

5. Waiver Does Not Have to be Explicit

A waiver does not have to be explicit; it can be determined by the surrounding facts and circumstances. *North Carolina v Butler*, 441 US 369, 375-376 (1979). "[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.* at 373. However, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda v Arizona*, 384 US 436, 475 (1966).

"[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." *Berghuis v Thompkins*, 560 US 370, 388-389 (2010). During the three-hour interview in *Berghuis*, 560 US at 376, 382, the defendant did not invoke his right to remain silent, because he never said "that he wanted to remain silent or that he did not want to talk with the police." Further, the record

[73] *Miranda v Arizona*, 384 US 436 (1966).

demonstrated that the defendant waived his right to remain silent by knowingly and voluntarily making a statement to the police, where: (1) "there [wa]s no contention that [he] did not understand his rights; and from this it follows that he knew what he gave up when he spoke"; (2) his response to a detective's question regarding "whether [he] prayed to God for forgiveness for shooting the victim [wa]s a 'course of conduct indicating waiver' of the right to remain silent"; and (3) "there [wa]s no evidence that [his] statement was coerced." *Id*. at 385-387, quoting *Butler*, 441 US at 373. Additionally, the police were not required to obtain a waiver of the defendant's right to remain silent before questioning him, because "after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights." *Berghuis*, 560 US at 388.

"When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent." *People v McReavy*, 436 Mich 197, 222 (1990). "[A] defendant who speaks following *Miranda* warnings must affirmatively reassert the right to remain silent." *People v Davis*, 191 Mich App 29, 35-36 (1991).

6. Timing of Waiver

A *Miranda* waiver made midway through an interrogation does not permit the use of a confession obtained before the *Miranda* warning was given. *Missouri v Seibert*, 542 US 600, 609-610, 613, 617 (2004).

7. Reinitiated Communication by Defendant After Invoking *Miranda* - Right to Counsel

"[T]here is no bright-line rule that, in the absence of rereading the person his *Miranda* rights a second time when discussions are reinitiated [by a defendant after invoking his or her *Miranda* rights], the person's subsequent statements must be suppressed. Rather, the test is whether, under the totality of the circumstances, the person voluntarily, knowingly, and intelligently waived his right to counsel and to remain silent." *People v Clark*, 330 Mich App 392, 398 (2019). "The fact that police officers do not again fully advise the defendant of his *Miranda* rights after he reinitiates communication with them is just one factor to consider under to totality of the circumstances." *Id*. at 419, 421 (finding that because the time lapse of a few minutes "between when defendant initially invoked his right to counsel, reinitiated discussion, and then

began talking again with the officers," the officers' reminder to defendant "that his *Miranda* rights were recently read to him . . . was adequate under the circumstances").

8. Cases Involving Valid Waiver

Hearing-impaired defendant. A preponderance of the evidence proved that a deaf-mute defendant knowingly, intelligently, and voluntarily waived her *Miranda* rights when she made inculpatory statements during interrogation after a detective placed a constitutional rights form within the defendant's range of vision, read portions of the form aloud while a sign language interpreter signed and mouthed the detective's words to the defendant, and the defendant signed the form. *People v McBride*, 480 Mich 1047 (2008); *People v McBride*, 273 Mich App 238, 240-244 (2006).

Reinitiated communication by defendant after invoking *Miranda*. Defendant's waiver was valid where "[t]he time lapse between when defendant initially invoked his right to counsel, reinitated discussions, and then began talking again with the officers was only a few minutes"; "the officers reminded defendant that his *Miranda* rights were recently read to him, and he continued talking with the officers." *People v Clark*, 330 Mich App 392, 421 (2019). "Given the brief time lapse, the reminder was adequate under the circumstances[.]" *Id*.

Intoxication. A defendant made a voluntary, knowing, and intelligent waiver of his right against self-incrimination, even when he was intoxicated and suicidal at the time of the confession. *People v Tierney*, 266 Mich App 687, 709-710 (2005). The *Tierney* Court affirmed the trial court's analysis of the *Cipriano*[74] factors and emphasized that a defendant's intoxication was only one of the eleven *Cipriano* factors. *Tierney*, 266 Mich App at 709-710. The Court noted that any effect that the defendant's intoxication may have had on the defendant was significantly outweighed by other factors, including the defendant's college education, his experience with the criminal justice system, the absence of any threats, and the fact that necessities (e.g., medical care) were not withheld from the defendant during police questioning. *Id*. at 709. See also *People v Leighty*, 161 Mich App 565, 571 (1987) (severe intoxication from drugs or alcohol may preclude an effective waiver of *Miranda* rights, but it is not dispositive; the totality of the circumstances must be examined).

[74] *People v Cipriano*, 431 Mich 315 (1988).

Subsequent interrogation. Notwithstanding the fact that the suspect was not held in continuous custody between his first interrogation (at which he requested counsel and denied involvement in the crime), and his second interrogation 11 days later (at which he acknowledged his right to counsel and implicated himself in the crime), the defendant executed a valid waiver of his right to counsel at the second interrogation. *People v Harris*, 261 Mich App 44, 55 (2004). Two police officers involved in the defendant's interrogation refuted the defendant's claim that he requested counsel at the second interrogation, and the prosecution's evidence included the defendant's videotaped acknowledgment of his right to counsel and a signed waiver of that right. *Id*.

E. Custodial Interrogation

"[N]either *Miranda*'s[75] right to be given a series of warnings nor *Edwards*'s[76] right to have counsel present apply absent custodial interrogation[.]"[77] *People v Elliott*, 494 Mich 292, 304 (2013). "If the accused is never subjected to custodial interrogation after he has invoked his right to counsel, *Edwards* is inapplicable[; i]n other words, according to *Edwards*, the [Fifth Amendment] right the accused invokes under *Miranda* is the right to have counsel present during custodial interrogation[, and] . . . [i]n the absence of a post-invocation custodial interrogation, there can be no infringement of that right." *Elliott*, 494 Mich at 303, 305 (further holding that because "defendant was not subjected to custodial interrogation by the parole officer" to whom he made incriminating statements, it was unnecessary to "consider whether a parole officer . . . may be considered a law enforcement officer for purposes of *Miranda*") (citation omitted).

Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v Arizona*, 384 US 436, 444 (1966). Whether a suspect is in custody or deprived of his or her freedom of action in any significant manner requires a two-pronged analysis. *Thompson v Keohane*, 516 US 99, 112 (1995). First, the reviewing court must look at the circumstances surrounding the interrogation. *Id*. Second, the reviewing court must determine whether, given those circumstances, a reasonable person would have felt that he or she was at liberty to terminate the interrogation and leave. *Id*.

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[75] *Miranda v Arizona*, 384 US 436 (1966).

[76] *Edwards v Arizona*, 451 US 477, 484-485 (1981).

[77] See Section 3.14(C) for more information on invoking *Miranda* rights.

1. Custody

"To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave"; "[t]he determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *People v Zahn*, 234 Mich App 438, 449 (1999).

2. Interrogation

Interrogation involves questioning or its functional equivalent which includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301 (1980).

3. Questioning a Child

The age of a child subjected to police questioning "properly informs the *Miranda*[78] custody analysis." *JDB v North Carolina*, 564 US 261, 265 (2011). "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. . . . [C]ourts can account for that reality without doing any damage to the objective nature of the custody analysis." *Id.* at 272. Although officers are not required to consider a suspect's subjective state of mind or other unknowable circumstances, a child's age is a fact that "yields objective conclusions" that "are self-evident to anyone who was a child once . . . , including any police officer or judge"; thus, "a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action." *Id.* at 271-272, 275. Cautioning that "a child's age will [not] be a determinative, or even a significant, factor in every case," the Court concluded that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *Id.* at 277.

[78] *Miranda v Arizona*, 384 US 436 (1966).

4. Questioning a Motorist

"[A] motorist detained for a routine traffic stop or investigative stop is ordinarily not in custody within the meaning of *Miranda*."[79] *People v Steele*, 292 Mich App 308, 317 (2011).

5. Questioning a Prisoner

There is no "categorical rule . . . that the questioning of a prisoner is always custodial [within the meaning of *Miranda*[80]] when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison." *Howes v Fields*, 565 US 499, 505 (2012). Rather, "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation, . . . includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Id.* at 514, 516-517. Similarly, "[w]here . . . a parolee is incarcerated for an alleged parole violation, 'custodial' means more than just the normal restrictions that exist as a result of the incarceration." *People v Elliott*, 494 Mich 292, 305-306 (2013). "[T]he first constitutional step is to determine 'whether an individual's freedom of movement was curtailed[.]' If so, the court should then ask 'the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.' Thus, '[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*.'" *Elliott*, 494 Mich at 308, quoting *Fields*, 565 US at 509.

A break in custody of 14 days ends the presumption of involuntariness established in *Edwards v Arizona*, 451 US 477 (1981), because that duration "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." *Maryland v Shatzer*, 559 US 98, 110 (2010). The Court also held that when an individual is interrogated while in prison for an unrelated crime, released back into the general prison population, then questioned again at a later time, the situation constitutes a break in custody for purposes of *Miranda*. *Shatzer*, 559 US at 112-114. According to the Court, "[w]ithout minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon

[79] *Miranda v Arizona*, 384 US 436 (1966).

[80] *Miranda v Arizona*, 384 US 436 (1966).

conviction of a crime does not create the coercive pressures identified in *Miranda*." *Id*. at 113.

6. Questioning by a Non-Police Actor

Individuals not acting on the government's behalf may not be required to give *Miranda*[81] warnings before eliciting a statement. See *People v Anderson*, 209 Mich App 527, 533-534 (1995) (a juvenile corrections officer whose job duties did not require the interrogation of suspects, who did not wear a badge or uniform or carry a gun, and who did not have authority to arrest or detain citizens, was not required to give a defendant *Miranda* warnings). See also *People v Porterfield*, 166 Mich App 562, 567 (1988) (a protective services caseworker not charged with enforcement of criminal laws and not acting on behalf of police, is not required to advise an individual of *Miranda* rights); *People v Faulkner*, 90 Mich App 520, 525 (1979) (a private investigator is not required to advise individuals of their constitutional rights before eliciting a statement).

7. Custodial Interrogation Existed

- *Edwards v Arizona*, 451 US 477, 487 (1981) (custodial interrogation existed where the defendant invoked his right to counsel, the police stopped questioning him, the police returned to him the next day and advised him of his *Miranda* rights again, and defendant subsequently made an incriminating statement; the "statement made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible").

- *People v Kelly*, 505 Mich 933 (2019) (custodial interrogation existed where the defendant was handcuffed and under restraint when questioned).

- *People v Barritt*, 325 Mich App 556, 574, 575-576, 582-583, 584 (2018) (custodial interrogation existed and defendant's Fifth Amendment rights were violated where there totality of the circumstances showed that defendant "was always in the company of at least one armed officer"; "he was told by the police to get into the back of a police car"; his "dog had been forcibly removed from the home by animal-control officers"; "[h]e was not able to drive to the police station in the same car that brought him to the house, despite the fact that the police had told defendant's driver to

[81] *Miranda v Arizona*, 384 US 436 (1966).

drive to the very same police station"; he "did not get to arrange the time of the interview, the place of the interview, or when the interview would conclude"; and "[a]t the end of the interview defendant was handcuffed and placed in another police vehicle." The "mode of transportation implie[d] a physical restraint regardless of whether . . . defendant voluntarily accepted the ride." Further, whether defendant was told he was free to leave was relevant, and the fact that he was not told until the end of the interview (and after he stated he needed a lawyer) that he was not under arrest and could finish anytime, weighed in favor of finding custody. The accusatory nature of the questioning also weighed in favor of finding custody because it "would lead a reasonable person to perceive that they were not free to leave[.]").[82]

8. Custodial Interrogation Did Not Exist

- *Howes v Fields*, 565 US 499, 514, 516-517 (2012) (there was no custodial interrogation where the respondent, a jail inmate, was escorted to a conference room and questioned by officers regarding allegations that he had committed an unrelated offense prior to his incarceration; "[t]aking into account all of the circumstances of the questioning," including that the respondent was not physically restrained or threatened, that he was interviewed under conditions that were not uncomfortable, and, "especially . . . that [he] was told that he was free to end the questioning and to return to his cell, . . . respondent was not in custody within the meaning of *Miranda*").[83]

- *People v Elliott*, 494 Mich 292, 297-299, 308-313 (2013) (Defendant was not subjected to custodial interrogation when his first interrogation about a robbery was discontinued after he requested an attorney, then subsequently met with a different parole officer at the jail who served him with an amended notice of parole violation and during the

[82]The facts in *Barritt* were sufficient to support a finding of custody even though defendant was not handcuffed during the interrogation. However, the mere presence of a police dog in the interrogation room did not impose "a physical restraint on defendant's freedom to move." *Barritt III*, 325 Mich App at 578.

[83] Cf. *Mathis v United States*, 391 US 1, 3-5 (1968) (holding that a state prisoner was entitled to *Miranda* warnings before being questioned by a federal revenue agent, and rejecting the Government's assertions that *Miranda* was inapplicable where "(1) . . . the[] questions were asked as a part of a routine tax investigation where no criminal proceedings might even [have been] brought, and (2) . . . the [prisoner] had not been put in jail by the officers questioning him, but was there for an entirely separate offense").

meeting, confessed to his involvement in the robbery. "[D]efendant was not subjected to the type of coercive pressure against which *Miranda* was designed to guard" because "the meeting . . . took place in the jail library, it was of short duration (15 to 25 minutes), defendant was not physically restrained, . . . he was escorted to the library by a deputy, not by the parole officer," he "was not free to leave the jail library by himself," and "much like the prisoner in *Fields*, a 'reasonable person' in defendant's 'position,' i.e., a *parolee*, would be aware that a parole officer is acting independently of the police who placed him in custody and has no control over the jail, its staff, or the individuals incarcerated there." Additionally, "there [was] no evidence of coercion or any other manner of psychological intimidation[, and] . . . defendant . . . did not even once indicate that he did not want to talk to the parole officer.").

- *People v White*, 493 Mich 187, 191-192, 195, 198-200, 202, 204-206 (2013) (Where defendant asserted his right to remain silent after an officer provided him with *Miranda* warnings, the officer's statement to the 17-year-old defendant that he "'hope[d] that the gun [was] in a place where nobody [could] get a hold of it and nobody else [could] get hurt by it'" did not constitute either "'express questioning or its functional equivalent'" under *Innis*,[84] and the trial court therefore erred in suppressing the defendant's subsequent incriminating statements. "The officer's comment . . . was not a question because it did not ask for an answer or invite a response[, but instead] was a mere expression of hope and concern[, and] . . . the officer's addition of the words 'okay' and 'all right' at the end of his comment did not transform a non-question into a question" where he had "*repeatedly* used [these] words . . . in a manner that failed to garner any response from defendant." "Furthermore, immediately before the officer made the statement at issue, he said, 'I'm not asking you questions, I'm just telling you.' Although this [was] certainly not dispositive of whether what follow[ed] constituted a 'question,' . . . [t]he very utterance itself made it less likely either that the officer would have reasonably expected defendant to answer with an incriminating response *or* that defendant would have proffered an incriminating response." The officer's comment about the location of the gun was a "direct statement[] to the defendant," but because there was "nothing in the

[84] *Rhode Island v Innis*, 446 US 291, 299-303 (1980).

record to suggest that the officer was aware that defendant was 'peculiarly susceptible to an appeal to his conscience' concerning the safety of others," and because "the officer's remark [was not] 'particularly "evocative,"'" the "defendant was not subjected to the 'functional equivalent' of express questioning[.]"[85]).

- *People v Cortez (On Remand)*, 299 Mich App 679, 685-688, 699-701 (2013) (the defendant prisoner who, after being handcuffed and confined in an office with a closed door, was questioned about a weapon that was found in his cell was not in custody for purposes of *Miranda*; although "defendant was not told that he was free to end the questioning and return to his cell, . . . other coercive aspects of the interrogation that existed in *Fields* [were] absent" where the interview lasted only 15 minutes, there was no evidence that the defendant's sleep schedule was interrupted or that he was made uncomfortable, the questioning corrections officer did not threaten him, and he was questioned about gang activity inside the prison away from the general prison population).

- *People v Jones*, 301 Mich App 566, 580 (2013) ("defendant was not in custody for purposes of *Miranda* during [a] traffic stop or while she was waiting in the police cruiser during the search of her vehicle" where the detaining officer "asked defendant and her children to sit in his police cruiser for their own safety;" because "defendant was not handcuffed and was informed that she was not under arrest, . . . under the totality of the circumstances, a reasonable person in defendant's position would have believed she was free to leave").

- *People v Steele*, 292 Mich App 308, 319 (2011) ("[g]iven the circumstances that justified the *Terry*[86] stop, [the police officer] was permitted to temporarily detain defendant and make a reasonable inquiry into possible criminal activity"; the police officer's "brief questioning was within the scope of the stop and confirmed the officer's suspicions concerning the presence of a controlled substance without subjecting defendant to a custodial interrogation").

- *People v Vaughn*, 291 Mich App 183, 186-190 (2010), vacated in part on other grounds 491 Mich 642

[85]Quoting *Rhode Island v Innis*, 446 US 291, 302-303 (1980).

[86]*Terry v Ohio*, 392 US 1 (1968).

(2012)[87] (no custodial interrogation where plainclothes police officers entered the defendant's home with the defendant's mother's permission, did not draw their weapons, requested the defendant to come from the basement to the main floor, did not handcuff him or otherwise restrict his movement, and questioned him in his mother's presence).

F. Motion to Suppress Confession (*Walker* Hearing)

A defendant may move to suppress their confession at a hearing typically called a *Walker* hearing. *People v Walker (On Rehearing)*, 374 Mich 331, 338 (1965). Hearings on the admissibility of confessions must be conducted outside the presence of the jury. MRE 104(c)(1).[88] A defendant in a criminal case does not become subject to cross-examination on other issues in the case by testifying. MRE 104(d). The rules of evidence do not apply to *Walker* hearings, except those on privileges. MRE 104(a); *People v Richardson*, 204 Mich App 71, 80 (1994).

The prosecution bears the burden of showing the admissibility of a confession. *Brown v Illinois*, 422 US 590, 604 (1975).

1. Common Challenges to Confessions

Illegal arrest/unlawful detention. There must be a warrant or probable cause to arrest, or the detention is illegal and "any evidence obtained as a result of that unlawful detention or any statement made [by an individual] while unlawfully detained must be suppressed." *People v Lewis*, 160 Mich App 20, 25 (1987). See also *People v Dowdy*, 211 Mich App 562, 569 (1995), where an initial warrantless entry was unconstitutional but a defendant's statement was admissible because it was made after police had probable cause to arrest the defendant. To determine whether the illegal arrest caused the confession, the court should consider the time between the illegal arrest and confession, whether the official misconduct was flagrant, whether there were intervening circumstances, and any events that occurred before the arrest. *People v Mallory*, 421 Mich 229, 243 n 8 (1984).

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[87] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[88] MRE 104(c) also requires that the court to conduct any hearing on a preliminary question so that the jury cannot hear it when "a defendant in a criminal case is a witness and so requests" or "justice so requires." MRE 104(c)(2)-(3).

Where the defendant comes forward with proof that his or her confession was involuntary and was obtained as a result of a statutorily unlawful detention, the prosecution has the burden of proving that the confession was voluntary and admissible. *People v Jordan*, 149 Mich App 568, 577 (1986). See Section 3.14(D)(3) for more information on voluntariness.

Unreasonable prearraignment delay. Generally, the court should make a probable cause determination within 48 hours of a defendant's arrest. See *Riverside v McLaughlin*, 500 US 44, 56 (1991). A confession obtained during an unreasonable prearraignment delay may be inadmissible. *Mallory*, 421 Mich at 243; *People v White*, 392 Mich 404, 424 (1974). "[W]here the delay has been employed as a tool to extract the statement, the exclusionary rule will be imposed even if the statement was given voluntarily." *Jordan*, 149 Mich App at 577. Although the "48 hour" rule established in *Riverside*, 500 US at 44, forms a presumption of unreasonableness, the delay is only one factor to be considered in determining whether the statement was involuntary. *People v Manning*, 243 Mich App 615, 642-643 (2000). "The proper analysis is voluntariness under the *Cipriano*[89] factors." *Id.* at 643. See Section 3.14(D)(3) for more information on voluntariness.

G. Scope/Applicability of Exclusionary Rule

Miranda warnings are constitutionally required and apply to the admissibility of statements made during custodial interrogations in both federal and state courts. *Dickerson v United States*, 530 US 428, 432, 442 (2000). Confessions obtained in violation of a defendant's Fifth Amendment privilege against compulsory self-incrimination are not admissible. *Miranda v Arizona*, 384 US 436, 474-477 (1966); *People v Hill*, 429 Mich 382, 394-395 (1987). If a defendant asserts his or her right to counsel, the interrogation must cease until counsel is present, or, after the lapse of a significant period of time, the defendant knowingly and intelligently waives his or her right to counsel. *People v Parker*, 84 Mich App 447, 457 (1978).

"Application of the exclusionary rule to a constitutional violation is a question of law that is reviewed de novo." *People v Frazier*, 478 Mich 231, 240 (2007).

[89] *People v Cipriano*, 431 Mich 315 (1988).

1. Testimonial vs. Physical Evidence

The *Miranda* rule bars only testimonial, not physical evidence.[90] *United States v Patane*, 542 US 630, 636 (2004). Physical (nontestimonial) evidence obtained as a direct result of unwarned but voluntary statements given in violation of *Miranda* is not covered by the exclusionary rule. *Patane*, 542 US at 637. See *People v Campbell*, 329 Mich App 185, 204-205 (2019), where the trial court erred by suppressing evidence at trial when a police officer had failed to give the defendant *Miranda* warnings before conducting additional questioning and the court did not find that the defendant's admission was involuntary. In *Campbell*, a police officer asked the defendant if he had any weapons inside the vehicle following a traffic stop. *Id*. at 190. Defendant admitted he had a firearm, and upon additional questioning by the officer, that he did not have a CPL. *Id*. at 190-191. Defendant was then advised "that he would be arrested for having a gun in his vehicle without being licensed to carry a concealed weapon." *Id*. at 203 (defendant "was undoubtedly in custody at that point as no reasonable person could have believed he or she was free to leave"). Subsequently, "without advising [defendant] of his rights as required by *Miranda*," the officer asked defendant "if he had any other weapons in the vehicle, prompting [defendant] to disclose the location of two additional loaded guns." *Campbell*, 329 Mich App at 203. "[T]he trial court correctly ruled that [defendant's] statement regarding the second and third guns was inadmissible." *Id*. However, "application of the exclusionary rule to evidence obtained as a result of a *Miranda* violation is not a foregone conclusion because a violation of *Miranda* is not, in and of itself, a violation of the Constitution." *Campbell*, 329 Mich App at 204-205 (the court "erred by suppressing the second and third guns on the basis of a *Miranda* violation").[91]

2. Public Safety Exception

The *Miranda* rule does not apply "in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *New York v Quarles*, 467 US 649, 656 (1984); *People v Attebury*, 463 Mich 662, 670 (2001). To

[90] "A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony" must capture the entire interrogation, including notification of a defendant's *Miranda* rights, in a time-stamped, audiovisual recording. MCL 763.8(2). See Section 3.14(B)(2) for discussion of major felony recordings.

[91] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11, for information on search and seizure issues, including the exclusionary rule.

excuse the *Miranda* warnings, the circumstances must present an immediate threat to public or police safety and the questions posed to the accused must be objectively and reasonably necessary to protect the public or the police from an immediate danger. *Quarles*, 467 US at 655-658; *Attebury*, 463 Mich at 664, 670-671, 674 (officers executing an arrest warrant for assault with a dangerous weapon were justified in questioning the defendant about the location of his gun before giving him *Miranda* warnings, where the questioning was "directly related to an objectively reasonable need to secure protection from the possibility of immediate danger associated with the gun").

3. No Police Misconduct

In the absence of police misconduct, the exclusionary rule does not apply to prohibit the admission of evidence obtained as a result of a defendant's confession even when the defendant's confession was obtained in violation of the defendant's Sixth Amendment right to counsel and is inadmissible in the prosecution's case-in-chief. See *People v Frazier*, 478 Mich 231, 250 (2007). The exclusionary rule does not apply because excluding a confession (and evidence discovered as a result of the confession) that did not result from police misconduct would not further the purpose of the exclusionary rule—to deter future police misconduct. *Id.* at 252.

After consulting with an attorney, to whom defendant admitted being present for but denied any advance knowledge or involvement in a robbery and double-homicide, defendant insisted on talking to police following his arrest and arraignment. *Frazier*, 478 Mich at 236. Based on defendant's assertion of non-involvement, "defense counsel advised defendant that one option would be to talk to the police and tell the truth." *Id.* Defense counsel was present when defendant was given his *Miranda*[92] warnings, but counsel did not remain for the interrogation "because he assumed that he could not be present during questioning." *Id.* Despite previously informing defense counsel that he did not have any advance knowledge of the robbery and murders, defendant admitted during the interrogation "that he knew [the perpetrator] had been armed and had intended to rob the victims." *Id.* at 236-237. Defendant further admitted that the perpetrator "paid him with two $50 bills after the murders," "that two street sweepers gave him a ride home after the

[92] *Miranda v Arizona*, 384 US 436 (1966).

murders and he asked them to change a $50 bill." *Id*. at 237. "The police later located the street sweepers, who testified that defendant approached them for a ride . . . and asked if they had change for a $50 bill." *Id*. The *Frazier* Court concluded the exclusionary rule did not apply to the testimony of the street sweepers because "defendant's confession did not result from police misconduct," and "the purpose of the exclusionary rule [was] in no way served by excluding the street sweepers' testimony." *Id*. at 235. The *Frazier* Court further commented that even if the defendant's confession did result from police misconduct, the exclusionary rule did not apply because any connection between the misconduct involved in obtaining the defendant's confession, and the witness's testimony obtained as a result, was sufficiently attenuated to dissipate any taint. *Id*. at 253. "Under the attenuation exception to the exclusionary rule, exclusion is improper when the connection between the illegality and the discovery of the challenged evidence has become so attenuated as to dissipate the taint[.] Attenuation can occur when the causal connection is remote or when the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id*. (quotation marks and citations omitted).

4. Evidence of Defendant's Silence Generally Inadmissible

Generally, a defendant's silence with the police after arrest and having received *Miranda* warnings is inadmissible at trial. *People v Boyd*, 470 Mich 363, 374-375 (2004).[93] See also *People v Clary*, 494 Mich 260, 271-272 (2013) (holding that the prosecutor improperly referred to the defendant's failure, "after he was arrested and arraigned, [to tell] the police that he did not shoot the complainant"). However, an arrested defendant's silence after *Miranda* may be used against the defendant if he or she "testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Doyle v Ohio*, 426 US 610, 619 n 11 (1976). See also *Boyd*, 470 Mich at 374-375.

"[A] defendant's nonverbal conduct [such as sitting with his head in his hands, looking down] cannot be characterized as 'silence' that is inadmissible per se under the Michigan Constitution." *People v McReavy*, 436 Mich 197, 205, 222 (1990).

"'[T]he Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior

[93] See Section 3.14(C) for discussion of asserting *Miranda* rights.

silence' at his first trial. *Jenkins[v Anderson*, 447 US 231, 235 (1980)], citing *Raffel v United States*, [271 US 494 (1926)]." *Clary*, 494 Mich at 266, 272, 280 (noting that "even though this [type of] silence is . . . post-*Miranda* silence, . . . *Raffel* has not been overruled by . . . any . . . United States Supreme Court decision," and holding that where the defendant did not testify at his first trial, which ended in a mistrial, he was not "improperly impeached with his silence when the prosecutor [at the retrial] made repeated references to his failure to testify at his first trial").[94]

Similarly, "it [is] not 'error to require the defendant, . . . offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial.'" *Clary*, 494 Mich at 266, quoting *Raffel*, 271 US at 499 (alteration added) (noting that the defendant's cross-examination must be relevant and within the scope of cross-examination rules). At the defendant's first trial in *Clary*, 494 Mich at 263, the complainant testified that the defendant shot him, and the defendant did not testify. The first trial resulted in a mistrial due to a hung jury. *Id*. At the defendant's second trial, the complainant again testified that the defendant shot him, and the defendant took the stand and testified that he did not shoot the complainant. *Id*. at 263-264. The prosecutor impeached the defendant by asking him why he had not provided that testimony at the first trial. *Id*. at 264. The Michigan Supreme Court held that where a "defendant's silence [is] clearly used for impeachment purposes . . . it is admissible under *Raffel*." *Clary*, 494 Mich at 270-271. However, the Court cautioned that just because the impeachment is constitutionally sound, does not mean that it is automatically admissible under the Michigan Rules of Evidence. *Id*. at n 8. Rather, "the admission of a defendant's prior silence, as with any other piece of evidence, must comply with the rules of evidence, including MRE 401 (defining relevant evidence), MRE 402 (providing that relevant evidence is generally admissible), and MRE 403 (providing that relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice)." *Clary*, 494 Mich at 271 n 8.

A defendant is required to testify to preserve for review a challenge to the trial court's ruling in limine allowing the prosecution to admit evidence of the defendant's exercise of

[94] The defendant's convictions following his second trial were nevertheless reversed because the prosecutor improperly referred to the defendant's post-arrest, post-*Miranda* silence in violation of *Doyle*, 426 US at 618-619. *Clary*, 494 Mich at 263.

the *Miranda* right to remain silent. *Boyd*, 470 Mich at 365. "Whether [a] defendant was improperly impeached with his silence is a question of law that [appellate courts] review de novo." *Clary*, 494 Mich at 264.

Prearrest silence. "The issue of prearrest silence is one of relevance," and a "defendant's failure to respond to an accusation is not probative evidence of the truth of the accusation." *People v Hackett*, 460 Mich 202, 214-215 (1999). Tacit admissions are inadmissible "because the inference of relevancy rests solely on the defendant's failure to deny." *Id*. at 213 (quotation marks and citation omitted). However, "a defendant's prearrest silence is admissible for impeachment purposes." *Id*.

3.15 Lay Testimony[95]

A. Admissibility

MRE 701 limits lay opinion testimony to certain circumstances:

> "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue." MRE 701.

Testimony by police detectives "about the behavior patterns of crime victims" was properly admitted under MRE 701 because the detectives' "opinions were based on their observations and training." *People v Allen*, 331 Mich App 587, 607, 609 (2020), vacated in part on other grounds 507 Mich 856 (2021).[96] "Review of the record establishe[d] 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." *Allen*, 331 Mich App at 609 (also, the "testimony was not a 'technical or scientific' analysis" and the detectives' "understanding of trauma and crime victims was acquired through training and experience").

The trial court did not abuse its discretion by admitting the witness's testimony regarding the opinion she noted in her claims log about the plaintiff's injury as lay opinion testimony under MRE

[95]See Chapter 4 for information on expert testimony.

[96]For more information on the precedential value of an opinion with negative subsequent history, see our note.

701 where the witness "testified that she had significant experience in reviewing medical documentation for defendant [insurance company], she had approved payment of approximately 100 automobile-accident claims, and she had approved payment of those claims after determining that the insured had suffered a serious impairment of body function." *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76, 89 (2017).[97] "Because [the witness's] testimony was based on her review of medical records in the ordinary course of her employment, the opinion expressed in her claims log was rationally based on her perceptions, and it was helpful to a clear understanding of her trial testimony and to the determination whether [the plaintiff] suffered a serious impairment of body function." *Id.* at 90. Moreover, the admissibility of the witness's "claims-log entry, wherein she expressed the opinion that [the plaintiff] had suffered a serious impairment of body function, was not rendered inadmissible simply because the jury may have believed [the witness's] initial evaluation of the seriousness and extent of [the plaintiff's] injuries." *Id.* at 91 (rejecting the defendant's argument that the witness's "testimony was inadmissible because the existence of a threshold injury is a legal conclusion, and witness testimony regarding a legal conclusion is improper").

B. Distinction Between Lay and Expert Testimony[98]

The Michigan Court of Appeals noted the difference between testimony by a lay witness and an expert witness in *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455 (1995) (citations omitted):

> "Lay witness testimony in the form of an opinion is permitted where it is rationally based on the witness' perception and helpful to a clear understanding of the witness' testimony or the determination of a fact at issue. An expert witness is one who has been qualified by knowledge, skill, experience, training, or education and is used where scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or determine a fact at issue."

C. Physical Observation

"Any witness is qualified to testify as to his or her physical observations and opinions formed as a result of them." *Lamson v Martin (After Remand)*, 216 Mich App 452, 459 (1996).

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[97] The witness was an insurance adjuster employed by the defendant. *Andreson*, 322 Mich App at 87.

[98] See Chapter 4 for information on expert testimony.

Admission of a sexual assault nurse's testimony that the victim was "shielding herself" and "had her arms huddled around herself" while the nurse conducted a physical examination of the victim did not constitute plain error affecting defendant's substantial rights. *People v Brown*, 326 Mich App 185, 197 (2019). Defendant challenged the testimony arguing it "improperly enhanced the victim's credibility by indicating that, even though there was no evidence of trauma, the victim's body language implied that the sexual assaults occurred." *Id*. The nurse's "testimony was admissible lay testimony under MRE 701, rather than as expert testimony," because "testimony regarding the victim's body language was not based on [the nurse's] specialized knowledge but on her 'perception of the witness.'" *Brown*, 326 Mich App at 197.

D. Property

A lay witness may testify as to his or her opinion of the monetary value of his or her real property, *Grand Rapids v H R Terryberry Co*, 122 Mich App 750, 753-754 (1983), or personal property, *People v Watts*, 133 Mich App 80, 83-84 (1984). Also see MRE 1101(b)(8) regarding the admissibility of hearsay concerning proof of property value at a preliminary examination.

For purposes of MRE 1101(b)(8), "ownership" of property includes the right to convey or sell that property. *People v Caban*, 275 Mich App 419, 422 (2007). In *Caban*, an out-of-court statement made by a nonexpert regarding a defendant's right to convey a piece of property was admissible at a defendant's preliminary examination for a crime related to the defendant's authority to sell the property. *Id*. MRE 1101(b)(8) also authorizes hearsay to be admitted at a preliminary examination in a criminal case "to prove the ownership, value, or possession of — or right to use or enter — property."

Chapter 4: Expert Witnesses and Scientific Evidence

4.1 Expert Testimony[1]

A. Admissibility

1. Rule

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." MRE 702.

"In contrast to MCL 600.2169 [applicable to expert testimony in a medical malpractice action[2]], . . . nothing in MRE 702 requires that a medical expert be board certified in a particular specialty, . . . or that a medical expert have devoted a majority of his or her practice to a given specialty to be qualified to offer expert testimony." *People v McKewen*, 326 Mich App 342, 350 (2018) (holding the trial court did not abuse its discretion in determining that a board-certified cardiothoracic and general trauma surgeon who treated the victim was qualified to testify that the victim had been stabbed by a knife despite defendant's objection that the witness was not qualified "because he did not possess the same qualifications as, for example, a medical examiner"). "To 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

[1] Also see the following sections: Section 4.3, Syndrome Evidence—Expert Testimony; Section 4.4, Medical Malpractice—Expert Testimony; Section 4.5, Gang-Related Crimes–Expert Testimony; Section 4.6, Standardized Field Sobriety Tests–Expert Testimony; and Section 4.8, Police Officer as Witness. See also the National Judicial College and the Justice Speakers Institute's *Science Bench Book for Judges* (2nd ed) as an additional reference guide. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[2] See Section 4.4 for discussion of medical malpractice expert testimony.

creation of new certifications any time a novel or rare issue were before a trial court." *People v Brown*, 326 Mich App 185, 196-197 (2019) (a certified nurse who had not yet received her sexual assault nurse examiner certification was still considered competent as a medical professional).

2. Trial Court's Gatekeeper Role

To effectuate its gatekeeper role, a court must focus its inquiry "solely on principles and methodology, not the conclusions that they generate." *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 595 (1993). The *Daubert* test "requires the trial judge to make a preliminary assessment of whether the proposed expert's testimony is scientifically valid and whether the reasoning and methodology upon which the expert bases their testimony can be applied to the facts in the case." *Danhoff v Fahim*, ___ Mich ___, ___ (2024) (citation omitted). "This preliminary assessment is known as the trial court's gatekeeping function." *Id.* at ___ (noting that "the gatekeeping function performed by trial courts applies to all expert testimony, rather than to only a limited subset of scientific expert testimony"). "Although the *Daubert* gatekeeping function applies to all experts, the list of factors in *Daubert* is flexible and nonexhaustive: *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Danhoff*, ___ Mich at ___ (quotation marks and citation omitted). "The specific inquiry is flexible based on the circumstances of each case but may include a determination that the expert's theory or the techniques used to generate that theory—but not the expert's conclusions—can be tested, has been subjected to peer review and publication, has a known or potential error rate, or is generally accepted among the scientific community." *Id.* at ___. "In other words, before expert testimony may be admitted at trial, the plaintiff must prove that the expert's testimony is relevant and reliable." *Id.* at ___.

"The evolution of the federal expert witness doctrine is important for understanding Michigan's approach." *Id.* at ___. Effective January 1, 2004, Michigan adopted the *Daubert* test by amending MRE 702. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782 (2004), which states:

> "MRE 702 has . . . been amended explicitly to incorporate *Daubert*'s standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It

> has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on 'novel' science—is reliable.
>
> * * *
>
> "[T]he court's gatekeeper role is the same under *Davis-Frye*[3] and *Daubert*. Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just 'general acceptance' in determining whether expert testimony must be excluded."

See also MCL 600.2955, which codifies the *Daubert* test "[i]n an action for the death of a person or for injury to a person or property[.]" "MCL 600.2955 presents a nonexhaustive list of seven factors that a trial court shall consider when it determines whether an expert's opinions are reliable." *Danhoff*, ___ Mich at ___. "[T]hose seven factors are:

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, 'relevant expert community' means individuals who are knowledgeable in the field of study and are

[3] The *Davis-Frye* test was derived from *People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 App DC 46 (1923).

> gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation." *Danhoff*, ___ Mich at ___, quoting MCL 600.2955(1).

MCL 600.2955(1) only requires the court to *consider* the seven factors enumerated there; it does not require each factor to favor the proffered testimony in order to be admissible. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 137 (2007). In addition, "all the factors in MCL 600.2955 may not be relevant in every case." *Elher v Misra*, 499 Mich 11, 26 (2016) (holding that "the scientific testing and replication factor [in MCL 600.2955(1)(a) did] not fit the type of [standard-of-care] opinion at issue in [the] case," and that although "the circuit court abused its discretion by relying on this factor, . . . this [did] not render the circuit court's ultimate decision [to exclude an expert's opinion testimony] an abuse of discretion" where the other arguments for admitting the testimony did not sufficiently establish the expert's reliability).

"MRE 702 'requires trial judges to act as gatekeepers who must exclude unreliable expert testimony.'" *Lenawee Co v Wagley*, 301 Mich App 134, 162 (2013), quoting Staff Comment to 2004 Amendment of MRE 702. "The purpose of a *Daubert* hearing is to filter out unreliable expert evidence." *Lenawee Co*, 301 Mich App at 162. See also *Elher*, 499 Mich at 24 (noting that while the plaintiff's expert "was qualified to testify as an expert based on his extensive experience," the question was whether the expert's opinion "was *sufficiently reliable* under the principles articulated in MRE 702 and . . . MCL 600.2955) (emphasis added). Indeed, "[u]nder MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Danhoff*, ___ Mich at ___ n 11 (quotation marks and citation omitted).

Expert testimony based on non-scientific knowledge. "While *Daubert* hearings are required when dealing with expert *scientific* opinions in an effort to ensure the reliability of the foundation for the opinion, where non-scientific expert testimony is involved, the *Daubert* factors may be pertinent, or

the relevant reliability concerns may focus upon personal knowledge or experience." *Lenawee Co*, 301 Mich App at 163 (alteration, quotation marks and citations omitted). In *Lenawee Co*, 301 Mich App at 163, a realtor's videotaped deposition testimony concerning the marketability of the defendants' property was played at trial over the plaintiff's objections and requests for a *Daubert* hearing. However, because the realtor's testimony was not "scientific" expert testimony, and instead constituted "other specialized knowledge," the trial court did not abuse its discretion in declining to conduct a *Daubert* hearing before admitting the testimony. *Lenawee Co*, 301 Mich App at 163-164. "[T]he *Daubert* factors may or may not be relevant in assessing reliability, depending on the nature of the issue, the expert's expertise, and the subject of the expert's testimony. *Elher*, 499 Mich at 24-25. "[I]n some cases, the relevant reliability concerns may focus upon personal knowledge or experience"; however, the *Daubert* factors may be helpful in determining reliability even if all the factors do not necessarily apply. *Elher*, 499 Mich at 25 (quotation marks and citation omitted). How to determine reliability is within the trial court's discretion. *Id*.

3. Application

"MRE 702 does not require that an expert be certified by the state in the particular area in which the expert is qualified. Rather, an expert may be qualified on the basis of 'knowledge, skill, experience, training, or education[.]'" *People v Brown*, 326 Mich App 185, 196 (2019), quoting MRE 702. In *Brown*, the trial court properly qualified a certified nurse as an expert witness in a first-degree criminal sexual conduct trial even though she had not yet received her state certification as a sexual assault nurse examiner. *Brown*, 326 Mich App at 196. "[The nurse's] testimony regarding the lack of injury in most sexual assault cases . . . was properly admitted because it was based on [her] specialized knowledge and assisted the jury in understanding the evidence in [the] case." *Id*. at 197.

An expert witness's failure to identify any medical or scientific literature in support of his or her testimony does not necessarily suggest that the expert's opinion is unreliable or inadmissible. *People v Unger*, 278 Mich App 210, 220 (2008). In *Unger*, the Court noted, "it is obvious that not every particular factual circumstance can be the subject of peer-reviewed writing. There are necessarily novel cases that raise unique facts and have not been previously discussed in the body of medical texts and journals." *Id*. However, "a lack of supporting literature is an important factor in determining the

admissibility of expert witness testimony." *Edry v Adelman*, 486 Mich 634, 640 (2010) (holding that "peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702"). In *Edry*, the plaintiff's expert witness's opinion was not based on reliable principles or methods, was contradicted by both the defendant's expert witness and published literature that was admitted and acknowledged as authoritative by the plaintiff's expert, and the plaintiff failed to admit any literature that supported her expert's testimony. *Id.* at 640. The Michigan Supreme Court concluded that "the lack of supporting literature, combined with the lack of any other form of support for [the expert's] opinion, render[ed] his opinion unreliable and inadmissible under MRE 702." *Edry*, 486 Mich at 641.

"Neither MRE 702 nor MCL 600.2955 requires a trial court to exclude the testimony of a plaintiff's expert on the basis of the plaintiff's failure to support their expert's claims with published literature." *Danhoff v Fahim*, ___ Mich ___, ___ (2024) ("Although published literature may be an important factor in determining reliability, it is not a dispositive factor . . . ."). In *Danhoff*, the plaintiff's expert "opined that because a bowel perforation like plaintiff experienced is so rare and so likely to have been caused by a medical instrument in an area it should not have been that it constitutes a breach of the standard of care." *Id.* at ___. "The trial court determined that [plaintiff's expert's] opinion was unreliable almost exclusively because he did not cite supportive literature without considering whether (1) [plaintiff's expert] could have produced such supportive literature, (2) defendant produced any literature or other evidence to contradict [plaintiff's expert's] opinion, and (3) [plaintiff's expert's] opinion was otherwise sufficiently reliable under the factors provided by statute and MRE 702." *Danhoff*, ___ Mich at ___.

The *Danhoff* Court held that "scientific literature is not always required to support an expert's standard-of-care opinion, but that scientific literature is one of the factors that a trial court should consider when determining whether the opinion is reliable." *Danhoff*, ___ Mich at ___ (stating that "peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702, thus establishing reliability") (quotation marks and citation omitted). "[A]n expert in a medical malpractice lawsuit [may be able to] reliably support their opinion on the standard of care [even] if the adverse event is so rare that published, peer-reviewed medical literature on the subject may not exist." *Id.* at ___. "[E]ach case will present unique circumstances for a trial

court to determine whether the expert's opinion is reliable." *Id.* at ___. "In some cases, a lack of supportive literature may be fatal to a plaintiff's expert's reliability." *Id.* at ___. "In others, a plaintiff's expert may demonstrate reliability without supportive literature, especially where a complication is rare and there is a dearth of supportive literature available to support the opinion." *Id.* at ___ (holding that "the guidepost for admissibility is reliability, and trial courts must consider MRE 702 as well as the statutory reliability factors presented in MCL 600.2955 when determining if an expert is reliable").

"Treating a lack of supportive medical literature as dispositive that the expert's opinions are unreliable and, therefore, inadmissible, creates a conundrum." *Danhoff*, ___ Mich at ___. "If the failure to produce medical literature means that a plaintiff's otherwise reliable expert opinions are inadmissible, patients who experience complications so rare that they are not studied by the academic community or discussed in peer-reviewed publications would not be able to offer admissible expert testimony when seeking legal recourse for their injuries." *Id.* at ___. "The avoidance of such a result is why MCL 600.2955 has several factors and does not merely specify that reliability is a product of peer-reviewed medical literature." *Danhoff*, ___ Mich at ___ ("It is also why we have consistently noted that peer-reviewed medical literature is not always necessary or sufficient to meet reliability requirements.") (quotation marks and citations omitted). Ultimately, in *Danhoff*, the Michigan Supreme Court held that "[t]he lower courts erred by concluding that [plaintiff's expert's] opinions were unreliable because they were unsupported by medical literature." *Id.* at ___ ("The trial court abused its discretion by inadequately assessing [plaintiff's expert's] reliability as a standard-of-care expert without appropriately analyzing MRE 702 or the statutory reliability factors of MCL 600.2955.").

"[D]epending on the particular facts at issue in a matter and the expert's specific expertise, a biomechanical engineer may testify, if not making a medical diagnosis, regarding the impact of the forces at play and a resulting injury." *People v Hawkins*, ___ Mich App ___, ___ (2023) ("declin[ing] to articulate any bright-line rule prohibiting or allowing biomechanical engineers from providing testimony related to medical causation"). In *Hawkins*, defendant retained a biomechanical engineer "as an expert witness to counter the prosecution's evidence that the [8-month-old] decedent's injuries were caused by multiple blows or incidents of trauma." *Id.* at ___. The parties agreed that the biomechanical engineer "could

testify regarding the general forces at play" and "how a typical person might be injured therefrom." *Id.* at ___. Defendant also made it clear that the expert would "not offer a medical opinion or diagnosis evaluating the decedent's cause of death[.]" *Id.* at ___. The Court of Appeals concluded that the proposed testimony — that the decedent's injuries "could have been caused from a single impact or blow" — was within the expert's area of expertise because it was "based on the expert's biomechanical expertise and the forces at play[.]" *Id.* at ___. The *Hawkins* Court determined that the trial court abused its discretion by precluding the biomechanical engineer's testimony under MRE 702 because the substance of his testimony was (1) "scientific, technical, and not common knowledge to the average person," (2) "probative of a fact at issue at trial, whether the decedent's injuries resulted from a single blow or multiple blows," and (3) he was "qualified to testify about how forces and motion impact the body . . . by nature of his knowledge, experience, training, and education on the subject." *Hawkins*, ___ Mich App at ___ (noting "[t]he facts that [the expert was] not a medical doctor and lack[ed] specific medical training and education are weaknesses or gaps in his testimony to be explored on cross-examination").

"A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable." *People v Lemons*, ___ Mich ___, ___ (2024) (quotation marks and citation omitted). "The job of the courts is to . . . ensur[e] that expert testimony employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Lemons*, ___ Mich at ___ (quotation marks and citation omitted). In *Lemons*, the "trial court stepped beyond its role as gatekeeper of relevant and reliable information" when it excluded the defendant's biochemical engineer's testimony because "biomechanical studies are not presently able to replicate the exact number and degree of injury to the brain that would occur as a result of Shaken Baby Syndrome [SBS]." *Lemons*, ___ Mich at ___ (observing that defendant's biomechanical engineer testified that "there [were] 'good reasons,' grounded in biomechanical science, to conclude that shaking is insufficient to produce the accelerations necessary to produce injuries typically associated with SBS without also causing significant injuries to the neck").

"Biomechanics is the study of forces acting on and generated within the body and of the effects of these forces on the tissues, fluids, or materials used for diagnosis, treatment, or research purposes," and "SBS is a multidisciplinary diagnosis based on

the theory that vigorously shaking an infant creates great rotational acceleration and deceleration forces that result in a constellation of symptoms that may not manifest externally." *Id*. at __ (cleaned up). "[T]he SBS hypothesis is inherently grounded in biomechanical principles." *Id*. at ___ (quotation marks and citation omitted). However, "just as a biomechanical engineer may not testify about medical causation outside of their expertise, the medical community is not the judge of the validity of biomechanical research, nor is it the sole relevant expert community with respect to SBS." *Id*. at ___ ("find[ing] the position that biomechanics—the study of forces acting on and generated within the human body—is divorceable from a diagnosis of *shaken* baby syndrome to be untenable").

"As it relates to reliability, the focus of the MRE 702 inquiry must be solely on principles and methodology, not on the conclusions that they generate." *Lemons*, ___ Mich at ___ (quotation marks and citation omitted). "That said, it is not enough that the expert's opinion rests on data viewed as legitimate in the context of a particular area of expertise." *Id*. at ___ (quotation marks and citation omitted). "Instead, the proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology." *Id*. at ___ (cleaned up). "The test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research." *Id*. at ___ (quotation marks and citation omitted). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id*. at ___ (quotation marks and citation omitted).

"When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *Id*. at ___ (cleaned up). "In the context of expert evidence, relevance is sometimes referred to as 'fit': The trial court must ensure the expert's testimony is sufficiently tied to the facts of the case, so that it 'fits' the dispute and will assist the trier of fact." *Id*. at ___ (quotation marks and citation omitted). "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Id*. at ___ (quotation marks and citation omitted).

"In the realm of the biomechanical evidence underlying SBS, there can never be a *perfectly* replicated model of a shaken

infant for obvious ethical reasons." *Id*. at ___ (stating that "there will always be at least some gap between the data and the conclusions reached"). "This cannot and does not prohibit a qualified expert from testifying, on the basis of reliable principles and methodologies, about what can be extrapolated from various imperfect modeling about how an infant's body reacts to shaking." *Id*. at ___. "Any limitations in the conclusions that can be drawn from biomechanical studies as applied to the facts of this case go to its weight, not admissibility." *Id*. at ___. "There is nothing inherently problematic about presenting to a jury expert testimony in biomechanics." *Id*. at ___.

The *Lemons* Court held that the defendant's expert witness's "testimony satisfied the requirements of MRE 702" because "[h]e was a qualified expert in the field of biomechanical engineering," "[h]is testimony regarding the biomechanical mechanism of SBS would assist the trier of fact in ascertaining a fact at issue—whether [defendant's infant daughter] died from injuries caused by abusive shaking," and "[b]iomechanical engineering is a legitimate field of scientific study and [defendant's expert's] testimony was based on sufficient facts or data and was the product of reliable principles and methods." *Lemons*, ___ Mich at ___ (quotation marks and citation omitted) (noting that "conclusions and methodology are not entirely distinct from one another").

Furthermore, the expert's "testimony was not 'far removed' or missing a connecting link between data, methodology, and conclusion. Rather, it was based on studies specifically designed to test the effects of abusive shaking on infants, utilized various models to test the hypotheses, and specifically concluded that shaking without serious injury to the neck could not produce symptoms associated with SBS." *Id*. at ___. "[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty because arguably, there are no certainties in science." *Id*. at ___ (quotation marks and citation omitted) (Therefore, the *Lemons* Court held that "although clearly not universally accepted, [defendant's expert's] opinion [was] certainly objective, rational, and based on sound and trustworthy scientific literature." *Id*. at ___ (cleaned up)."The opinion "'fit' the facts in dispute . . . and would assist the trier of fact in determining whether the prosecution could prove beyond a reasonable doubt that [defendant's daughter's] cause of death was SBS." *Id*. at ___ (citation omitted) (holding that "the trial court abused its discretion by misapplying MRE 702 and ordering that biomechanical evidence was inadmissible").

The trial court "did not abuse its discretion by concluding that [a medical expert]'s background and experience were not sufficient to render his opinion reliable," and in excluding the expert's testimony under MRE 702, "when [the expert] admitted that his opinion [that the defendant-physician breached the standard of care] was based on his own beliefs, there was no evidence that his opinion was generally accepted within the relevant expert community, there was no peer-reviewed medical literature supporting his opinion, plaintiff failed to provide any other support for [the expert]'s opinion, and defendants submitted contradictory peer-reviewed literature." *Elher v Misra*, 499 Mich 11, 27-28 (2016) (noting that "[w]hile peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature, combined with the lack of any other form of support, rendered [the expert]'s opinion unreliable and inadmissible under MRE 702").

In *People v Dobek*, 274 Mich App 58, 92-93 (2007), the defendant was not allowed to use an expert witness who, through psychological testing and interviewing, planned to testify that the defendant did not demonstrate the typical characteristics of a sex offender. The expert witness admitted that psychological testing "cannot establish with any degree of certainty that a person is or is not a sex offender." *Id.* at 95. The Court of Appeals compared the danger of admitting evidence of sex offender profiling to that of admitting the results of a favorable polygraph test. *Id.* at 97. According to the Court, the expert's testimony "was neither sufficiently scientifically reliable nor supported by sufficient scientific data," as required by MRE 702. *Dobek*, 274 Mich App at 94-95. In addition, "the proffered evidence would not assist the trier of fact to understand the evidence or determine a fact in issue; rather, any arguable probative value attached to the evidence would be substantially outweighed by the danger of unfair prejudice to the prosecution, confusion of the issues, or misleading the jury." *Id.* at 95.[4]

"[B]ecause the claim of a false confession is beyond the common knowledge of the ordinary person, expert testimony about this phenomenon is admissible under MRE 702 when it meets the other requirements of MRE 702." *People v Kowalski*, 492 Mich 106, 129 (2012) (plurality opinion). See also *People v*

[4]Referring to *Dobek* as "on point and indistinguishable," the Court of Appeals affirmed the trial court's exclusion of expert testimony regarding sex offender profiling and its application to the defendant. *People v Steele*, 283 Mich App 472, 482 (2009) (the same expert witness as in *Dobek* was to testify that the defendant did not demonstrate the typical characteristics of a sex offender).

Warner, ___ Mich ___, ___ (2024) ("*Kowalski* did not amount to a categorical ban on all false-confession testimony"). An expert "may not comment on the truthfulness of a defendant's confession, vouch for the veracity of a defendant recanting a confession, or give an opinion as to whether defendant was telling the truth when he made the statements to the police." *Id*. (quotation marks, alterations, and citations omitted). In *Kowalski*, two experts proposed to offer testimony based on research and literature about the phenomenon of false confessions. *Id*. at 111-112, 132. One of the experts also proposed to testify about the defendant's psychological profile. *Id*. at 112, 135. The Court of Appeals held that although testimony about the phenomenon of false confessions was the proper subject for an expert witness, the proposed testimony in this case was too unreliable to be admitted because the sources were prone to inaccuracy and had not been subjected to scientific peer-review. *Id*. at 133. However, the trial court erred by failing to separately consider the proposed testimony regarding the defendant's psychological profile, which was based on data from tests that the expert himself performed on the defendant. *Id*. at 135-136. In addition, the trial court also failed to adequately analyze MRE 403 before excluding the psychological profile testimony. *Kowalski*, 492 Mich at 136-137. The Court of Appeals explained that the testimony "can provide guidance to a fact-finder regarding behavior that would seem counterintuitive to a juror" and therefore it could have probative value even in the absence of the testimony about false-confession literature. *Id*. at 137. The case was remanded to the trial court to determine the admissibility of the evidence under both MRE 702 and MRE 403. *Kowalski*, 492 Mich at 138.

Expert testimony concerning Y-STR DNA analysis, which "involves testing DNA only on the Y-chromosome," is "properly admitted under MRE 702." *People v Wood* 307 Mich App 485, 509, 514-515 (2014), vacated in part on other grounds 498 Mich 914 (2015)[5] (noting that the prosecution provided "[a]bundant evidence illustrat[ing] that the . . . technique 'has been or can be tested,' . . . that standards exist to govern the performance of the technique, [and] . . . that many publications and peer reviews have scrutinized the soundness of the . . . technique, as well as the statistical analysis methods and the database used by analysts") (citations omitted). Similarly, STRmix probabilistic genotype testing, which is "a more recent form of DNA testing and a relatively new method of

[5]For more information on the precedential value of an opinion with negative subsequent history, see our note.

evaluating complex mixtures," is properly admitted under MRE 702. *People v Muhammad*, 326 Mich App 40, 47, 57 (2018).[6]

During the defendant's trial for reckless driving where the defendant claimed he tried to stop at a stop sign but his brakes did not respond, the trial court did not abuse its discretion by allowing the prosecution to present expert testimony from a mechanic that the vehicle's break line broke during the accident and the brakes should have worked prior to the accident. *People v Carll*, 322 Mich App 690, 698, 699 (2018). "An expert witness may offer an opinion only if he or she has specialized knowledge that will assist the trier of fact to understand the evidence," and "[t]he determinative inquiry in qualifying an expert is the nature and extent of knowledge and actual experience[.]" *Id.* at 699-700 (holding that the mechanic was qualified as an expert where "[h]e had a college certification in automotive technology, a state certification in brakes, 15 years' experience inspecting and repairing breaks," worked on brakes weekly, and had repaired hundreds of brakes) (quotation marks and citation omitted). Further the mechanic's methodology satisfied the standard of reliability under MRE 702 where he testified to personally examining the vehicle, explained the data necessary to form opinions about the condition of the brake lines, "explained the mechanism of hydraulic brakes and the fact that defendant's truck had separate lines for front and rear breaks, thereby ruling out the possibility that a single brake line failure would affect both front and rear brakes," testified to his experience with rusting brakes and brake lines to explain that the broken brake line was not damaged by rust or another natural cause, and concluded that the most likely reason for the broken brake line was the crash itself. *Carll*, 322 Mich App at 701 (concluding that the expert "had sufficient data to form an opinion, based his testimony on reliable principles and methods, and applied those methods reliably to the facts of the case").

Drug Recognition Expert (DRE) testimony is not automatically admissible, and the trial court must still make a determination whether a DRE officer is qualified to offer expert testimony. See *People v Bowden*, 344 Mich App 171, 175 n 2 (2022) (noting that even if a person's "certification designates him to be a drug recognition 'expert,' that label has no bearing on whether he may properly testify as an expert for purposes of MRE 702"). See Section 4.7 for additional information on DRE testimony.

[6]See Section 4.10(C)(3) for additional information on the admissibility of STRmix probabilistic genotype testing.

B. Scheduling Testimony

"In a civil action, the court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

> (1) Scheduling the presentation of the parties' expert witnesses sequentially; or
>
> (2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination." MCR 2.513(G).

Committee Tip:

Sequential or near-contemporaneous scheduling of competing expert witnesses may have its best usage in domestic or civil bench trials.

C. Testifying Via Video Communication Equipment[7]

After a court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." MCL 600.2164a(1).

"[T]he use of videoconferencing technology shall not be used in bench or jury trials, or any civil proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and opportunity to be heard on the use of videoconferencing technology." MCR 2.408(A)(2).

Similarly, the court must "consider constitutional requirements, in addition to the factors contained in MCR 2.407," "[w]hen determining whether to utilize videoconferencing technology" in criminal proceedings. MCR 6.006(A)(3).

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[7] See Section 3.5(G) for discussion of the potential implications of a criminal defendant's right of confrontation with respect to the use of audio and video technology.

The party wishing to present expert testimony by video communication equipment must file a motion at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party initiating "the use of video communication equipment . . . shall pay the cost for its use, unless the court otherwise directs." MCL 600.2164a(3). "A verbatim record of the testimony shall be taken in the same manner as for other testimony." MCL 600.2164a(1). See also M Crim JI 5.16, which addresses witness testimony introduced via video rather than in-person:

> "The next witness, [*identify witness*], will testify by videoconferencing technology. You are to judge the witness's testimony by the same standards as any other witness, and you should give the witness's testimony the same consideration you would have given it had the witness testified in person. If you cannot hear something that is said or if you have any difficulty observing the witness on the videoconferencing screen, please raise your hand immediately."

D. Number of Experts

No more than three experts on the same issue are allowed to testify on either side unless the court, in exercising its discretion, permits more. MCL 600.2164(2). MCL 600.2164(2) is not "applicable to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters or opinion." MCL 600.2164(3).

E. Funding the Expert Witness

1. Fees Taxable as Costs

MCL 600.2164(1) states in relevant part:

> "No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case."

"Instead 'is to appear' applies to witnesses who could have been called to testify at some point, either by deposition or through trial testimony. The phrase 'is to appear' does not refer to the situation . . . in which a case proceeded to trial and

verdict but the witness gave neither deposition nor trial testimony, notwithstanding language in other cases which could be read as authorizing witness fees under such circumstances." *Carlsen Estate v Southwestern Mich Emergency Servs, PC*, 338 Mich App 678, 704 (2021).

"MCL 600.2164(1) authorizes a trial court to award expert witness fees as an element of taxable costs." *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466-467 (2001) (the trial court did not abuse its discretion in ordering a lower amount for expert witness fees than requested by the plaintiff because it "considered and weighed the reasonableness of plaintiff's request"). See also *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 336, 342 (1994), where the trial court abused its discretion when it completely refused to award expert witness fees to the defendant, awarding only ordinary witness fees, after determining that the witness was in fact an expert.

"Under MCL 600.2164(3), an expert must testify as to 'matters of opinion' and not to 'established facts' to be entitled to compensation in excess of that for an ordinary witness." *Int'l Outdoor, Inc v SS Mitx, LLC*, ___ Mich App ___, ___ (2023). In *Int'l Outdoor*, the witness "testified about his investigation of the computer devices at issue and informed the court about the observations and reports that he made in his investigation," and "[t]he trial court qualified him as an expert in computer forensics, and he offered opinion testimony about his observations throughout the hearing." *Id.* at ___. Accordingly, the trial court had authority to grant the request to tax the expert's fees as a cost. *Id.* at ___. However, a "trial court may only tax those fees related to testifying as an expert witness or preparing to testify as an expert witness; the court may not tax as a cost those fees arising from 'conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position.'" *Id.* at ___ (citation omitted). "Additionally, the trial court may assess the reasonableness of an expert's fees and adjust them accordingly." *Id.* at ___. Accordingly, the trial court erred by allowing the expert's fees to be taxed for charges that "included time and expenses arguably not compensable as costs, such as hardware that he purchased as part of his investigation and telephone conversations apparently for the purpose of educating counsel." *Id.* at ___. "Moreover, the record [did] not demonstrate that the trial court evaluated the reasonableness of [the expert's] fees." *Id.* at ___ ("vacat[ing] the trial court's order to the extent that it taxed costs for [the expert's] fees and remand[ing] to the trial court to permit it to assess the requested fees.")

Contingency fees are prohibited for expert witnesses in medical malpractice cases. MCL 600.2169(4).

Even where an expert witness does not testify, the prevailing party may still recover expert witness fees for the cost of preparing the witness. *Peterson v Fertel*, 283 Mich App 232, 241 (2009). See also *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 73-74 (2017) (holding costs for expert witness fees are properly awarded "under MCL 600.2164 where a case is dismissed before that expert can testify at trial," and where "[t]he costs sought by [the plaintiff] in connection with the expert's time [are] necessary for the expert to develop [their] opinion regarding the cause of the damages").

2. Amount to Pay Expert Witness in Criminal Cases

A defendant may qualify for public funds for an expert even if they have retained counsel. See *People v Ceasor*, 507 Mich 884 (2021) (finding "counsel performed deficiently" by failing to make such a request and that defendant demonstrated prejudice because there was no victim who could provide an account, no eyewitnesses, no corroborative physical evidence and no apparent motive to harm, making the expert the case).

Although "focused on sentencing and . . . whether *any* funding for an expert, irrespective of the amount, should be authorized," a court may still "employ and be guided by" the reasonable probability principle initially articulated in *Moore v Kemp*, 809 F2d 702, 712 (CA 11, 1987) and adopted by the Michigan Supreme Court in *People v Kennedy*, 502 Mich 206, 227 (2018), when determining the amount to pay an expert in a criminal case. See *People v Williams*, 328 Mich App 408, 416 (2019). By failing to provide any "substantive analysis to explain why it believed that defendant's requested sum [of $42,650] was [highly] excessive" or "explain how it arrived at the sum of $2,500" to fund the expert witness, the trial court erred in limiting the expert witness funding. *Id.* at 417 (the matter was remanded for the trial court "to take into consideration the principles set forth in *Kennedy* in determining the amount of funds to reimburse defendant . . . so as to satisfy constitutional requirements," while giving "[s]pecial attention . . . to the *Kennedy* Court's adoption of the 'reasonable probability' standard articulated . . . in *Moore*").

Committee Tip:

A more detailed recitation of the thought process used when selecting an amount will better insulate the ruling from reversal than a limited record.

See Section 4.1(K)(2) for information on appointing experts for indigent defendants in criminal cases.

3. Compensable Activity and Evidentiary Hearing

"An expert is not automatically entitled to compensation for all services rendered. Conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position are not regarded as properly compensable as expert witness fees. Experts are properly compensated for court time and the time required to prepare for their testimony. In addition, the traveling expenses of witnesses may be taxed as costs, MCL 600.2405(1); MCL 600.2552(1); MCL 600.2552(5)." *Carlsen Estate v Southwestern Emergency Servs, PC*, 338 Mich App 678, 707 (2021) (quotation marks and citation omitted). "When the record is insufficient . . . to discern the actual hours expended for taxable costs of court time from that attributable to conference and meeting time, which would not necessarily be a taxable cost, the remedy is a remand for an evidentiary hearing to further distinguish and recalculate those hours spent on taxable versus nontaxable costs." *Carlsen Estate*, 338 Mich App at 707-708 (quotation marks and citation omitted). In *Carlsen Estate*, invoices that stated that the expert had "discussion[s] with attorneys" were "not sufficient to allow the trial court, or [the Court of Appeals], to determine whether these discussions [were] taxable because they were for trial preparation, or [were] not taxable because they were for educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position." *Id.* at 709 (quotation marks and citation omitted).

"A witness may be compensated for his or her travel expenses 'in coming to the place of attendance and returning from the place of attendance' for trial, but only as provided under MCL 600.2552(5)." *Int'l Outdoor, Inc v SS Mitx, LLC*, ___ Mich App ___, ___ (2023). "Under MCL 600.2552(5), the witness may be reimbursed a 'per-mile rate' equal to the rate set by the department of management and budget for state employees."

Int'l Outdoor, ___ Mich App at ___. "Mileage must be 'estimated from the residence of the witness, if his or her residence is within this state, or from the boundary line of this state that the witness passed in coming into this state, if his or her residence is out of this state.'" *Id.* at ___, quoting MCL 600.2552(1). While "MCL 600.2552 does not limit reimbursement to any particular mode of travel," the trial court erred when it allowed the full cost of an expert's airfare to be taxed as a cost "without applying the estimated miles to the rate of reimbursement provided under MCL 600.2552(5)." *Int'l Outdoor*, ___ Mich App at ___ ("vacat[ing] the trial court's order to the extent that it included this expense and remand[ing] to the trial court for amendment of the order to reflect the cost of [the expert's] travel expense calculated under MCL 600.2552.")

F. Discovery

1. Civil Cases

"Except as exempted by these rules, stipulation, or court order, a party must, without awaiting a discovery request, provide to the other parties[, among other things,] . . . the anticipated subject areas of expert testimony." MCR 2.302(A)(1)(h). See MCR 2.302(A)(4) for a list of cases exempt from this initial disclosure.

Experts who are expected to testify at trial must be identified and "facts known and opinions held by experts, otherwise discoverable under the provisions of [MCR 2.302(B)(1)] and acquired or developed in anticipation of litigation or for trial," may only be obtained as set out in MCR 2.302(B)(4)(a)-(d).

MCR 2.302(B)(4)(a) addresses interrogatories, depositions, and discovery by other means:

- Interrogatories may "require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." MCR 2.302(B)(4)(a)(*i*).

- "A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. The party taking the deposition may notice that the deposition is to be taken for the purpose of discovery only and that it shall not be admissible at

> trial except for the purpose of impeachment, without the necessity of obtaining a protective order as set forth in MCR 2.302(C)(7)." MCR 2.302(B)(4)(a)(*ii*). But see MCR 2.302(B)(4)(d), which adds that "[t]he deposition may be taken at any time before trial on reasonable notice to the opposite party, and may be offered as evidence at trial as provided in MCR 2.308(A). The court need not adjourn the trial because of the unavailability of expert witnesses or their depositions."

- "On motion, the court may order further discovery by other means[.]" MCR 2.302(B)(4)(a)(*iii*).

"A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except

> (*i*) as provided in MCR 2.311 [(physical and mental examination of an individual)], or
>
> (*ii*) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." MCR 2.302(B)(4)(b).

"Subject to [MCR 2.302(B)(4)], a party may obtain discovery of documents and tangible things otherwise discoverable under [MCR 2.302(B)(1)] and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." MCR 2.302(B)(3)(a). MCR 2.302(B)(3)(a) "protects drafts of any interrogatory answer required under [MCR 2.302(B)(4)(a)(*i*)], regardless of the form in which the draft is recorded," and "communications between the party's attorney and any expert witness under [MCR 2.302(B)(4)], regardless of the form of the communications, except to the extent that the communications:

> (*i*) relate to compensation for the expert's study or testimony;

> (*ii*) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
>
> (*iii*) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." MCR 2.302(B)(4)(e)-(f).

Unless manifest injustice would result, the court must require that the party seeking discovery of an expert pay the expert a reasonable fee for time spent in a deposition. MCR 2.302(B)(4)(c)(*i*). This does not include preparation time. *Id*. The party seeking discovery may have to pay "a fair portion of the fees and expenses reasonably incurred by the [other] party in obtaining facts and opinions from the expert." MCR 2.302(B)(4)(c)(*ii*). MCR 2.302(B)(4) "does not require that the deposition testimony of the expert be used at trial before the trial court may award fees under the rule." *Carlsen Estate v Southwestern Mich Emergency Servs, PC*, 338 Mich App 678, 703 (2021) (quotation marks and citation omitted).

"MCR 2.302(B)(4) applies to experts who are third parties to the litigation; such experts examine the facts from a distance, offer opinions, and have no financial stake in the outcome other than receiving a court-approved witness fee." *Spine Specialists of Mich, PC v State Farm Mut Auto Ins Co*, 317 Mich App 497, 503 (2016). Accordingly, "[a]s the sole owner of [the plaintiff medical facility] and the physician who treated [a patient] on [the plaintiff's] behalf, [the owner-physician] was obligated to provide deposition testimony" in the plaintiff's action to recover payment for services rendered to the patient following a motor vehicle accident, and was therefore "ineligible [under MCR 2.302(B)(4)(c)(*i*)] to charge a fee for his deposition"; "[w]hile a party (or an employee of a party, as here) with specialized knowledge may offer an expert opinion within his or her field, the court rules do not contemplate payment to a party offering an opinion on its own behalf." *Spine Specialists*, 317 Mich App at 502, 503-504 (noting that the owner-physician would "serve as [the plaintiff's] spokesperson at trial, and [had] a vested interest in the outcome of [the] case"). Moreover, "[r]equiring payment to a party for the right to take the party's deposition would unreasonably burden the process of trial preparation, constituting manifest injustice" within the meaning of MCR 2.302(B)(4)(c). *Spine Specialists*, 317 Mich App at 503, 505. See Section 4.1(E) for discussion of fees taxable as costs.

"MCR 2.302(B)(4) applies only to facts known or opinions held by an expert that were *acquired or developed in anticipation of litigation*—not to any and all information possessed by an expert." *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 369 (2022) (quotation marks and citation omitted). "MCR 2.302(B)(4) was inapplicable to plaintiff's request" that a doctor produce records from a three-year period "showing [the doctor's] earnings for performing medicolegal work and showing the number of patient examinations [the doctor] performed," because the records were "kept in the ordinary course of business," and were not "acquired or developed in anticipation of litigation or trial." *Micheli*, 340 Mich App at 371.

2. Criminal Cases

Upon request, a party must provide all other parties with the names and addresses of any expert witnesses that may be called at trial. MCR 6.201(A)(1).[8] Alternatively, the party may provide the other party with the witness's name and make the witness available for interview. *Id.* "[T]he witness list may be amended without leave of the court no later than 28 days before trial[.]" *Id.*

Upon request, a party must provide all other parties with "the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion[.]" MCR 6.201(A)(3). However, failure to do so does not necessarily require the court to preclude the expert from testifying. See *People v Rose*, 289 Mich App 499, 525-526 (2010). In *Rose*, the trial court permitted an expert to testify even though the prosecutor failed to comply with the court's discovery order to supply the opposing party with the expert's curriculum vitae or summary of his proposed testimony. *Id.* The Court of Appeals affirmed the trial court's decision because the expert's testimony was limited in nature (the expert did not comment on the substantive facts in the case), the defendant waited until the day before trial to raise the issue (notice of the expert was given months before trial), and no evidence of prejudice to the defendant existed. *Id.* at 526.

[8] MCR 6.201(A) is applicable to felonies and, in limited circumstances, to misdemeanors. See MCR 6.001(A); MCR 6.610(E)(1)-(2). "MCR 6.201(A) only applies in misdemeanor proceedings . . . if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A)." MCR 6.610(E)(2).

Committee Tip:

A court may choose from a number of remedies. Explore the possibility of allowing a short delay, reordering the presentation of the witnesses, giving an opportunity for counsel to interview the witness before the witness testifies, or other measures short of preclusion.

G. Factual Basis for Opinion

"An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. The facts or data must be in evidence — or, in the court's discretion, be admitted in evidence later." MRE 703.

MRE 703 "permits an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony." *People v Fackelman*, 489 Mich 515, 534 (2011) (quotation marks and citation omitted). In *Fackelman*, the testifying experts relied on a report generated by a non-testifying expert who had observed and diagnosed the defendant shortly after the incident giving rise to the case. *Id*. at 518, 521-522. The report contained facts and data, in addition to opinion evidence (the defendant's diagnosis), which was deemed inadmissible under the federal and state constitutions, as well as MRE 703. *Fackelman*, 489 Mich at 535. The Michigan Supreme Court concluded that "because the diagnosis was inadmissible, . . . the report should have been redacted before it was admitted into evidence, and the jury should have been instructed that the proper and limited purpose of the report was to allow them to consider the facts and data on which the testifying experts based their opinions." *Id*.

MRE 703 provides that the evidence upon which expert testimony is based can be admitted either before or after the expert testifies. *Shivers v Covenant Healthcare Sys*, 339 Mich App 369, 375 (2021). In *Shivers*, the trial court granted the defendant's motion in limine to preclude a witness's testimony because the defendant argued it would be based on the inadmissible hearsay statements of a doctor. *Id*. The Michigan Court of Appeals held that the trial court's decision was premature because the plaintiff stated that she would call the doctor to testify at trial, so the facts and data upon which the witness based her opinion would be in evidence. *Id*.

MRE 703 establishes that the type of evidence that *must* be admitted as the basis for an expert's opinion are those "facts or data that are *particular* to that case." *People v Yost*, 278 Mich App 341, 390 (2008). In *Yost*, the defendant was accused of killing her daughter by administering a lethal dose of Imipramine, a medication used to control bedwetting and anxiety. *Id.* at 344-345. The trial court precluded the defendant's expert witness from testifying about the pharmacological characteristics of Imipramine (its half-life, post mortem redistribution, the volume of distribution, and the level of Imipramine that would be considered lethal) because the testimony was based on an outside source and constituted inadmissible hearsay. *Id.* at 388-389. The Court of Appeals reversed this decision and explained that some of the facts or data particular to the *Yost* case included the child's weight, the dosage of Imipramine prescribed, and the actual level of Imipramine in the child's blood. However, the pharmacological characteristics of Imipramine were "constants in every case involving Imipramine." *Id.* at 390. Because the pharmacological characteristics of Imipramine were not particular to the *Yost* case, "it was not necessary to have the data in evidence before [the expert] could utilize them in rendering an opinion." *Id.* at 390.

H. Cross-Examination

On cross-examination, it is proper to elicit the number of times an expert witness has testified in court, or has been involved in particular types of cases. *Wilson v Stilwill*, 411 Mich 587, 599-600 (1981). "A pattern of testifying as an expert witness for a particular category of plaintiffs or defendants may suggest bias. However, such testimony is only minimally probative of bias and should be carefully scrutinized by the trial court." *Id.* at 601.

Repeated references to expert witnesses as "hired guns" may require a new trial. See *Kern v St. Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978) (when defense counsel "continuously raised the groundless charge, by direct attack and innuendo, that the 'bought' testimony of plaintiffs' out-of-state expert witnesses was collusive and untrue," it was so prejudicial that it required a new trial). However, contrast with *Wilson*, 411 Mich at 605 (an indirect statement implying an expert witness was a "professional witness" did not require new trial where plaintiff's counsel responded to the statement in rebuttal argument and the jury was instructed that statements in closing arguments are not evidence); *Wolak v Walczak*, 125 Mich App 271, 275 (1983) (where there was no "harrassment or belittlement of plaintiffs' expert," the court's allowance of a single statement characterizing an expert witness as a "professional witness" did not require a new trial). See also *People v Unger*, 278 Mich App 210, 236-237 (2008) ("[t]he prosecution was free to argue

that defense counsel had 'bought' [the expert's] testimony by paying him a substantial amount of money"; "counsel is always free to argue from the evidence presented at trial that an expert witness had a financial motive to testify").

"To the extent called to an expert witness's attention on cross-examination, a statement is admissible for impeachment purposes only if:

- the statement is contained in a published treatise, periodical, or pamphlet;
- the publication is on a subject of history, medicine, or other science or art; and
- the publication is established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice." MRE 707.

I. Opinion on Ultimate Issue

"[T]he function of an expert witness is to supply expert testimony. This testimony includes opinion evidence, when a proper foundation is laid, and opinion evidence may embrace ultimate issues of fact. However, the opinion of an expert may not extend to the creation of new legal definitions and standards and to legal conclusions." *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 122 (1996). Further, an expert witness is not permitted to tell the jury how to decide the case. *People v Drossart*, 99 Mich App 66, 79 (1980). "[A] witness is prohibited from opining on the issue of a party's negligence or nonnegligence, capacity or noncapacity to execute a will or deed, simple versus gross negligence, the criminal responsibility of an accused, or [the accused's] guilt or innocence." *Id*. at 79-80. "[W]here a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *Id*. at 80. "An expert witness also may not give testimony regarding a question of law, because it is the exclusive responsibility of the trial court to find and interpret the law." *Carson Fischer Potts and Hyman*, 220 Mich App at 123.

J. Report[9]

Upon request in a criminal case, a party must provide "either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the

[9]See Section 4.9 for information on the admissibility of a forensic laboratory report and certificate.

underlying basis of that opinion[.]" MCR 6.201(A)(3).[10] This is similar to the rule in civil cases, MCR 2.302(B)(4)(a)(*i*) (use of interrogatories to gather information on expert testimony, facts and opinions, and summary of grounds for opinions).

K. Court-Appointed Expert

1. Court-Appointed Expert to Assist Court

"On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations." MRE 706(a). While the "court may appoint any expert that the parties agree on and any of its own choosing[, it] may only appoint someone who consents to act." *Id*. MRE 706 does not apply to a request for an appointed expert to consult with and assist a litigant. *In re Yarbrough Minors*, 314 Mich App 111, 121, 121 n 7 (2016). "The court must inform the expert of the expert's duties." MRE 706(b). "The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate." *Id*. The expert must inform the parties of any findings made. MRE 706(b)(1). The expert may be deposed, called to testify by the court or any party, and may be cross-examined by any party, including the party that called the expert. MRE 706(b)(2)-MRE 706(b)(4).

2. Court-Appointed Expert Indigent Defendants in Criminal Cases

When considering an indigent criminal defendant's request for expert assistance, trial courts must apply the due process analysis set forth in *Ake v Oklahoma*, 470 US 68 (1985). *People v Kennedy*, 502 Mich 206, 210, 228 (2018). "When an indigent defendant requests funds for an expert witness, they must show something more than a mere possibility of assistance from a requested expert." *People v Warner*, ___ Mich ___, ___ (2024) (cleaned up). "Specifically, a defendant must show the trial court that there exists a *reasonable probability* both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Id*. at ___ (quotation marks and citation omitted). "*Ake* instructs

[10] MCR 6.201(A) is applicable to felonies and, in limited circumstances, to misdemeanors. See MCR 6.001(A); MCR 6.610(E)(1)-(2). "MCR 6.201(A) only applies in misdemeanor proceedings . . . if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A)." MCR 6.610(E)(2).

that due process requires, for example, that when a defendant's sanity will be *a significant factor at trial*, the State must assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense*." *Id.* at ___ (cleaned up). "In addition, the defendant should inform the court why the particular expert is necessary." *Id.* (quotation marks and citation omitted). "Though the defendant is not expected to provide the court with a detailed analysis of the assistance an appointed expert might provide, a defendant's bare assertion that an expert would be beneficial cannot, without more, entitle him or her to an expert." *Id.* at ___ (cleaned up). However, a "defendant is not required to show that he is unable to present his defense without expert assistance." *Id.* at ___.

Ake is the controlling law in this area, and analysis under MCL 775.15 (as frequently occurred previously) is improper because "MCL 775.15, by its express terms, does not provide for the appointment of expert witnesses. It merely provides a means for subpoenaing certain witnesses and for paying their cost of attending trial." *Kennedy*, 502 Mich at 222. The *Kennedy* opinion overrules *People v Jacobsen*, 448 Mich 639 (1995) and *People v Tanner*, 469 Mich 437 (2003), to the extent those cases did not apply *Ake* and held (or suggested) that MCL 775.15 governs a request by an indigent defendant for the appointment of an expert at government expense. *Kennedy*, 502 Mich at 225.

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system[.] To implement this principle, [the United States Supreme Court has] focused on identifying the basic tools of an adequate defense *or appeal*, and [has] required that such tools be provided to those defendants who cannot afford to pay for them." *Ake*, 470 US at 77 (quotation marks and citations omitted; emphasis added). Thus, the *Kennedy* analysis extends to "post judgment motions seeking an expert and discovery to aid in [an] appeal." *People v Ulp*, 504 Mich 964, 964-965 (2019) (the trial court erred in denying the defendant's postjudgment motions when it concluded *Kennedy* applied only if "'defendant made a sufficient showing . . . that denial of expert assistance would result in a fundamentally unfair *trial*'").

"[I]n a trial in which the veracity of a confession is central, it is fundamentally unfair when an indigent defendant is deprived of an adequate opportunity to present their claims fairly by being denied funding to support necessary expert assistance on false confessions." *Warner*, ___ Mich at ___ (quotation

marks and citation omitted). In *Warner*, the defendant signed an incriminating statement during a series of interrogations in which law enforcement officers employed various techniques to obtain a confession; the defendant was ultimately convicted of first-degree criminal sexual conduct for sexually assaulting his stepdaughter. *Id*. at ___. Before his second trial,[11] the "defendant moved for funds to retain an expert witness in false confessions." *Id*. at ___ ("Because a large part of the prosecution's case was based on defendant's confession, defendant explained that he needed the expert in false confessions to support his defense."). "Defendant's motion identified two potential experts [who] could testify about the attributes associated with false confessions and interviewer bias." *Id*. at ___. "Specifically, [one expert] would testify about police interrogation techniques and false confessions, while [the other expert] would perform psychological testing on defendant and testify about the psychology of whether the attributes of a false confession are present." *Id*. at ___ (quotation marks omitted).

The Michigan Supreme Court held that "there was a reasonable probability that defendant's proposed expert could have assisted the jury in understanding whether the conditions for a false confession were present and, if so, how those conditions affected the interrogations." *Id*. at ___. The Court in *Warner* noted that "without [defendant's] expert, due process was not served, because the veracity of defendant's confession was a significant factor at trial." *Id*. at ___ (quotation marks and citation omitted). The *Warner* Court reasoned that "[t]he proposed expert would at least have identified circumstances and techniques tending to result in false confessions, which the jury could have found applicable to defendant's confession." *Id*. at ___. The Court observed that the defendant's "confession was the only corroborating evidence for [his stepdaughter's] allegations and was central to the prosecution's case." *Id*. at ___ (stating that "the elements of a false confession are beyond the understanding of the average juror") (quotation marks and citation omitted). Accordingly, "defendant showed a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Id*. at ___ (quotation marks and citation omitted) ("The question is not whether the jury *could* have convicted defendant had his confession been sufficiently impeached, but rather whether, viewing the evidence presented at trial as a whole, there is a

[11]Defendant's first conviction was vacated on unrelated grounds. *People v Warner*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2019 (Docket No. 340272).

sufficient *probability* that the trial would be rendered 'fundamentally unfair.'"). Therefore, the trial court abused its discretion when it "denied an indigent defendant the opportunity to fund an expert witness whose testimony would be integral to fundamental issues of the trial." *Id.* at ___ (remanding to trial court to determine whether defendant was indigent when he filed his motion).

"[W]hen a defendant requests an expert to present an affirmative defense, a defendant must make the additional showing of a substantial basis for the defense." *People v Propp*, 508 Mich 374, 381 (2021). In *Propp*, the defendant was charged with open murder and requested an expert to assist him in advancing the defense that the victim's death was an accident. *Id.* at 377. The Michigan Supreme Court held that the Michigan Court of Appeals erred by requiring the defendant to show a substantial basis for the defense because the defense of accident was not an affirmative defense; rather, it negated the element of intent for the charge of first-degree premeditated murder, which the prosecutor had the burden to prove. *Id.* at 382.

On remand, the Court of Appeals held that "the trial court did not commit any error entitling defendant to a new trial by denying his motion to appoint a defense expert on the subject of erotic asphyxiation" because "no additional expert testimony was necessary to explain such a simple concept to the jury—i.e., that defendant was claiming that he did not intend to kill the victim and that he must have done so accidentally while restricting her airflow (at her request) during a consensual sexual encounter." *People v Propp (On Remand)*, 340 Mich App 652, 661 (2022). Accordingly, the Court of Appeals determined that "it is not reasonably probable that the denial of this expert assistance resulted in a fundamentally unfair trial." *Id.* at 660.

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9, for additional information regarding the appointment of experts for indigent defendants in criminal cases. See also MIDC Standards 3 and 5.

3. Court-Appointed Expert in Parental Termination Proceedings

In a parental termination proceeding, whether there is a reasonable probability that an expert would assist the defense is not the correct standard for determining a respondent's entitlement to expert assistance funding. *In re Yarbrough*

Minors, 314 Mich App 111, 114 (2016). "[W]hen considering a request for expert witness funding" in a parental termination proceeding, "the proper inquiry weighs the interests at stake under the due process framework established in *Mathews v Eldridge*, [424 US 319, 335 (1976),]" which "examine[s] the private and governmental interests at stake, the extent to which the procedures otherwise available to [the parent] serve[] their interests, and the burden on the state of providing expert funding." *Yarbrough*, 314 Mich App at 114, 134, 137 ("highlight[ing] the inherently fact-specific inquiry required by the *Eldridge* due process framework"). In *Yarbrough*, "the private interests strongly favored funding for an expert witness or consultant" where "[t]he science swirling around cases involving 'shaken baby syndrome' and other forms of child abuse [was] 'highly contested,'" and "the nature of the child welfare proceedings [did not] adequately safeguard[] respondents' interests, absent funding for an independent expert," where "only one side possesse[d] the funds necessary to pay an expert witness, [and] the opposing side [was required to] rely on cross-examination to attack the expert's testimony." *Yarbrough*, 314 Mich App at 135-136 (citation omitted). Further, the burden of providing approximately $2,500 as requested by the respondents did not "outweigh[] the interests of [the] indigent [respondents], who otherwise lacked the financial resources to retain expert medical consultation." *Id.* at 137 (holding that the trial court abused its discretion by failing to conduct a due process analysis under *Eldridge* and by failing to authorize reasonable funding for an expert witness).[12]

4. Improper Delegation of Duties

It is improper for the court to "delegate its functions of making conclusions of law, reviewing motions, requiring the production of evidence, issuing subpoenas, conducting and regulating miscellaneous proceedings, examining documents and witnesses, and preparing final findings of fact" to an appointed expert witness. *Carson Fischer Potts and Hyman*, 220 Mich App 116, 121 (1996). In *Carson Fischer Potts and Hyman*, the trial court appointed an expert to "'make findings of fact, conclusions of law and a final recommendation and proposed judgment'" for the court. *Id.* at 118. The Michigan Court of Appeals concluded it was error to "delegate specific judicial functions to an 'expert witness.' It is within the peculiar

[12]For a detailed discussion of expert testimony in child protective proceedings, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 11.

province of the judiciary to adjudicate upon and protect the rights and interests of the citizens, and to construe and apply the laws." *Id.* at 121.

L. Motion to Strike

"A party must move to strike an expert within a reasonable time after learning the expert's [sic: identity] and basic qualifications. The failure to timely do so results in forfeiture of the issue." *Cox v Flint Bd of Hosp Mgrs (On Remand)*, 243 Mich App 72, 80 (2000) (citation omitted), rev'd on other grounds 467 Mich 1 (2002).[13]

M. Disqualification Based on Conflict of Interest

"Cases granting disqualification are rare because courts are generally reluctant to disqualify expert witnesses, especially those who possess useful specialized knowledge." *Teutsch Estate v Van De Ven*, 336 Mich App 604, 609 (2021) (quotation marks, alteration, and citation omitted). In evaluating whether to disqualify an expert witness on the basis of conflict of interest where "side-switching" is not an issue, courts should consider "whether the attorney or client acted reasonably in assuming that a confidential or fiduciary relationship of some sort existed and, if so, whether the relationship developed into a matter sufficiently substantial to make disqualification or some other judicial remedy appropriate." *Id.* at 609-610 (quotation marks and citation omitted). "Stating each proposition negatively, if any disclosures of privileged or confidential material were undertaken without a reasonable expectation that they would be so maintained . . ., or if, despite the existence of a relationship conducive to such disclosures, no disclosures of any significance were made, it would seem inappropriate for the court to dictate to the expert." *Id.* at 610 (quotation marks and citation omitted).

Several factors may be considered in evaluating the reasonableness of a party's assumption of a fiduciary relationship, including: "(1) whether the relationship was long standing and involved frequent contacts, (2) whether the expert was to be called as a witness in the underlying case, (3) whether the parties entered into a formal confidentiality agreement, (4) whether the expert was retained to assist in the litigation or paid a fee, (5) whether work product was discussed or the party provided documents to the expert, and (6) whether the expert derived any of his specific ideas from work done under the direction of the retaining party." *Teutsch Estate*, 336 Mich

[13]For more information on the precedential value of an opinion with negative subsequent history, see our note.

App at 611. "As to the second prong, . . . [c]onfidential information is information of particular significance or information which can readily be identified as either attorney work product or within the scope of the attorney-client privilege." *Id*. at 612 (quotation marks and citation omitted). Courts should also consider public interest factors, "such as preventing conflicts of interest, maintaining the integrity of the judicial process, maintaining accessibility to experts with specialized knowledge, . . . encouraging experts to pursue their professional calling, . . . [and] whether another expert is available and whether the opposing party will be unduly burdened by having to retain a new expert." *Id*. at 613 (quotation marks and citation omitted).

N. Rebutting Defendant's Presentation of Expert Testimony on Mental State

"When a defendant presents evidence through a psychological expert who has examined [the defendant], the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him." *Kansas v Cheever*, 571 US 87, 94 (2013). Specifically, "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence." *Id*. at 98 (finding the Fifth Amendment did not prohibit the government from introducing evidence from the defendant's court-ordered mental evaluation to rebut expert testimony that supported a defense of voluntary intoxication).

O. Jury Instructions

Civil. M Civ JI 4.10 – Weighing Expert Testimony.

Criminal. M Crim JI 5.10 – Expert Witness.

4.2 Criminal Cases Involving Abuse Charges

"[A]ny use of the word 'abuse' in the context of a medical diagnosis, irrespective of whether that is in fact an accepted medical diagnosis, constitutes plain error in a criminal proceeding involving charges of abuse." *People v Ackley (On Remand)*, 336 Mich App 586, 591-592, 594 (2021). ("medical expert testimony invade[s] the province of the jury by referencing accepted medical terminology that might be misunderstood by laypersons as conveying emotional or legally conclusory connotations"). The *Ackley* Court cautioned that "the bench and bar must be mindful of any impermissible words used by experts, and experts

should be cautioned that some words may be accepted medical terminology but are unacceptable in a Michigan courtroom." *Id*. at 593-594. "[E]xperts are permitted to draw and testify regarding conclusions that encompass a question to be decided by the jury, so long as the expert does not purport–or, importantly for this matter, even appear to purport–to draw a legal conclusion." *Id*. at 595. "Thus, where it is possible to draw a medical diagnosis based on a physical examination, as opposed to a complainant's self-reporting, an expert is fully permitted to testify that, in their opinion, a particular injury was not accidentally self-inflicted," but "[t]he expert may not call that manner of injury 'abuse,' because, even if that is a term used in the medical community, it is also a legal conclusion and would be understood by laypersons to connote something different from what another doctor might understand." *Id*.

"[D]epending on the particular facts at issue in a matter and the expert's specific expertise, a biomechanical engineer may testify, if not making a medical diagnosis, regarding the impact of the forces at play and a resulting injury." *People v Hawkins*, ___ Mich App ___, ___ (2023) ("declin[ing] to articulate any bright-line rule prohibiting or allowing biomechanical engineers from providing testimony related to medical causation"). In *Hawkins*, a defendant charged with murder and child abuse retained a biomechanical engineer "as an expert witness to counter the prosecution's evidence that the [8-month-old] decedent's injuries were caused by multiple blows or incidents of trauma." *Id*. at ___. The parties agreed that the biomechanical engineer "could testify regarding the general forces at play" and "how a typical person might be injured therefrom." *Id*. at ___. Defendant also made it clear that the expert would "not offer a medical opinion or diagnosis evaluating the decedent's cause of death[.]" *Id*. at ___. The proposed testimony — that the decedent's injuries "could have been caused from a single impact or blow" — was within the expert's area of expertise because it was "based on the expert's biomechanical expertise and the forces at play[.]" *Id*. at ___. Accordingly, the Court of Appeals determined that the trial court abused its discretion by precluding the biomechanical engineer's testimony under MRE 702. *Hawkins*, ___ Mich App at ___ (noting "[t]he facts that [the expert was] not a medical doctor and lack[ed] specific medical training and education are weaknesses or gaps in his testimony to be explored on cross-examination").

"A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable." *People v Lemons*, ___ Mich ___, ___ (2024) (quotation marks and citation omitted). "The job of the courts is to . . . ensur[e] that expert testimony employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Lemons*, ___ Mich at ___ (quotation marks and citation omitted). In *Lemons*, the "trial court stepped beyond its role as gatekeeper of relevant and reliable information" when it excluded the defendant's

biochemical engineer's testimony because "biomechanical studies are not presently able to replicate the exact number and degree of injury to the brain that would occur as a result of Shaken Baby Syndrome [SBS]." *Lemons*, ___ Mich at ___ (observing that defendant's biomechanical engineer testified that "there [were] 'good reasons,' grounded in biomechanical science, to conclude that shaking is insufficient to produce the accelerations necessary to produce injuries typically associated with SBS without also causing significant injuries to the neck").

"Biomechanics is the study of forces acting on and generated within the body and of the effects of these forces on the tissues, fluids, or materials used for diagnosis, treatment, or research purposes," and "SBS is a multidisciplinary diagnosis based on the theory that vigorously shaking an infant creates great rotational acceleration and deceleration forces that result in a constellation of symptoms that may not manifest externally." *Id*. at __ (cleaned up). "[T]he SBS hypothesis is inherently grounded in biomechanical principles." *Id*. at ___ (quotation marks and citation omitted). However, "just as a biomechanical engineer may not testify about medical causation outside of their expertise, the medical community is not the judge of the validity of biomechanical research, nor is it the sole relevant expert community with respect to SBS." *Id*. at ___ ("find[ing] the position that biomechanics—the study of forces acting on and generated within the human body—is divorceable from a diagnosis of *shaken* baby syndrome to be untenable").

"As it relates to reliability, the focus of the MRE 702 inquiry must be solely on principles and methodology, not on the conclusions that they generate." *Lemons*, ___ Mich at ___ (quotation marks and citation omitted). "That said, it is not enough that the expert's opinion rests on data viewed as legitimate in the context of a particular area of expertise." *Id*. at ___ (quotation marks and citation omitted). "Instead, the proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology." *Id*. at ___ (cleaned up). "The test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research." *Id*. at ___ (quotation marks and citation omitted). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id*. at ___ (quotation marks and citation omitted).

"When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *Id*. at ___ (cleaned up). "In the context of expert evidence, relevance is sometimes referred to as 'fit': The trial court must ensure the expert's testimony is sufficiently tied to the facts of the case, so that it 'fits' the dispute and will assist the trier of fact." *Id*. at ___ (quotation marks and

citation omitted). "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Id*. at ___ (quotation marks and citation omitted).

"In the realm of the biomechanical evidence underlying SBS, there can never be a *perfectly* replicated model of a shaken infant for obvious ethical reasons." *Id*. at ___ (stating that "there will always be at least some gap between the data and the conclusions reached"). "This cannot and does not prohibit a qualified expert from testifying, on the basis of reliable principles and methodologies, about what can be extrapolated from various imperfect modeling about how an infant's body reacts to shaking." *Id*. at ___. "Any limitations in the conclusions that can be drawn from biomechanical studies as applied to the facts of this case go to its weight, not admissibility." *Id*. at ___. "There is nothing inherently problematic about presenting to a jury expert testimony in biomechanics." *Id*. at ___.

The *Lemons* Court held that the defendant's expert witness's "testimony satisfied the requirements of MRE 702" because "[h]e was a qualified expert in the field of biomechanical engineering," "[h]is testimony regarding the biomechanical mechanism of SBS would assist the trier of fact in ascertaining a fact at issue—whether [defendant's infant daughter] died from injuries caused by abusive shaking," and "[b]iomechanical engineering is a legitimate field of scientific study and [defendant's expert's] testimony was based on sufficient facts or data and was the product of reliable principles and methods." *Lemons*, ___ Mich at ___ (quotation marks and citation omitted) (noting that "conclusions and methodology are not entirely distinct from one another").

Furthermore, the expert's "testimony was not 'far removed' or missing a connecting link between data, methodology, and conclusion. Rather, it was based on studies specifically designed to test the effects of abusive shaking on infants, utilized various models to test the hypotheses, and specifically concluded that shaking without serious injury to the neck could not produce symptoms associated with SBS." *Id*. at ___. "[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty because arguably, there are no certainties in science." *Id*. at ___ (quotation marks and citation omitted) (Therefore, the *Lemons* Court held that "although clearly not universally accepted, [defendant's expert's] opinion [was] certainly objective, rational, and based on sound and trustworthy scientific literature." *Id*. at ___ (cleaned up)."The opinion "'fit' the facts in dispute . . . and would assist the trier of fact in determining whether the prosecution could prove beyond a reasonable doubt that [defendant's daughter's] cause of death was SBS." *Id*. at ___ (citation omitted) (holding that "the trial court abused its discretion by misapplying MRE 702 and ordering that biomechanical evidence was inadmissible").

4.3 Syndrome Evidence—Expert Testimony

A. Battered Woman Syndrome/Battered Partner Syndrome[14]

Expert testimony on the "generalities or characteristics" associated with battered woman syndrome is admissible for the narrow purpose of describing the victim's distinctive pattern of behavior that was brought out at trial. *People v Daoust*, 228 Mich App 1, 10 (1998), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008).[15]

Expert testimony relating to the characteristics associated with battered woman syndrome is admissible when the witness is properly qualified and the testimony is relevant and helpful to the jury's evaluation of the complainant's credibility. *People v Christel*, 449 Mich 578, 579-580 (1995). The expert's testimony is admissible to help explain the complainant's behavior, but the testimony is not admissible to express the expert's opinion of whether the complainant was a battered woman or to comment on the complainant's honesty. *Id*. at 580.

B. Sexually Abused Child Syndrome

"'[C]ourts should be particularly insistent in protecting innocent defendants in child sexual abuse cases' given 'the concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury.'" *People v Musser*, 494 Mich 337, 362-363 (2013) (holding that a detective who was not qualified as an expert witness was still subject to the same limitations as an expert because he "'gave . . . the same aura of superior knowledge that accompanies expert witnesses in other trials'" and because, as a police officer, jurors may have been inclined to place undue weight on his testimony), quoting *People v Peterson*, 450 Mich 349, 371 (1995), modified 450 Mich 1212 (1995). Accordingly, an expert witness's testimony is limited. *Peterson*, 450 Mich at 352. The expert witness may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of the victim, or (3) testify to the defendant's guilt. *Id*.

Despite these limitations, "(1) an expert may testify in the prosecution's case in chief [(rather than only in rebuttal)] regarding

[14] "Because abusive conduct and victimization are neither gender-specific nor exclusive to married couples, the broader term 'battered partner syndrome' . . . is the most appropriate." *People v Spaulding*, 332 Mich App 638, 648 n 2 (2020). The cases discussed in this subsection predate *Spaulding*, and thus, reference *battered woman syndrome*.

[15] For more information on the precedential value of an opinion with negative subsequent history, see our note.

typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson*, 450 Mich at 352-353.

"Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse." *Peterson*, 450 Mich at 373-374.

Where the defense theory raised the issue of the complainant's postincident behavior (attempting suicide), it was not an abuse of discretion to admit expert testimony comparing the child-victim's postincident behavior with that of sexually abused children. *People v Lukity*, 460 Mich 484, 500-502 (1999). The Court stated:

> "Under *Peterson*, raising the issue of a complainant's post-incident behavior opens the door to expert testimony that the complainant's behavior was consistent with that of a sexual abuse victim. Accordingly, the trial court did not abuse its discretion in allowing [the expert] to testify.
>
> "Moreover, defendant effectively cross-examined [the expert] and convincingly argued in closing that the fact that a behavior is 'consistent' with the behavior of a sexual abuse victim is not dispositive evidence that sexual abuse occurred. Specifically, [the defendant] argued that 'almost any behavior is not inconsistent with being a victim of sexual assault.'" *Lukity*, 469 Mich at 501-502.

In *People v Smith*, the case consolidated with *Peterson*, the Michigan Supreme Court found that the trial itself was "an almost perfect model for the limitations that must be set in allowing expert testimony into evidence in child sexual abuse cases." *Peterson*, 450 Mich at 381. In that case, the victim delayed reporting the abuse for several years, but the defendant did not ask the victim any questions suggesting that the delay in reporting was inconsistent with the alleged abuse nor did the defendant attack the victim's credibility. *Id.* at 358. The trial court allowed a single expert to clarify, during the prosecutor's case-in-chief, that child sexual abuse victims frequently delay reporting the abuse. *Id.* at 359-360. The

expert's testimony helped to dispel common misperceptions held by jurors regarding the reporting of child sexual abuse, rebutted an inference that the victim's delay was inconsistent with the behavior of a child sexual abuse victim, and did not improperly bolster the victim's credibility. *Id.* at 379-380.

"Michigan courts regularly admit expert testimony concerning typical and relevant symptoms of abuse, such as delayed reporting and secrecy." *People v Muniz*, 343 Mich App 437, 443 (2022). In *Muniz*, an expert witness "provided a general explanation of sexual-assault victims' behavior following an assault" and "gave testimony regarding a wide range of many aspects of such behavior." *Id.* at 445. The Court of Appeals concluded that the expert's "testimony properly gave a general explanation of 'the common postincident behavior of children who are victims of sexual abuse'" under *Peterson*. *Muniz*, 343 Mich App at 445. The Court rejected the defendant's argument that an expert's "testimony lacked reliability because it appeared to be based on his training and experience treating victims rather than academic studies." *Id.* at 443. The Michigan Supreme Court "long has recognized that there has developed a body of knowledge and experience about the symptomatology of child abuse victimization" "that serves only to define the broad range of possible physical, psychological, and emotional reactions that a child victim could potentially experience." *Id.* at 443 (cleaned up). The "purpose of allowing expert testimony in these kinds of cases is to give the jury a framework of possible alternatives for the behaviors, and to provide sufficient background information about each individual behavior at issue which will help the jury to dispel any popular misconception commonly associated with the demonstrated reaction." *Id.* at 444 (quotation marks and citation omitted). "[I]n addition to his work in treating over 300 victims of abuse, [the expert witness] testified regarding his training, continuing education through conferences and training sessions, and research, all sources of his knowledge." *Id.* at 444 (noting that a witness may be qualified "as an expert [under MRE 702] by knowledge, skill, experience, training, or education"). The Court noted that "[a]lthough defendant's affiant may disagree with several of [the expert's] assertions, his affidavit does not establish that the totality of [the expert's] testimony lacked reliability or admissibility."*Id.* at 445. Accordingly, the *Muniz* Court held that the expert appropriately "defined the parameters of his knowledge base, which were adequate to qualify him." *Id.* at 445.

In *People v Thorpe*, 504 Mich 230, 235 (2019), the prosecutor presented "testimony from an expert in the area of child sexual abuse and disclosure about the rate of false reports of sexual abuse by children to rebut testimony elicited on cross-examination that

children can lie and manipulate." The expert witness "also identified only two specific scenarios in his experience when children might lie, neither of which applie[d to the] case," which "for all intents and purposes" constituted improper vouching because the testimony could lead to the reasonable conclusion that "there was a 0% chance [the complainant] had lied about sexual abuse." *Id*. at 259. Accordingly, "expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity." *Id*. at 235. "Because the trial turned on the jury's assessment of [the complainant's] credibility, the improperly admitted testimony wherein [the expert] vouched for [the complainant's] credibility likely affected the jury's ultimate decision." *Id*. at 260.

In *People v Harbison*, the case consolidated with *Thorpe*, the Michigan Supreme Court considered "the admissibility of expert testimony from an examining physician that 'diagnosed' the complainant with 'probable pediatric sexual abuse' despite not having made any physical findings of sexual abuse to support that conclusion." *Thorpe*, 504 Mich at 235. The Court concluded that "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *Id*. "An examining physician's opinion is objectionable when it is solely based 'on what the victim . . . told' the physician." *Id*. at 255, quoting *People v Smith*, 425 Mich 98, 109 (1986) (admission of the physician's testimony constituted plain error affecting the defendant's substantial rights requiring a new trial). "Such testimony is not permissible because a jury [is] in just as good a position to evaluate the victim's testimony as the doctor." *Thorpe*, 504 Mich at 255 (quotation marks and citation omitted; alteration in the original). See also *People v Uribe*, 508 Mich 898 (2021) (finding that the testimony of a doctor who "repeatedly testified to the ultimate issue of the case–whether the complainant was sexually abused–and this testimony lacked physical corroboration," was "impermissible because it vouche[d] for the complainant's credibility and veracity and invade[d] the province of the jury to determine this issue"; a "curative instruction employed by the trial court could not erase the prejudice the defendant suffered by way of this testimony," and "the trial court abused its discretion by denying the defendant's motion for a mistrial").

"*Harbison*, . . . and the cases on which [it] relied, establish a bright-line rule that an examining physician's opinion that a complainant was sexually abused is admissible only if supported by physical

findings," because "[i]n the absence of physical findings, it necessarily follows that the physician's opinion is solely based on [their] assessment of the complainant's statements." *People v Del Cid (On Remand)*, 331 Mich App 532, 547 (2020). The *Del Cid* Court concluded that a diagnosis of "'[p]ossible pediatric sexual abuse' is not significantly different from 'probable pediatric sexual abuse' [as was at issue in *Harbison*] in terms of the physician's endorsement of the accusation. In both instances, the examining physician speaks to the likelihood of abuse in the absence of any physical evidence and couches it in terms of a medical diagnosis." *Del Cid (On Remand)*, 331 Mich App at 547. Furthermore, even if "possible sexual abuse" was considered to be "significantly different from 'probable sexual abuse,'" it would be precluded under MRE 403 because "[t]estimony that the 'diagnosis' is merely 'possible' has very little probative value while, for the reasons discussed in *Harbison*, such testimony is highly prejudicial." *Del Cid (On Remand)*, 331 Mich App at 548, 550 ("a 'diagnosis' of sexual abuse absent physical findings is a term of art and has no probative value at trial"; admission of expert testimony regarding "possible pediatric sexual abuse" absent corroborating physical evidence constituted error that "affected defendant's substantial rights").

Expert testimony may be admissible regarding patterns of behavior exhibited by adult sex offenders to desensitize child victims. *People v Ackerman*, 257 Mich App 434, 442 (2003). In *Ackerman*, before committing acts of sexual misconduct, the defendant repeatedly allowed his pants to fall down, exposing his genitals, to several girls at a youth community center. *Id.* at 441. The Court stated that this behavior "supported an inference that defendant's actions were part of a system of desensitizing girls to sexual misconduct." *Id.* In addition, the Court affirmed the trial court's decision to allow an expert to testify as to the common practices of child molesters, which often includes desensitizing the victim. *Id.* at 443-444. The Court stated:

> "We believe that most of our citizen-jurors lack direct knowledge of or experience with the typical forms of conduct engaged in by adults who sexually abuse children. Accordingly, the trial court reasonably concluded that testimony about the typical patterns of behavior exhibited by child sexual abuse offenders would aid the jury." *Ackerman*, 257 Mich App at 445.

C. Shaken Baby Syndrome (Abusive Head Trauma)

Abusive head trauma (also commonly known as shaken baby syndrome) is "the 'constellations of injuries that are caused by the directed application of force to an infant or young child, resulting in

physical injury to the head and/or its contents.'" *People v McFarlane*, 325 Mich App 507, 520 (2018), quoting The American Academy of Pediatrics (2009). Within the medical community, there is a debate about the reliability of a diagnosis "that a particular child's injuries were the result of inflicted trauma." *McFarlane*, 325 Mich App at 521. However, "courts continue to allow experts to offer the diagnosis on the ground that it is accepted and reliable." *Id*. In these cases, "a physician may properly offer an opinion that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease because a jury is unlikely to be able to assess the medical evidence." *Id*. at 522. "Expressing an opinion that the trauma was inflicted or not accidental does not impermissibly invade the province of the jury because the expert is not expressing an opinion regarding the defendant's guilt or whether the defendant had a culpable state of mind, which the expert may not do." *Id*. at 523. "Instead, the expert is interpreting the medical evidence and offering the opinion that the trauma was caused by human agency, and the jury is free to reject that opinion on the basis of the evidence adduced at trial, including a contrary opinion by another expert." *Id*.

"Notwithstanding the propriety of a diagnosis of inflicted trauma, . . . in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as 'abusive head trauma' or opines that the inflicted trauma amounted to child abuse." *McFarlane*, 325 Mich App at 523. "The ordinary understanding of the term 'abuse' – as opposed to neglect or carelessness – implies a level of willfulness and moral culpability that implicates the defendant's intent or knowledge when performing the act that caused the head trauma. An expert may not offer an opinion on the intent or criminal responsibility of the accused." *Id*. at 523-526 (citation omitted) (holding that it was plain error to allow the expert witness to use the phrase "abusive head trauma" and to agree that the injuries amounted to "child abuse," but that the error did not effect the outcome of the trial given the "totality of the evidence [to support a finding] that defendant became angry with [the victim], violently shook her out of frustration, and caused the injuries at issue").

"[T]he diagnostic term 'abusive head trauma' . . . invade[s] the province of the jury when used in cases involving allegations of abuse, even if it is medically possible to determine that a particular injury was nonaccidentally inflicted and the term constitutes a formal diagnosis recognized in the medical community. Therefore, use of the term automatically constitutes plain error." *People v Ackley (On Remand)*, 336 Mich App 586, 592 (2021). However, it is not improper under *McFarlane* "for any of the prosecution's experts to

testify that, in their opinion, [a victim] did not sustain [their] injuries by accident or self-directed misadventure. Rather, the experts [are] prohibited from characterizing the nonaccidental way in which those injuries were sustained as 'abuse' or 'abusive.'" *Ackley*, 336 Mich App at 595. In *Ackley*, "the use of the term 'abuse' by some of the prosecution's experts [did not make] any difference to the outcome in light of the other overwhelming evidence of defendant's guilt." *Id*. at 603. "The overwhelming majority of the prosecution's expert witnesses provided concrete, permissible testimony to the effect that [the victim] sustained drastic injuries that either could not have been accidental or self-inflicted, or were highly unlikely to have been accidental of self-inflicted. Not all of them used the word 'abuse,' or at least did not do so on direct examination." *Id*. at 602. "The term 'abusive head trauma' was raised for the first time during [the expert's] testimony by the defense on cross-examination," and "although [the expert] used the word 'trauma' during direct examination, she did not use any variation on the word 'abuse' at all during direct examination. To the extent there was any error regarding the word 'abuse' during [the expert's] testimony, any such error was attributable to defendant and was not grounds for relief." *Id*. at 598 n 5.

For detailed information about expert witness testimony in cases involving Shaken Baby Syndrome, see Section 4.1(A)(3), *People v Hawkins*, ___ Mich App ___, ___ (2023), and *People v Lemons*, ___ Mich ___ (2024).

Committee Tip:

As can be seen with other areas of expertise, issues arise not so much as to the qualifications of the expert but rather as to the breadth of the opinion rendered. Care should be taken not to conflate the two.

4.4 Medical Malpractice—Expert Testimony[16]

A. Requirements

"In a medical malpractice action, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard of care by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Stokes v Swofford*, ___ Mich ___, ___ (2024) (quotation marks and citation omitted). Generally, a plaintiff in a medical malpractice action "must produce expert testimony to support their position as to the standard of care in their case and that the standard was breached." *Danhoff v Fahim*, ___ Mich ___, ___ (2024). "The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955, and MCL 600.2169." *Danhoff*, ___ Mich at ___ (quotation marks and citation omitted).

MRE 702 "guides the admissibility of the testimony of medical experts in medical malpractice litigation who aver in affidavits of merit as to the applicable medical standard of care and whether that standard of care was breached." *Danhoff*, ___ Mich at ___ (noting that "it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible"). MRE 702 provides:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

[16] This section includes information on expert testimony that is specific to medical malpractice cases. See Section 4.1 for general information on expert testimony. See also the Michigan Judicial Institute's *Medical Malpractice - Criteria for Admission of Expert Testimony Flowchart*.

> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." MRE 702.

"Further guidance as to the reliability of medical expert testimony comes from MCL 600.2955[, which] expresses that the keys to admissibility are relevance and reliability." *Danhoff*, ___ Mich at ___. "MCL 600.2955 presents a nonexhaustive list of seven factors that a trial court shall consider when it determines whether an expert's opinions are reliable." *Danhoff*, ___ Mich at ___. Specifically, the seven factors are:

> "(a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation." MCL 600.2955(1).

"Neither MRE 702 nor MCL 600.2955 requires a trial court to exclude the testimony of a plaintiff's expert on the basis of the plaintiff's failure to support their expert's claims with published literature." *Danhoff*, ___ Mich at ___. "Expert testimony is inadmissible when it does not meet the reliability requirements of MRE 702, MCL 600.2955, and MCL 600.2169—not because the expert's testimony was not or could not be supported by peer-reviewed literature." *Danhoff*, ___ Mich at ___.

"MCL 600.2912d(1) mandates that the plaintiff in a medical malpractice action 'file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169.'" *Stokes v Swofford*, ___ Mich ___, ___ (2024). MCL 600.2169 sets forth the qualifications necessary for an expert witness to testify regarding the standard of care in medical malpractice cases. "The 'matching' required by MCL 600.2169(1) is limited to general board specialties and does not require precise matching of subspecialties." *Stokes*, ___ Mich at ___ ("emphasiz[ing] that a trial court must ensure that experts with matching specialties under MCL 600.2169(1) meet other criteria set forth in MCL 600.2169(2) and that MCL 600.2169(3) provides trial courts with broad discretion in assessing experts").

"Admission of expert testimony . . . does not depend on an expert's being *exactly as knowledgeable* as a defendant in a medical malpractice action." *Albro v Drayer*, 303 Mich App 758, 763 (2014) (holding that the defendant's experts satisfied MCL 600.2169(1)). There is "no rule, statute, or binding authority requiring identical experience and expertise between a party and an expert[.]" *Id*. In *Albro*, the plaintiff argued that the defendant's experts were "unqualified to render an opinion regarding defendant's compliance with the standard of care because they ha[d] little or no, or at least no recent, personal experience actually performing the specific surgical procedure defendant performed." *Id*. at 761-762. Although "none of defendant's experts were *as* familiar with the [specific] procedure as was defendant, . . . *all of them were familiar with the [specific] procedure*." *Id*. at 762-763. Accordingly, "[t]he trial court did not abuse its discretion by finding that defendant's experts were, at a minimum, sufficiently knowledgeable, trained, or educated to form an expert opinion under MRE 702 . . . [and] none of the considerations under MCL 600.2169(2) demand[ed] that the experts be excluded." *Albro*, 303 Mich App at 763.

MCL 600.2169 "does not impermissibly infringe on [the Supreme Court's] constitutional rule-making authority over 'practice and procedure.'" *McDougall v Schanz*, 461 Mich 15, 37 (1999).

"A party must move to strike an expert within a reasonable time after learning the expert's [sic: identity] and basic qualifications. The failure to timely do so results in forfeiture of the issue." *Cox v Flint Bd of Hosp Mgrs (On Remand)*, 243 Mich App 72, 80 (2000), rev'd on other grounds 467 Mich 1 (2002) (citation omitted).[17]

[17]For more information on the precedential value of an opinion with negative subsequent history, see our note.

B. Standard of Care

1. Generally

"Generally, expert testimony is required in a malpractice case in order to establish the applicable standard of care and to demonstrate that the professional breached that standard." *Elher v Misra*, 499 Mich 11, 21 (2016) (quotation marks and citations omitted). "The proponent of the evidence has the burden of establishing its relevance and admissibility." *Id.* at 22. "The standard of care is controlled by how other physicians in a field of medicine would act when providing the same treatment." *Stokes v Swofford*, ___ Mich ___, ___ (2024). "The standard of care for general practitioners is subject to the locality rule, which holds that the relevant standard of care is that which applies 'in the community in which the defendant practices or in a similar community[.]'" *Id.* at ___ n 1, quoting MCL 600.2912a(1)(a). "On the other hand, physician specialists and experts are held to a fieldwide standard of care." *Stokes*, ___ Mich at ___ n 1 (explaining that specialists are measured by a national standard because the public's reliance "upon the skills of a specialist and the wealth and sources of his knowledge are not limited to the geographic area in which he practices") (cleaned up). Put simply, general practitioners are held to a local or similar community standard of care; specialists are held to a nationwide standard of care. *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 383 (1994).

Nurses are not engaged in the practice of medicine and are, therefore, not held to the same standard of care as general practitioners or specialists. *Decker v Rochowiak*, 287 Mich App 666, 686 (2010). "Rather, the common-law standard of care applies to malpractice actions against nurses. The applicable standard of care is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities. The standard of care required of a nurse must be established by expert testimony." *Id.* (quotation marks, alteration, and citations omitted). In *Decker*, the defendant appealed because the "plaintiff's expert reviewed the case 'in light of a "national" standard of care'" as opposed to a local one. *Id.* at 685. The Court of Appeals concluded that, although the expert stated she was applying a national standard of care to her testimony, "the actual substance of [her] lengthy testimony was that the procedures at issue [in *Decker* were] so commonplace that the *same* standard of care applied locally and nationally. . . . Thus, plaintiff's expert applied the proper standard of care, which happened to be the same locally as well as nationally." *Id.* at 686-687.

MCL 600.2169(1)(b) "states that the expert must have spent the *majority* of his or her time the year preceding the alleged malpractice practicing or teaching the specialty the defendant physician was practicing at the time of the alleged malpractice." *Kiefer v Markley*, 283 Mich App 555, 559 (2009). Accordingly, the Court concluded that the proposed expert physician must "spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice." *Id.*

The requirement in MCL 600.2169(1)(b)(*i*) that the expert be engaged in "active clinical practice" does not "require that the professional physically interact with patients. Rather, the word 'active' must be understood to mean that, as part of his or her normal professional practice at the relevant time, the professional was involved—directly or indirectly—in the care of patients in a clinical setting." *Gay v Select Specialty Hosp*, 295 Mich App 284, 297 (2012). Likewise, "[t]he Legislature's statement [in MCL 600.2169(1)(b)(*ii*)] that the professional may meet the time requirement by devoting the majority of his or her time to the instruction of students [does not mean] that the professional must actually spend a majority of his or her time instructing students." *Gay*, 295 Mich App at 300. "It is commonly understood that a person who teaches—and especially with regard to persons who teach a profession—must spend significant time preparing for class, maintaining familiarity with new and evolving professional techniques, and participating in meetings designed to further the educational process." *Id.*

"Neither MRE 702 nor MCL 600.2955 requires a trial court to exclude the testimony of a plaintiff's expert on the basis of the plaintiff's failure to support their expert's claims with published literature." *Danhoff v Fahim*, ___ Mich ___, ___ (2024) ("Although published literature may be an important factor in determining reliability, it is not a dispositive factor . . . ."). In *Danhoff*, the plaintiff's expert "opined that because a bowel perforation like plaintiff experienced is so rare and so likely to have been caused by a medical instrument in an area it should not have been that it constitutes a breach of the standard of care." *Id.* at ___. "The trial court determined that [plaintiff's expert's] opinion was unreliable almost exclusively because he did not cite supportive literature without considering whether (1) [plaintiff's expert] could have produced such supportive literature, (2) defendant produced any literature or other evidence to contradict [plaintiff's expert's] opinion, and (3) [plaintiff's expert's] opinion was otherwise sufficiently reliable

under the factors provided by statute and MRE 702." *Danhoff*, ___ Mich at ___.

The *Danhoff* Court held that "scientific literature is not always required to support an expert's standard-of-care opinion, but that scientific literature is one of the factors that a trial court should consider when determining whether the opinion is reliable." *Danhoff*, ___ Mich at ___ (stating that "peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702, thus establishing reliability") (quotation marks and citation omitted). "[A]n expert in a medical malpractice lawsuit [may be able to] reliably support their opinion on the standard of care [even] if the adverse event is so rare that published, peer-reviewed medical literature on the subject may not exist." *Id*. at ___. "[E]ach case will present unique circumstances for a trial court to determine whether the expert's opinion is reliable." *Id*. at ___. "In some cases, a lack of supportive literature may be fatal to a plaintiff's expert's reliability." *Id*. at ___. "In others, a plaintiff's expert may demonstrate reliability without supportive literature, especially where a complication is rare and there is a dearth of supportive literature available to support the opinion." *Id*. at ___ (holding that "the guidepost for admissibility is reliability, and trial courts must consider MRE 702 as well as the statutory reliability factors presented in MCL 600.2955 when determining if an expert is reliable").

"Treating a lack of supportive medical literature as dispositive that the expert's opinions are unreliable and, therefore, inadmissible, creates a conundrum." *Danhoff*, ___ Mich at ___. "If the failure to produce medical literature means that a plaintiff's otherwise reliable expert opinions are inadmissible, patients who experience complications so rare that they are not studied by the academic community or discussed in peer-reviewed publications would not be able to offer admissible expert testimony when seeking legal recourse for their injuries." *Id*. at ___. "The avoidance of such a result is why MCL 600.2955 has several factors and does not merely specify that reliability is a product of peer-reviewed medical literature." *Danhoff*, ___ Mich at ___ ("It is also why we have consistently noted that peer-reviewed medical literature is not always necessary or sufficient to meet reliability requirements.") (quotation marks and citations omitted). Ultimately, in *Danhoff*, the Michigan Supreme Court held that "[t]he lower courts erred by concluding that [plaintiff's expert's] opinions were unreliable because they were unsupported by medical literature." *Id*. at ___ ("The trial court abused its discretion by inadequately assessing [plaintiff's

expert's] reliability as a standard-of-care expert without appropriately analyzing MRE 702 or the statutory reliability factors of MCL 600.2955.").

"Although peer-reviewed and published literature is significant" with respect to whether expert opinion testimony meets "the test of scientific reliability" under MRE 702, "its absence is not dispositive." *Zehel v Nugent*, 344 Mich App 490, 512, 513 (2022). "It would not be surprising that no literature existed regarding a rare phenomenon for which no experiment could be ethically performed[.]" *Id.* at 514 (holding it was "reasonable to rely upon plaintiff's experts' experience and background" where "defendants had proffered nothing to contradict plaintiff's experts' opinions").

The number of medical professionals "who use any particular procedure is not determinative of the standard of care." *Albro v Drayer*, 303 Mich App 758, 765 (2014) (finding an expert's testimony that a "third" of foot and ankle doctors use a particular procedure inappropriate because it lacked foundation in the record and was not determinative of the standard of care).

Timing of establishing the applicable standard of care. Although a trial court errs by waiting to establish the applicable standard of care until after the proofs have closed, such an error does not always require reversal. *Jilek v Stockson*, 490 Mich 961, 961-962 (2011). In *Jilek*, the trial court allowed the parties to argue at trial which standard of care applied, ultimately deciding the issue in the defendants' favor after the close of proofs. *Id.* at 961. However, because the trial court had been misled by the plaintiff's own arguments, and it did not preclude the plaintiff from presenting standard-of-care testimony for both specialties, upholding the jury's verdict in favor of the defendants was not "'inconsistent with substantial justice,' [under] MCR 2.613(A)." *Jilek*, 490 Mich at 962.

Nurse midwives. Obstetricians/gynecologists are not qualified to testify regarding the standard of care applicable to nurse midwives because they do not practice in "the same health profession" as a nurse midwife. *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 496-497 (2006). The Court stated:

> "Though it may appear reasonable that a physician with substantial educational and professional credentials should be able to testify about the standard of care of a nurse who works in a closely related field, we are constrained by the plain words of the statute [(MCL 600.2169(1)(b)] that the

> expert witness must practice in the 'same health profession.' Consequently, we conclude that because nurse midwives are separately licensed professionals who practice nursing with specialty certification in the practice of nurse midwifery, obstetricians/gynecologists may not testify about their standard of practice or care." *McElhaney*, 269 Mich App at 497.

Physician's assistant. Where a party seeks to admit expert testimony regarding the appropriate standard of care for a physician assistant, MCL 600.2169(1)(b) applies because MCL 600.2169(1)(a) and MCL 600.2169(1)(c) apply only to physicians, and MCL 600.2169(1)(b) applies both to physicians and other health professionals, which includes physician assistants. *Wolford v Duncan*, 279 Mich App 631, 635-637 (2008). Similarly, MCL 600.2169(1)(b) applies to expert witnesses testifying as to the standard of care for nurses. *Gay*, 295 Mich App at 294.

2. Specialists

A specialist is "a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice." *Stokes v Swofford*, ___ Mich ___, ___ (2024) (quotation marks and citation omitted) (noting that "a physician can be a specialist who is not board certified—and that a specialist is somebody who can potentially become board certified").

MCL 600.2169(1) requires a proposed expert to meet certain criteria when a defendant is a specialist. The statute states, in relevant part:

> "(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> > (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the

> testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> > (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
> >
> > (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty."

"MCL 600.2169(1)(a) says that if the defendant physician is a specialist, then the expert must practice or teach in the 'same *specialty*.'" *Stokes v Swofford*, ___ Mich ___, ___ (2024). "Similarly, the statute states that if the defendant physician 'is a *specialist* who is board certified, the expert witness must be a specialist who is board certified in that *specialty*.'" *Id.* at ___, quoting MCL 600.2169(1)(a). "[T]he words 'specialist' and 'specialties' as used in MCL 600.2169(1) are defined as the specialties recognized by the American Board of Medical Specialties (ABMS), the American Osteopathic Association (AOA), the American Board of Physician Specialties (ABPS), or other similar nationally recognized umbrella-based physician certifying entities." *Stokes*, ___ Mich at ___. "[T]he 'matching' requirement under MCL 600.2169 follows the listed general board certifications, which are the baseline 'specialties' recognized by such entities for certification purposes." *Stokes*, ___ Mich at ___.

"The statute does not require matching of *sub*specialties." *Id.* at ___ ("A medical subspecialty is a concentrated area of

knowledge and skills existing 'within a specialty' requiring additional training and education."). "Nowhere in the language of MCL 600.2169 is there a reference to 'subspecialties.'" *Stokes*, ___ Mich at ___, overruling in part *Woodard v Custer*, 476 Mich 545 (2006).[18] According to the *Stokes* Court, "*Woodard* incorrectly conflated the terms 'specialty' and 'subspecialty' in a manner that is inconsistent with the plain language of the statute, and it essentially negated MCL 600.2169(2) and (3), which provide significant discretion to trial courts to exclude experts even when such experts qualify under [MCL 600.2169(2)]." *Stokes*, ___ Mich at ___.

Level of certification/matching of credentials. "Board certified" is defined as a "certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications." *Stokes*, ___ Mich at ___ n 14 (citation omitted). However, a "'board certification' that requires prerequisites set forth by a more general umbrella certification applies in the same way to both a 'specialty' and 'subspecialty.'" *Id*. ("recogniz[ing] that a subspecialty is different from a specialty"). "While both may require 'board certifications' from a professional organization, a certification that requires as a prerequisite the possession of another more *general* board certification (a 'specialty') from an umbrella-certifying entity before seeking further certification is a *sub*specialty for purposes of MCL 600.2169." *Stokes*, ___ Mich at ___ n 14. "The "matching" required by MCL 600.2169(1) is limited to general board specialties and does not require precise matching of subspecialties." *Stokes*, ___ Mich at ___.

Timing of board certification. "[A] proposed expert's board-certification qualification [under MCL 600.2169(1)(a)] is based on the expert's board-certification status at the time of the alleged malpractice rather than at the time of the testimony." *Rock v Crocker*, 499 Mich 247, 251 (2016). "On the basis of the plain language of [MCL 600.2169] and contextual clues from the surrounding provisions, . . . both the specialty and board-certification requirements [of MCL 600.2169(1)(a)] apply at the time of the occurrence that is the basis for the claim or action." *Rock*, 499 Mich at 261-262 (additionally noting, however, that "[w]ith respect to the licensure requirement[of MCL 600.2169(1)], the parties [did] not dispute that the expert must be licensed at the time of the *testimony*") (emphasis added).

[18] For more information on the precedential value of an opinion with negative subsequent history, see our note.

Internal medicine. "Internal medicine is recognized as a specialty" with "more than 20 subspecialties that often have little to do with one another." *Stokes*, ___ Mich at ___. "For instance, a pulmonologist and a cardiologist are both subspecialists under the specialty of internal medicine." *Id.* at ___. "A pulmonologist is an internal medicine physician who specializes in the respiratory system." *Id.* at ___ n 17. "A cardiologist is an internal medicine physician who specializes in the heart." *Id.* at ___ n 18. "Concerns have been raised that doing away with consideration of subspecialties for purposes of the *matching* requirement would mean that a pulmonologist would then be qualified to testify against a cardiologist since both share the same *specialty*." *Id.* at ___. "However, this argument ignores MCL 600.2169(2) and (3)." *Stokes*, ___ Mich at ___. "Even if expert specialties 'match' under MCL 600.2169(1), the trial court still has discretion on whether to accept the expert as qualified to provide testimony in a particular case." *Stokes*, ___ Mich at ___.

Radiology specialties. "Neuroradiology is a subspecialty of diagnostic radiology; within both disciplines, a physician is trained in interpreting bodily images, although neuroradiologists specialize in interpreting images of the brain, spine, head, and neck." *Stokes*, ___ Mich at ___. In *Stokes*, diagnostic radiology was "the one most relevant specialty . . . because it was the only *specialty* that defendant held and practiced." *Id.* at ___. "Therefore, the proposed expert would need to be a specialist in diagnostic radiology, which he was." *Id.* at ___. "[P]laintiff's proposed expert . . . practices] diagnostic radiology whenever he reads a neuroimaging scan." *Id.* at ___. In other words, plaintiff's expert "spen[t] 100% of his time practicing the 'one relevant specialty'—diagnostic radiology—and thus he satisfie[d] the requirements under MCL 600.2169(1) to testify as an expert in the case against [the defendant]." *Stokes*, ___ Mich at ___ (holding that plaintiff's proposed expert "was qualified because his subspecialty of neuroradiology was subsumed within the broader specialty of diagnostic radiology").

Osteopathic/allopathic physician. The fact that defendant-doctor was a licensed osteopathic physician (D.O.) and the doctor who executed an affidavit of merit on plaintiff's behalf was a licensed allopathic physician (M.D.) was "not pertinent in analyzing MCL 600.2169(1)(b)(*i*) . . . because the specialty of obstetrics-gynecology govern[ed] the standard of practice of care under MCL 600.2169(1)(a)" and plaintiff's expert had "devoted a majority of his professional time to the active clinical practice of obstetrics-gynecology" "during the year

immediately preceding the alleged act of malpractice[.]" *Crego v Edward W Sparrow Hosp Ass'n*, 327 Mich App 525, 530 (2019). "[T]he requirements of [MCL 600.2169(1)(a)] were satisfied because both doctors [were] board-certified OB-GYNs," and MCL 600.2169(1)(b) "does not require re-evaluation of whether there are matching credentials. Whether a defendant and a plaintiff's expert practiced in the 'same health profession' . . . need only be resolved when a specialty, board-certified or otherwise, is not implicated[.]" *Crego*, 327 Mich App at 533, 535.

Nurses. Where the plaintiff's proposed nursing expert, a certified nurse practitioner, "did not spend the majority of her professional time in the year preceding the alleged malpractice practicing or teaching the health profession of a nurse, as opposed to the health profession of a nurse practitioner, she did not satisfy the statutory criteria [under MCL 600.2169(1)(b)] to testify concerning the standard of care applicable to [the defendant], a registered nurse[, and the proposed expert witness's] testimony was therefore properly excluded." *Cox v Hartman*, 322 Mich App 292, 305 (2017) (concluding that "[t]he health profession of a nurse and the health profession of a nurse practitioner are different, as reflected in the fact that the former is practiced pursuant to a license while the latter is practiced pursuant to a registration or specialty certification").

C. Trial Court Discretion in §600.2169(2) and §600.2169(3)

"Even if expert specialties 'match' under MCL 600.2169(1), the trial court still has discretion on whether to accept the expert as qualified to provide testimony in a particular case." *Stokes v Swofford*, ___ Mich ___, ___ (2024) (holding "that a trial court must ensure that experts with matching specialties under MCL 600.2169(1) meet other criteria set forth in MCL 600.2169(2) and that MCL 600.2169(3) provides trial courts with broad discretion in assessing experts"). "MCL 600.2169(2) *mandates* that the trial court evaluate all the following factors:

> '(a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in theactive clinical practice or instruction of the health profession or the specialty.

(d) The *relevancy* of the expert witness's testimony.'" *Stokes*, ___ Mich at ___.

Additionally, "[MCL 600.2169(3)] does not limit the power of the trial court to disqualify an expert witness on grounds *other than* the qualifications set forth in [MCL 600.2169]." In *Stokes*, the Michigan Supreme Court "clarif[ied] the standard of care requirements for expert medical witnesses under MCL 600.2169, as interpreted in *Woodard v Custer*."[19] *Stokes*, ___ Mich at ___ (overruling *Woodard* "in part because the test adopted by the *Woodard* Court regarding the evaluation of specialists in medical malpractice actions [was] inconsistent with the statutory language in MCL 600.2169"). "Specifically, *Woodard* incorrectly conflated the terms 'specialty' and 'subspecialty' in a manner that [was] inconsistent with the plain language of the statute" and "essentially negated MCL 600.2169(2) and (3), which provide significant discretion to trial courts to exclude experts even when such experts qualify under [MCL 600.2169(1)]." *Stokes*, ___ Mich at ___.

Internal medicine. "Internal medicine is recognized as a specialty" with "more than 20 subspecialties that often have little to do with one another." *Stokes*, ___ Mich at ___. "For instance, a pulmonologist and a cardiologist are both subspecialists under the specialty of internal medicine." *Id*. at ___. "A pulmonologist is an internal medicine physician who specializes in the respiratory system." *Id*. at ___ n 17. "A cardiologist is an internal medicine physician who specializes in the heart." *Id*. at ___ n 18. "Concerns have been raised that doing away with consideration of subspecialties for purposes of the *matching* requirement would mean that a pulmonologist would then be qualified to testify against a cardiologist since both share the same *specialty*." *Id*. at ___. "However, this argument ignores MCL 600.2169(2) and (3)." *Stokes*, ___ Mich at ___. Indeed, "the trial court would easily exclude a pulmonologist's testimony [under MCL 600.2169(2)] because the relevancy of that testimony would prove futile to ascertaining the cardiologist's performance." *Id*. at ___. "Moreover, a trial court could go further under MCL 600.2169(3)," which "allows disqualifications by the trial court for other reasons, meaning an internist who exclusively treats medical conditions associated with the lungs could be deemed unqualified to testify as an expert for an internist who exclusively treats medical conditions associated with the heart if the alleged malpractice involved an alleged error that is specific to the heart." *Stokes*, ___ Mich at ___.

[19] *Woodard v Custer*, 476 Mich 545 (2006). For more information on the precedential value of an opinion with negative subsequent history, see our note.

D. Exception to Requirement of Expert Testimony

Generally, an expert must testify in a medical malpractice action. However, "[a]n exception exists when the professional's breach of the standard or care is so obvious that it is within the common knowledge and experience of an ordinary layperson." *Elher v Misra*, 499 Mich 11, 21-22 (2016).

E. Hospital Regulations, Reports, and Peer Review Records

"[V]iolation of a regulation promulgated pursuant to statutory authority is admissible in a medical malpractice action," but hospital policies do *not* establish the standard of care or its violation. *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 766 (1988) ("[i]n general, the standard required of physicians and nurses . . . is not established by internal, administrative rules"). However, "internal rules and regulations are not categorically inadmissible as irrelevant." *Meyers v Rieck*, 509 Mich 460, 482 (2022). "[W]hile hospital rules and regulations [cannot] establish the standard of care, they '[can] be admissible as reflecting the community's standard where they were adopted by the relevant medical staff and where there is a causal relationship between the violation of the rule and the injury.'" *Id*. at 478, quoting *Gallagher*, 171 Mich App at 767. "[A] medical provider's rules and regulations can be used as evidence to help determine the standard of care, but they cannot be used as the standard itself without additional evidence." *Id*. at 480. "[C]ourts must be cautious in admitting this evidence" and "any jury receiving such evidence must be instructed as to its proper use." *Id*. at 481. "[A] medical provider's internal rules and regulations . . . must meet general evidentiary standards, including that the evidence be relevant . . . and its probative value must not be outweighed by the concerns listed in MRE 403." *Meyers*, 509 Mich at 481. Put differently, "[i]f they meet the rules governing the admission of evidence and if the jury is instructed as to their proper use — i.e., that they are evidence of the standard of care and do not fix the standard itself — then they might be admitted." *Id*. at 482.

A hospital incident report or peer review record may be inadmissible under the peer review privilege set forth by MCL 333.20175(13) and MCL 333.21515. See also *Gallagher*, 171 Mich App at 769-770.[20] MCL 333.20175(13) and MCL 333.21515 "make privileged all records, data, and knowledge collected for or by a peer review committee in furtherance of its statutorily mandated purpose of reducing morbidity and mortality and improving

[20]At the time *Gallagher* was decided, the peer-review privilege was located in MCL 333.20175(5); however, the statute was subsequently amended, and the peer review subsection of the statute is now MCL 333.20175(13). See 2023 PA 62.

patient care.[21] This includes objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report." *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 263 (2015). However, "the scope of the [peer review] privilege is not without limit." *Id.* at 261. "[T]he privilege only applies to records, data, and knowledge that are collected for or by the committee under [MCL 333.20175(13) and MCL 333.21515] 'for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients.'" *Krusac*, 497 Mich at 261-262, quoting MCL 333.21513(d).[22] "In determining whether any of the information requested is protected by the statutory privilege, the trial court should bear in mind that mere submission of information to a peer review committee does not satisfy the collection requirement[23] so as to bring the information within the protection of the statute. Also, in deciding whether a particular committee was assigned a review function so that information it collected is protected, the court may wish to consider the hospital's bylaws and internal regulations, and whether the committee's function is one of current patient care or retrospective review." *Monty v Warren Hosp Corp*, 422 Mich 138, 146-147 (1985) (citations omitted). Moreover, litigants "may still obtain relevant facts through eyewitness testimony, including from the author of a privileged incident report, and from the patient's medical record." *Krusac*, 497 Mich at 262.

"Nothing in the pertinent language of [MCL 333.20175(13)] suggests that the privilege does not extend to a freestanding surgical outpatient facility exercising the same credentialing review function under MCL 333.20813(c) that a hospital performs under MCL 333.21513(c)." *Dorsey v Surgical Institute of Mich, LLC*, 338 Mich App 199, 228 (2021).[24] MCL 333.21515 references Article 17, "which governs a wide variety of health facilities or agencies, including freestanding surgical outpatient facilities. However, the specific provision is set forth in Part 215 of Article 17, which addresses matters related to the narrower category of entities that constitute hospitals." *Dorsey*, 338 Mich App at 228. "[D]espite the placement of MCL 333.21515 in Part 215 alongside other provisions applicable to

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[21] "MCL 333.21513(d) imposes a duty on hospitals to create peer review committees 'for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients.'" *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 256 (2015), quoting MCL 333.21513(d).

[22] At the time *Krusac* was decided, the peer-review privilege was located in MCL 333.20175(8); however, the statute was subsequently amended, and the peer review subsection of the statute is now MCL 333.20175(13). See 2023 PA 62.

[23] See MCL 333.21515.

[24] At the time *Dorsey* was decided, the peer-review privilege was located in MCL 333.20175(8); however, the statute was subsequently amended, and the peer review subsection of the statute is now MCL 333.20175(13). See 2023 PA 62.

hospitals, the Legislature's reference to the review functions described in Article 17, as opposed to Part 215, evidences its intent to extend the statutory privilege for peer-review materials to all health facilities and agencies with review functions imposed by Article 17." *Dorsey*, 338 Mich App at 229 (concluding the peer review privilege in MCL 333.21515 applied to defendant (a freestanding surgical outpatient facility), that "[t]he plain language of [MCL 333.20175(13)] limited the use of [the credentialing file] to purposes provided in Article 17," and that "the file was not subject to discovery and should not have been admitted at trial").

F. Discovery

A defendant's attorneys are entitled to communicate ex parte with a plaintiff's treating physician when the plaintiff has waived the physician-patient privilege.[25] *Domako v Rowe*, 438 Mich 347, 362 (1991) (privilege was waived in the *Domako* case "by lack of timely assertion"). See also MCR 2.302(C). Pursuant to MCR 2.314(A)(1), when the mental or physical condition of a party is in controversy, medical information is generally subject to discovery. *Davis v Dow Corning Corp*, 209 Mich App 287, 292-293 (1995). Accordingly, once the patient allows discovery of medical information, there are no grounds for restricting access to the patient's physician. *Id*. at 293.

G. Weight of Expert Testimony

"[A] jury [can] disregard a physician's unrebutted testimony[.]" *Taylor Estate v Univ Physician Group*, 329 Mich App 268, 282 (2019). "[A] jury may disbelieve the most positive evidence even when it stands uncontradicted, and the judge cannot take from them their right of judgment[.]" *Strach v St John Hosp Corp*, 160 Mich App 251, 271 (1987) (citation omitted). See also *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 89-90 (2009); *Martin v Ledingham*, 488 Mich 987, 987-988 (2010). "[A] jury is free to credit or discredit any testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39 (2001). "That the physicians involved . . . are professional observers does not change the rule that their eyewitness testimony may be disbelieved by a jury." *Taylor Estate*, 329 Mich App at 285.

[25] This informal approach to discovery is not contrary to the Health Insurance Portability and Accountability Act (HIPAA). *Holman v Rasak*, 486 Mich 429, 446 (2010). The Michigan Supreme Court stated that "[a]n ex parte interview may be conducted and a covered entity may disclose protected health information during the interview in a manner that is consistent with HIPAA, as long as '[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)].'" *Holman*, 486 Mich at 446, quoting 45 CFR 164.512(e)(1)(ii)(B).

4.5 Gang-Related Crimes–Expert Testimony

A. General Standards Regarding Relevancy and "Assisting the Trier of Fact"

"As a threshold matter, applying MRE 402 and MRE 702 requires a trial court to act as a gatekeeper of gang-related expert testimony and determine whether that testimony is relevant and will assist the trier of fact to understand the evidence." *People v Bynum*, 496 Mich 610, 625 (2014). "[F]act evidence to show that the crime at issue is gang-related provides a sufficient basis for a trial court to conclude that expert testimony regarding gangs is relevant and will be helpful to the jury, although the significance of fact evidence and its relationship to gang violence can be gleaned from expert testimony. *Id.* at 629.

"The introduction of evidence regarding a defendant's gang membership is relevant and can 'assist the trier of fact to understand the evidence' when there is fact evidence that the crime at issue is gang-related." *Bynum*, 496 Mich at 625-626, quoting MRE 702.

B. Permissible Testimony

This subsection discusses only permissible testimony; for a discussion on limitations on gang-related expert testimony, see Section 4.5(C).

1. Underlying Fact Evidence

"Ordinarily, expert testimony about gang membership is of little value to a fact-finder *unless* there is a connection between gang membership and the crime at issue." *People v Bynum*, 496 Mich 610, 626 (2014). "Accordingly, the relevance of gang-related expert testimony may be satisfied by fact evidence that, at first glance, may not indicate gang motivations, but when coupled with expert testimony, provides the gang-crime connection." *Id.* (quotation marks and citation omitted).

"Sometimes . . . identifying whether a crime is gang-related requires an expert to establish the significance of seemingly innocuous matters–such as clothing, symbolism, and tattoos–as features of gang membership and gang involvement." *Bynum*, 496 Mich at 626. "At other times, an expert's testimony that the crime was committed in rival gang territory may be necessary to show why the defendant's presence in that area, a fact established by other evidence, was motivated by his gang affiliation." *Id.* (quotation marks and citation omitted).

In *Bynum*, the Court held that "the location of the crimes [(on disputed gang territory)], when combined with evidence that multiple gang members were involved in the crimes, provided sufficient fact evidence to conclude that expert testimony regarding gangs, gang membership, and gang culture would be relevant and helpful to the jury in this case." *Bynum*, 496 Mich at 630.

2. Expert Testimony to Establish Motive

Establishing a gang member's motive for committing a gang-related crime is an appropriate purpose for which expert testimony may be admitted. *People v Bynum*, 496 Mich 610, 630 (2014). Accordingly, "a gang expert may testify that a gang, in general, protects its turf through violence as an explanation for why a gang member might be willing to commit apparent random acts of violence against people the gang member believes pose a threat to that turf." *Id.*

C. Limitations on Expert Testimony

MRE 404(a)(1)[26] "limits the extent to which a witness may opine about a defendant's gang membership." *People v Bynum*, 496 Mich 610, 627 (2014). "[A]n expert may not testify that, on a particular occasion, a gang member acted in conformity with character traits commonly associated with gang members. Such testimony would attempt to prove a defendant's conduct simply because he or she is a gang member." *Id.* However, gang-related evidence could be admissible if it is used for a nonconformity purpose, such as proving motive, absence of mistake, or lack of accident. *People v Smith*, 336 Mich App 79, 113 (2021); MRE 404(b) (noting "[i]n a murder case, proof of motive is always relevant, even if not always necessary").

The expert in *Bynum* "veered into objectionable territory when he opined that [the defendant] had acted in conformity with his gang membership with regard to the specific crimes in question." *Bynum*, 496 Mich at 630-631. Specifically, the expert's testimony describing the character traits associated with gang membership to interpret a surveillance video improperly suggested the defendant's guilt. *Id.* at 631. The expert testified that when he viewed the video, he saw the gang members, including the defendant "all posted up at the store with a purpose. When they went to that store that day, they didn't know who they were going to beat up or shoot, but they went up

[26] MRE 404(a)(1) provides "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait" unless one of the enumerated exceptions apply. See Section 2.3 for more information on MRE 404(a).

there waiting for someone to give them the chance. 'Make us – give me a reason to – to shoot [you], to fight you, to show how tough we are, the Boardman Boys, on our turf.'" *Id*. (alteration in original). The Court held that "[i]n contrast to his otherwise admissible general testimony about aspects of gang culture, [the expert's] testimony interpreting the video evidence specifically connected those character traits to [the defendant's] conduct in a particular circumstance. Such testimony impermissibly attempted to 'prov[e] action in conformity' with character traits common to all gang members on a particular occasion. As a result, this testimony violated MRE 404(a)." *Bynum*, 496 Mich at 631.

Gang-related testimony is also subject to MRE 403, which requires the trial court to determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence. *Bynum*, 496 Mich at 635 n 43.

Committee Tip:

The distinction between acceptable and improper gang expert testimony often becomes muddled. Be on guard for its impermissible use as conformity evidence under MRE 404(a).

4.6 Standardized Field Sobriety Tests–Expert Testimony

"A person who is qualified by knowledge, skill, experience, training, or education, in the administration of standardized field sobriety tests, including the horizontal gaze nystagmus (HGN) test, shall be allowed to testify subject to showing of a proper foundation of qualifications. This section does not preclude the admissibility of a nonstandardized field sobriety test if it complies with the Michigan rules of evidence." MCL 257.625s. See Section 4.6(B)(4) for additional information about police officer testimony regarding field sobriety tests.

4.7 Drug Recognition Evaluator or Expert Testimony

Drug Recognition Evaluator or Expert (DRE) testimony is not automatically admissible, and the trial court must still make a determination whether a DRE officer is qualified to offer expert testimony. See *People v Bowden*, 344 Mich App 171, 175 n 2 (2022) (noting that even if a person's "certification designates him to be a drug recognition 'expert,' that label has no bearing on whether he may

properly testify as an expert for purposes of MRE 702"). In *Bowden*, "the prosecution filed a motion in the district court requesting the court to 'declare [a deputy involved in the traffic stop with the defendant] an expert in the field of Drug Evaluation and Classification and be allowed to testify, and provide an expert opinion, as a [DRE].'" *Id.* at 177 (the defendant was charged with operating while intoxicated on the basis of marijuana use). However, "the prosecution did not present any evidence in the district court to show that the DRE protocol had been validated as a reliable method for demonstrating a person's *level of impairment* due to marijuana or the *degree to which a person's driving abilities could be diminished* by any given level of marijuana." *Id.* at 189. Although the "studies on which the prosecution relied demonstrated the DRE protocol's level of accuracy with respect to determining whether a particular type of substance was *present* in a person's blood," "neither of the submitted reports purported to even address the question of how particular levels of marijuana impacted a person's ability to drive or rendered a person 'impaired.'" *Id.* at 189. Accordingly, the Court concluded that "the determination under the DRE protocol that a person is 'impaired' and unable to safely drive a car appears to be ultimately based on the DRE officer's subjective judgment, and there is no evidence in this record that the ability of a person to make such a judgment based on the application of the DRE protocol has been tested to demonstrate the accuracy and validity of reaching such a conclusion on a person's level of impairment due to marijuana." *Id.* at 189. The *Bowden* Court noted that the "prosecution did not present any evidence that the DRE protocol has been tested, or has a known error rate, *with respect to the purpose for which the prosecution intended to use the results of the protocol in this case—to provide evidence of defendant's level of impairment and impaired driving ability*." *Id.* at 190. The Court commented that there was simply no evidence "to support that the DRE protocol [could] reliably be used to detect the degree or level of intoxication caused by marijuana and determine whether that level of intoxication has made the person unable to safely drive a motor vehicle." *Id.* at 191. Because the prosecution "failed to establish any valid connection between the use of the DRE protocol and a conclusion regarding the degree to which a person's driving ability was diminished by the use of marijuana," the *Bowden* Court held that "the prosecution failed to meet its burden to establish the reliability, and thus the admissibility, of the proposed expert testimony." *Id.* at 191.

4.8 Police Officer as Witness

A. Lay Opinion Testimony

As with any lay witness, a police officer may be able to give opinion testimony under MRE 701. "[A]ny witness is qualified to testify as to his or her physical observations and opinions formed as a result

of these observations." *People v Grisham*, 125 Mich App 280, 286 (1983).

1. Examples

a. Cell Phone Data

An investigating detective's "opinion testimony that the telephone records showed evidence of human trafficking" was admissible under MRE 701 because "the detective's testimony was rationally based on his personal review of the records[.]" *People v Thurmond*, ___ Mich App ___, ___ (2023).

b. Identification on Surveillance Video

"[T]he trial court abused its discretion when it allowed [a police officer testifying as a lay witness] to identify [the defendant] in a surveillance video," because this "testimony invaded the province of the jury"; although the officer "could properly comment that, based on his experience, the individual appeared to be concealing a weapon," the officer "should not have been allowed to identify [the defendant] as that individual" where "[t]here was nothing about the images (i.e. poor quality of the images, defendant wearing a disguise) that necessitated [the officer's] opinion." *People v Perkins*, 314 Mich App 140, 160-162 (2016) (ultimately concluding that "the error was harmless"), vacated in part on other grounds by unpublished order of the Court of Appeals, entered February 12, 2016 (Docket Nos. 323454, 323876, and 325741).[27]

Contrast with *People v Fomby*, 300 Mich App 46, 53 (2013), where a police officer certified as a forensic video technician was permitted to give opinion testimony under MRE 701 linking "individuals depicted in [a] surveillance video as being the same individuals depicted in . . . still photographs" because his testimony was rationally based on his perception of the evidence and because it was helpful to the jury in evaluating the evidence to determine a fact at issue in the case. The officer's opinion testimony "did not invade the province of the jury" because he "did not identify defendant in the video or still images." *Fomby*, 300 Mich App at 53.

[27]For more information on the precedential value of an opinion with negative subsequent history, see our note.

c. Seatbelt

A police officer was permitted to give opinion testimony under MRE 701 that a plaintiff was not wearing a seat belt at the time of an automobile accident "because his testimony was based on his perceptions at the scene of the accident." *Chastain v Gen Motors Corp* (*On Remand*), 254 Mich App 576, 588 (2002).

d. Cause of Accident

Two police officers' opinion testimony as to the cause of an accident was inadmissible where the officers did not see the accident and based their conclusions solely upon witness statements taken after the accident. *Miller v Hensley*, 244 Mich App 528, 531 (2001) ("[b]ecause the officers' testimony that plaintiff was at fault for the collision was not rationally based on their own perceptions, the testimony was not admissible under MRE 701").

e. Damage Caused by Bullets

The trial court did not abuse its discretion by accepting opinion testimony from police officers that a car had been dented by bullets because "the officers' testimony . . . was [not] dependent upon scientific, technical or other specialized knowledge[.]" *People v Oliver*, 170 Mich App 38, 50-51 (1988), modified in part on other grounds 433 Mich 862 (1989).

f. Visible Intoxication

Two police officers were permitted to give opinion testimony that the defendant was visibly intoxicated. *Heyler v Dixon*, 160 Mich App 130, 148-149 (1987).

g. Concealment by Defendant

A police officer was permitted to give opinion testimony that the defendant was trying to conceal himself. *People v Smith*, 152 Mich App 756, 764 (1986) (the officer's testimony "that when he first spotted the defendant and his accomplice they were standing 'up against the house . . . trying to conceal themselves from the street or any vehicular traffic' . . . was clearly based on the witness's perception and involved a crucial issue, whether defendant was the victim of a crime or a culprit").

2. Jury Instruction

In a criminal case, a party may request the court to issue a jury instruction pursuant to M Crim JI 5.11, which indicates that the police officer's testimony is to be judged by the same standards used to evaluate the testimony of any other lay witness.

B. Expert Testimony

1. Blood Stain Interpretation

A police detective may be permitted to provide expert testimony regarding blood stain interpretation. *People v Haywood*, 209 Mich App 217, 224-225 (1995). In *Haywood*, the police officer "was clearly qualified by knowledge, experience, and training to testify regarding the bloodstains found in defendant's apartment. He had received over one hundred hours of training in bloodstain analysis and attended five different seminars. Further, he had utilized that training in approximately one hundred previous cases. Finally, [the police officer] indicated that he was familiar with the literature on the subject and [taught] a course on bloodstain interpretation to other law enforcement officers." *Id*. at 225.

2. Delayed Disclosure

"'Delayed disclosure' refers to sex abuse victims, including children, not immediately informing others of the abuse that transpired." *People v Dobek*, 274 Mich App 58, 76 n 8 (2007). In *Dobek*, the Court of Appeals concluded that a detective possessed the requisite knowledge, training, experience, and education concerning the sexual abuse of children to be considered an expert capable of testifying about delayed disclosure in sex abuse victims. *Id*. at 79.

3. Drug Dealing or Activity

Qualified police officers may testify as experts in controlled substance cases. *People v Murray*, 234 Mich App 46, 53 (1999). For an officer's expert testimony to be admissible, "'(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline.'" *Id*., quoting *People v Williams (After Remand)*, 198 Mich App 537, 541 (1993).

Police expert testimony regarding drug profiles is admissible, but only to the extent that the testimony does "not move

beyond an explanation of the typical characteristics of drug dealing[.]" *Murray*, 234 Mich App at 54. A limiting instruction to the jury is appropriate. See *id.* at 60-61. M Crim JI 4.17 provides such an instruction on the use of drug profile evidence.

4. Field Sobriety Tests

A police officer may testify as an expert about the results of field sobriety tests if the "evidence indicate[s] that the officer possess[es] knowledge, training, and experience regarding the field sobriety tests at issue." *People v Peebles*, 216 Mich App 661, 667-668 (1996) (the officer was qualified to testify where "he had been a police officer for one year and seven months at the time of the stop . . . and he had received four or five hours of training on the field tests at issue and had received on-the-job training regarding such tests").

5. Firearms

A police officer who had fired sawed-off shotguns was qualified as an expert to testify about their recoil characteristics. *People v Douglas*, 65 Mich App 107, 117 (1975).

6. Operation of Motor Vehicles

An officer was qualified to testify as an expert about the defendant's estimated speed at the time of an accident where his training "consisted of four days in an unspecified school and six months work with experienced officers." *People v Ebejer*, 66 Mich App 333, 340-343 (1976). Additionally, "the data upon which [the officer's] opinion was based was sufficient to support the admissibility of the testimony." *Id.* at 342-343 (within an hour or so of the accident, the officer made various measurements and examined skid marks, gouge marks, scratches, and photographs he had taken at the scene).

A police officer may give an expert opinion whether a tractor-trailer was properly loaded. *Jenkins v Raleigh Trucking Servs, Inc*, 187 Mich App 424, 429-430 (1991) (noting "defendants offered expert testimony to the contrary").

7. Self-Defense

A testifying detective's "expertise did not extend to offering a profile of the 'certain way' in which those who kill in self-defense act during interrogations," and "the trial court's decision to admit [the detective's] expert testimony in [that]

regard fell beyond the range of principled outcomes"; the detective's participation in an unidentified number of previous cases in which individuals claimed to have acted in self-defense did not "qualif[y] him to offer expert opinions regarding whether individuals act a 'certain way' after killing in self-defense as well as whether defendant's behavior . . . was consistent with that 'certain way.'" *People v Dixon-Bey*, 321 Mich App 490, 505 (2017). The detective's "expertise was in the area of interpreting evidence at homicide investigations, not in psychology or some other behavioral science," and while an officer "need not necessarily be a psychologist to offer this type of testimony, it is equally true that he does need to have the requisite knowledge, skill, experience, training, and education to be qualified as an expert in the area about which he is offering expert testimony[.]" *Id.* at 505, 509 (further concluding that the error was not outcome determinative).

Committee Tip:

Care should be taken in evaluating the admissibility of expert testimony from traditional fields of expertise.

C. Testimony About Defendant's Statement

MCL 763.8(2) provides that "[a] law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony shall make a time-stamped, audiovisual recording of the entire interrogation.[28] A major felony recording shall include the law enforcement official's notification to the individual of the individual's *Miranda*[29] rights." MCL 763.8(2).

However, "[a]ny failure to record a statement as required under [MCL 763.8] or to preserve a recorded statement does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible." MCL 763.9.[30]

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[28] MCL 763.8 "applies if the law enforcement agency has audiovisual recording equipment that is operational or accessible as provided in [MCL 763.11(3) or MCL 763.11(4)] or upon the expiration of the relevant time periods set forth in [MCL 763.11(3) or MCL 763.11(4)], whichever occurs first." MCL 763.8(1).

[29] *Miranda v Arizona*, 384 US 436 (1966).

4.9 Forensic Laboratory Reports and Certificates

MCR 6.202 concerns forensic laboratory reports and certificates, and applies to criminal trials in district and circuit court. MCR 6.202(A).

A. Disclosure of Report

"Upon receipt of a forensic laboratory report and certificate, if applicable, by the examining expert, the prosecutor shall serve a copy of the laboratory report and certificate on the opposing party's attorney or party, if not represented by an attorney, within 14 days after receipt of the laboratory report and certificate." MCR 6.202(B). Additionally, the prosecutor must file with the court "proof of service of the report and certificate, if applicable, on the opposing party's attorney or party, if not represented by an attorney[.]" MCR 6.202(B).

B. Notice

If a party intends to offer a forensic laboratory report as evidence at trial, the party's attorney (or party, if not represented by an attorney), must provide the opposing party's attorney (or party, if not represented by an attorney), with written notice of that fact. MCR 6.202(C)(1). If the prosecuting attorney intends to offer a forensic laboratory report as evidence at trial, notice to defense counsel (or the defendant, if not represented by counsel), must be included with the report. *Id*. If a defendant intends to offer a forensic laboratory report as evidence at trial, notice to the prosecuting attorney must be provided within 14 days after receiving the report. *Id*. "Except as provided in [MCR 6.202(C)(2)], the report and certification, if applicable, is admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified." MCR 6.202(C)(1).

C. Demand

After receiving a copy of the forensic laboratory report and certificate (if applicable), the opposing party's attorney (or party, if not represented by an attorney), may file a written objection to the use of the forensic laboratory report and certificate. MCR 6.202(C)(2). The written objection must be filed with the court where

[30] "[U]nless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement." MCL 763.9.

the matter is pending, and must be served on the opposing party's attorney (or party, if not represented by an attorney), within 14 days of receiving the notice. *Id*. If a written objection is filed, the forensic laboratory report and certificate are inadmissible under MCR 6.202(C)(1). If no objection is made to the use of the forensic laboratory report and certificate within 14 days of receipt of the notice, the forensic laboratory report and certificate are admissible in evidence as set out in MCR 6.202(C)(1). MCR 6.202(C)(2). The court must extend the time period of filing a written objection for good cause. MCR 6.202(C)(3). Compliance with MCR 6.202, such as extending the time period for filing a written objection for good cause, also constitutes good cause for adjourning trial. MCR 6.202(C)(4).

D. Certification

The analyst who conducted the analysis on the forensic sample and signed the report must complete a certificate on which he or she must state (1) that he or she is qualified by education, training, and experience to perform the analysis; (2) the name and location of the laboratory where the analysis was performed; (3) that performing the analysis is part of his or her regular duties; and (4) that the tests were performed under industry-approved procedures or standards and the report accurately reflects the analyst's findings and opinions regarding the results of those tests or analysis. MCR 6.202(D). Alternatively, a report submitted by an analyst employed by a laboratory that is accredited by a national or international accreditation entity that substantially meets the certification requirements set out in the court rule may provide proof of the laboratory's accreditation certificate in lieu of a separate certificate. *Id*.

4.10 Fingerprints

"Fingerprints are a matter of identification, not incrimination." *People v Cooper*, 220 Mich App 368, 375 (1996). The fingerprints themselves are the evidence, not the object on which they are found. *People v Cullens*, 55 Mich App 272, 274-275 (1974).

Provided they are properly authenticated under MRE 901, fingerprint cards bearing a defendant's fingerprints collected during an investigation at a time in which the defendant was not yet a suspect in the crime may be admissible as a business record or a public record under MRE 803(6) and MRE 803(8), respectively.[31] *People v Jambor (On Remand)*, 273 Mich App 477, 481-486 (2007).

Jury Instruction. M Crim JI 4.15 should only be given where the sole evidence of identity comes from fingerprints. See M Crim JI 4.15 use notes.

4.11 DNA (Deoxyribonucleic Acid) Identification Profiling System Act (DNA Profiling Act)[32]

A. Summary of Content of the Act

The DNA Profiling Act requires the department of state police to promulgate rules pursuant to the Administrative Procedures Act to implement the DNA Profiling Act. MCL 28.173.

Under MCL 28.173, the department must promulgate rules to govern the following issues:

> "(a) The method of collecting samples in a medically approved manner by qualified persons and the types and number of samples to be collected by the following:
>
> (*i*) The department of corrections from certain prisoners under . . . MCL 791.233d.
>
> (*ii*) Law enforcement agencies as provided under . . . MCL 750.520m, or certain juveniles under . . . MCL 712A.18k.
>
> (*iii*) The department of [health and] human services or a county juvenile agency, as applicable, from certain juveniles under . . . MCL 803.307a, or . . . MCL 803.225a. As used in this paragraph, 'county juvenile agency' means that term as defined in . . . MCL 45.622.
>
> (b) Distributing DNA database collection kits and instructions for collecting samples.
>
> (c) Storing and transmitting to the department the samples described in subdivision (a).
>
> (d) The DNA identification or genetic marker profiling of samples described in subdivision (a).

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[31] See Section 5.3(B)(6) on the business record hearsay exception, and Section 5.3(B)(8) on the public record hearsay exception.

[32] MCL 28.171 *et seq.*

> (e) The development, in cooperation with the federal bureau of investigation and other appropriate persons, of a system of filing, cataloging, retrieving, and comparing DNA identification profiles and computerizing this system.
>
> (f) Protecting the privacy interests of individuals whose samples are analyzed under this act."

The department of state police may promulgate rules to implement the DNA Identification Profiling System Act in addition to rules addressing the issues outlined in MCL 28.173.

B. Who Must Provide a Sample

The Michigan Penal Code requires a person to provide samples for chemical testing for DNA identification profiling or genetic markers if any of the following apply:

- The person is arrested for committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult. MCL 750.520m(1)(a).
- The person is convicted of, or found responsible for, a felony or attempted felony, or any of the following misdemeanors or local ordinances substantially corresponding to the misdemeanors:
  - MCL 750.167(1)(c) (disorderly person—window peeping);
  - MCL 750.167(1)(f) (disorderly person—indecent/obscene conduct in public);
  - MCL 750.167(1)(i) (disorderly person—loitering in house of ill fame or prostitution);
  - MCL 750.335a(1) (indecent exposure);
  - MCL 750.451(1) or MCL 750.450(2) (first and second prostitution violations);
  - MCL 750.454 (leasing a house for purposes of prostitution). MCL 750.520m(1)(b)(*i*)-(*iv*).

C. Collecting a Sample of an Individual's DNA

1. Collection and Forwarding of Samples

"The county sheriff or the investigating law enforcement agency as ordered by the court shall provide for collecting the samples required to be provided under [MCL 28.176(1)] in a medically approved manner by qualified persons using supplies provided by the department and shall forward those samples and any samples described in [MCL 28.176(1)] that were already in the agency's possession to the department after the individual from whom the sample was taken has been arraigned in the district court. However, the individual's DNA sample must not be forwarded to the department if the individual is not charged with committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult. If the individual's DNA sample is forwarded to the department despite the individual not having been charged as described in this subsection, the law enforcement agency shall notify the department to destroy that sample. The collecting and forwarding of samples must be done in the manner required under [the DNA Profiling Act]. A sample must be collected by the county sheriff or the investigating law enforcement agency after arrest but before sentencing or disposition as ordered by the court and promptly transmitted to the department of state police after the individual is charged with committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult. This subsection does not preclude a law enforcement agency or state agency from obtaining a sample at or after sentencing or disposition." MCL 28.176(4). See also MCL 750.520m(3) and MCL 750.520m(4).

2. Required Notice

"At the time a DNA sample is taken form an individual under [MCL 28.176], the individual shall be notified in writing of all of the following:

> (a) That, except as otherwise provided by law, the individual's DNA sample or DNA identification profile, or both, shall be destroyed or expunged, as appropriate, if the charge for which the sample was obtained has been dismissed or resulted in acquittal, or no charge was filed within the limitations period.

(b) That the individual's DNA sample or DNA identification profile, or both, will not be destroyed or expunged, as appropriate, if the department determines that the individual from whom the sample is taken is otherwise obligated to submit a sample or if it is evidence relating to another individual that would otherwise be retained under this section.

(c) That the burden is on the arresting law enforcement agency and the prosecution to request the destruction or expunction of a DNA sample or DNA identification profile as required under [MCL 28.176], not on the individual." MCL 28.176(4)(a)-(c).

D. Constitutional Issues

The United States Supreme Court has upheld the constitutionality of a state statute authorizing the collection and analysis of an arrestee's DNA according to national Combined DNA Index System (CODIS) procedures[33] "[a]s part of a routine booking procedure for serious offenses[.]" *Maryland v King*, 569 US 435, 440-441 (2013). "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Id.* at 465-466. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11, for discussion of Fourth Amendment search and seizure issues.

E. Individual's Refusal to Provide Sample

If an individual who is required by law to provide a sample for DNA identification profiling refuses or resists providing a sample, he or she must be advised that the refusal or resistance is a misdemeanor offense punishable by not more than one year of imprisonment, or a maximum fine of $1,000, or both. MCL 28.173a(1).

[33] The Michigan's DNA Identification Profiling System Act, MCL 28.171 *et seq.*, is part of CODIS, which links together existing state DNA databases. The CODIS unit manages the Combined DNA Index System and the National DNA System (NDIS). For detailed information about these databases, see the FBI's Frequently Asked Questions on CODIS. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

"If at the time an individual who is required by law to provide samples for DNA identification profiling is arrested for committing or attempting to commit a felony offense or is convicted or found responsible the investigating law enforcement agency or the department already has a sample from the individual that meets the requirements of the rules promulgated under this act, the individual is not required to provide another sample. However, if an individual's DNA sample is inadequate for purposes of analysis, the individual shall provide another DNA sample that is adequate for analysis." MCL 28.173a(2). See also MCL 28.176(3).[34]

F. Cooperative Agencies and Individuals

"The department of state police shall work with the federal bureau of investigation and other appropriate persons to develop the capability of conducting DNA identification and genetic marker profiling at department of state police crime laboratories. For this purpose, the department shall acquire, adapt, or construct the appropriate facilities, acquire the necessary equipment and supplies, evaluate and select analytic techniques and validate the chosen techniques, and obtain training for department of state police personnel." MCL 28.174.

G. Permissible Use of DNA Information

According to MCL 28.175a(1)(a)-(c), the department's use of the DNA profile information is limited to any or all of the following purposes:

- Identification for law enforcement purposes.
- Assistance with the recovery or identification of missing persons or human remains.
- If personal identifiers are removed, for academic, research, statistical analysis, or protocol development purposes.

H. Impermissible Use of DNA Information

DNA samples provided under the DNA Profiling Act must not be analyzed to identify any medical or genetic disorder. MCL 28.175a(2).

The DNA Profiling Act specifically prohibits several actions:

[34] See also Section 4.11(L).

> "(1) An individual shall not disseminate, receive, or otherwise use or attempt to use information in the DNA identification profile record knowing that the dissemination, receipt, or use of that information is for a purpose not authorized by law.
>
> (2) An individual shall not willfully remove, destroy, tamper with, or attempt to tamper with a DNA sample, record, or other DNA information obtained or retained under [the DNA Profiling Act] without lawful authority.
>
> (3) An individual shall not, without proper authority, obtain a DNA identification profile from the DNA identification profiling system.
>
> (4) An individual shall not, without proper authority, test a DNA sample obtained under [the DNA Profiling Act].
>
> (5) An individual shall not willfully fail to destroy a DNA sample or profile that has been required or ordered to be destroyed under [the DNA Profiling Act]." MCL 28.175(1)-(5).

Violation of MCL 28.175 is a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than $1,000, or both. MCL 28.175(7).

"Nothing in [MCL 28.175] shall be considered to prohibit the collection of a DNA sample in the course of a criminal investigation by a law enforcement agency." MCL 28.175(6).

I. Permanent Retention of DNA Profile

"Except as otherwise provided in [MCL 28.176], the department shall permanently retain a DNA identification profile of an individual obtained from a sample in the manner prescribed by the department under [the DNA Profiling Act] if any of the following apply:

> (a) The individual is arrested for committing or attempting to commit a felony offense or an offense that would be a felony offense if committed by an adult.
>
> (b) The individual is convicted of or found responsible for a felony or attempted felony, or any of the following misdemeanors, or local ordinances that are substantially corresponding to the following misdemeanors:

> (*i*) A violation of [MCL 750.167(1)(c), MCL 750.167(1)(f), or MCL 750.167(1)(i)] . . ., disorderly person by window peeping, engaging in indecent or obscene conduct in public, or loitering in a house of ill fame or prostitution.
>
> (*ii*) A violation of [MCL 750.335a(1)] . . ., indecent exposure.
>
> (*iii*) A violation punishable under [MCL 750.451(1) or MCL 750.451(2)] . . ., first and second prostitution violations.
>
> (*iv*) A violation of . . . MCL 750.454, leasing a house for purposes of prostitution." MCL 28.176(1).

J. Disclosure Permitted

"The DNA identification profiles of DNA samples received under [the DNA Profiling Act] must only be disclosed as follows:

> (a) To a criminal justice agency for law enforcement identification purposes.
>
> (b) In a judicial proceeding as authorized or required by a court.
>
> (c) To a defendant in a criminal case if the DNA identification profile is used in conjunction with a charge against the defendant.
>
> (d) For an academic, research, statistical analysis, or protocol developmental purpose only if personal identifications are removed." MCL 28.176(2).

K. DNA Sample Already Taken

"Notwithstanding [MCL 28.176(1)], if at the time the individual is arrested, convicted of, or found responsible for the violation the investigating law enforcement agency or the department already has a sample from the individual that meets the requirements of [the DNA Profiling Act], the individual is not required to provide another sample or pay the assessment required under [MCL 28.176(5)]."[35] MCL 28.176(3). See also MCL 28.173a(2) (containing

[35] MCL 28.176(5) states: "The court shall order each individual found responsible for or convicted of 1 or more of the crimes listed in [MCL 28.176(1)] to pay an assessment of $60.00. The assessment required under this subsection is in addition to any fine, costs, or other assessments imposed by the court." See also MCL 750.520m(5).

substantially similar language but also requiring an individual to provide a subsequent sample if his or her previous sample was inadequate for analysis purposes); MCL 750.520m(2) (containing substantially similar language).

L. Disposal of DNA Sample or Profile

1. Individual's Charge(s) Dismissed Before Trial

MCL 764.26a states:

> "(1) If an individual is arrested for any crime and the charge or charges are dismissed before trial, both of the following apply:
>
> (a) The arrest record shall be removed from the internet criminal history access tool (ICHAT).
>
> (b) If the prosecutor of the case agrees at any time after the case is dismissed, or if the prosecutor of the case or the judge of the court in which the case was filed does not object within 60 days from the date an order of dismissal was entered for cases in which the order of dismissal is entered after [June 12, 2018], all of the following apply:
>
> (*i*) The arrest record, all biometric data, and fingerprints shall be expunged or destroyed, or both, as appropriate.
>
> (*ii*) Any entry concerning the charge shall be removed from LEIN.
>
> (*iii*) Unless a DNA sample or profile, or both, is allowed or required to be retained by the department of state police under . . . MCL 28.176, the DNA sample or profile, or both, obtained from the individual shall be expunged or destroyed.
>
> (2) The department of state police shall comply with the requirements listed in subsection (1) upon receipt of an appropriate order of the district court or the circuit court."

2. Individual's Conviction Is Reversed (Court Order Required)

MCL 28.176(9) states:

> "If a sample was collected under [MCL 28.176(1)] from an individual who does not have more than 1 conviction, and that conviction was reversed by an appellate court, the sentencing court shall order the disposal of the sample collected and DNA identification profile record for that conviction in the manner provided in [MCL 28.176(12) and MCL 28.176(13)]."

3. Samples or Profiles No Longer Necessary or Individual Was Acquitted

Except for the DNA identification profiles required to be retained permanently, any other DNA identification profile must not be permanently retained but "must be retained only as long as it is needed for a criminal investigation or criminal prosecution." MCL 28.176(10). Except as provided by MCL 28.176(11), a DNA sample or DNA identification profile must be disposed of by the state police forensic laboratory under either of the following circumstances:

> "(a) The department receives a written request for disposal from the investigating police agency or prosecutor indicating that the sample or profile is no longer necessary for a criminal investigation or criminal prosecution.
>
> (b) The department receives a written request for disposal and a certified copy of a final court order establishing that the charge for which the sample was obtained has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable limitations period." MCL 28.176(10).

The disposal requirements in MCL 28.176(10) do not apply if:

- "[T]he individual from whom the sample [wa]s taken has otherwise become obligated to submit a sample." MCL 28.176(11)(a).
- Evidence that would otherwise be retained would be destroyed because the sample from the individual contains information or data relating to another individual. MCL 28.176(15). See MCL 28.176(11)(b).

M. Method and Timing of Disposal

According to MCL 28.176(12):

> "The state police forensic laboratory shall dispose of a sample and a DNA identification profile record in the following manner:
>
> (a) Not more than 60 days after the department receives notice under [MCL 28.176(10)[36]], the laboratory shall dispose of the sample in compliance with . . . MCL 333.13811.[37]
>
> (b) The laboratory shall dispose of the sample and the DNA identification profile record in the presence of a witness."

After disposing of the sample and/or profile, the laboratory must "make and keep a written record of the disposal, signed by the individual who witnessed the disposal." MCL 28.176(13).

N. Errors in Disposal, Retention, or Collection

According to MCL 28.176(14):

> "An identification, warrant, detention, probable cause to arrest, arrest, or conviction based upon a DNA match or DNA information is not invalidated if it is later determined that 1 or more of the following errors occurred in good faith:
>
> (a) A DNA sample was erroneously obtained.
>
> (b) A DNA identification profile was erroneously retained.
>
> (c) A DNA sample was not disposed of or there was a delay in disposing of the sample.
>
> (d) A DNA identification profile was not disposed of or there was a delay in disposing of the profile."

[36] MCL 28.176(10) sets forth the circumstances under which the state police forensic laboratory must dispose of a DNA sample and/or a DNA identification profile.

[37] Provisions of the Public Health Code governing the storage, decontamination, and disposal of medical waste.

4.12 DNA (Deoxyribonucleic Acid) Testing and Admissibility[38]

"Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21 (2003). Therefore, defendant's general "complaint that police conducted no forensic testing of the evidence was a matter for the jury to consider in its evaluation of the weight and strength of the evidence, but it [did] not render the evidence presented insufficient to support [the defendant's] convictions." *People v Savage*, 327 Mich App 604, 615 (2019).

A. DNA Molecule Defined

"The [DNA] molecule is a double helix, shaped like a twisted ladder. Phosphate and deoxyribose sugar form the rails of the ladder. Four chemical bases—Adenine (A), Cytosine (C), Guanine (G), and Thymine (T)—lie next to each other on the sugar links along the sides of the ladder. Each A always bonds with a T on the other side of the ladder, and each C always bonds with a G on the other side of the ladder, so that the possible base pairs on the ladder are A-T, T-A, C-G, and G-C. The base pairs are connected by a hydrogen bond, such that the bonds form the rungs of the ladder. There are approximately three billion base pairs in one DNA molecule. Although no two human beings have the same sequence of base pairs (except for identical twins), we share many sequences that create common characteristics such as arms, legs, fingers, and toes. The sequences of variation from person to person are known as polymorphisms. They contain different alleles, which are alternate forms of a gene capable of occupying a single location on a chromosome. Polymorphisms are the key to DNA identification because they create the individual characteristics of everyone and are detectable in laboratory testing."*People v Adams*, 195 Mich App 267, 270 (1992), modified and remanded on other grounds 441 Mich 916 (1993).[39]

[38] A detailed discussion of the scientific methods involved in forensic DNA testing is beyond the scope of this benchbook. For a discussion of DNA testing in Michigan, see https://www.michigan.gov/msp/0,4643,7-123-72297_60141_60282_60493---,00.html.

[39] For more information on the precedential value of an opinion with negative subsequent history, see our note.

B. Mitochondrial DNA (mtDNA)

Mitochondrial DNA testing is admissible without a *Davis-Frye*[40] hearing. *People v Holtzer*, 255 Mich App 478, 488 (2003). The *Holtzer* Court explained the differences between mtDNA and nuclear DNA:

> "There are two types of DNA, nuclear DNA (nDNA) and mitochondrial DNA [(mtDNA)]. Every cell of the body, except for red blood cells, contains both types of DNA. Nuclear DNA is the more commonly known variety, and is found in the nucleus of the cell. One-half of an individual's nuclear DNA comes from each parent. Each nDNA molecule consists of approximately three billion base pairs of nucleotides. Although over ninety-nine percent of nuclear DNA is the same for all people, every person, except for identical twins, has unique differences in his nuclear DNA. It is this uniqueness that gives rise to its usefulness in forensic work.
>
> Mitochondrial DNA, on the other hand, is found in small organelles called mitochondria, which are found in every cell floating in the protoplasm. An mtDNA molecule is significantly smaller than an nDNA molecule, containing only about sixteen thousand base pairs. It also differs from nDNA in that mtDNA is inherited solely from the mother. Accordingly, it can be used to establish a maternal lineage. Another difference between nDNA and mtDNA is that nDNA is arranged in a long, double helix 'twisted ladder' formation while mtDNA has a circular formation, like a twisted rubber band. Furthermore, while each cell has only one nucleus, it may have thousands of copies of mitochondria, and each mitochondria has between two and ten copies of mtDNA. Thus, while nDNA is significantly larger in size, mtDNA is present in significantly greater numbers. Additionally, mtDNA is more likely than nDNA to survive in a dead cell. Thus, it is easier to recover useable mtDNA than usable nDNA." *Holtzer*, 255 Mich App at 481-482.

C. Methods of Testing DNA

Any question about whether laboratory procedures were properly followed in testing DNA evidence presents an issue of weight, not

[40] The *Davis-Frye* test was derived from *People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 App DC 46 (1923).

admissibility, and is a question to be determined by the jury. *People Holtzer*, 255 Mich App 478, 490 (2003).

1. Restriction Fragment Length Polymorphisms (RFLP) Method

DNA identification testing does not require a *Davis-Frye*[41] hearing for its admissibility because "DNA identification testing is generally accepted in the scientific community as reliable." *People v Adams*, 195 Mich App 267, 277 (1992), modified and remanded on other grounds 441 Mich 916 (1993)[42] (DNA testing was performed using the RFLP method on dried semen found on the victim's blue jeans). Because of the overall acceptance of DNA testing in other jurisdictions, a trial court may take judicial notice of DNA identification testing's reliability. *Adams*, 195 Mich App at 277. However, the prosecution must show that the laboratory performing the DNA testing followed the generally accepted laboratory procedures before the DNA test results are admitted into evidence. *Id*.

See also *People v Leonard*, 224 Mich App 569, 589-591 (1997) (DNA results obtained by use of the RFLP method were properly admitted at trial because "[t]he RFLP method of DNA testing has been already established as accepted on the scientific community").

2. Polymerase Chain Reaction (PCR) Method

A *Davis-Frye*[43] hearing is not necessary to show the general acceptance of PCR (polymerase chain reaction) DNA testing methods within the scientific community. *People v Coy*, 258 Mich App 1, 9-12 (2003).

DNA identification evidence using the PCR method was properly admitted at trial because the method met the *Davis-Frye* standard for admission. *People v Lee*, 212 Mich App 228, 281-282 (1995). As with *People v Adams*, 195 Mich App 267, 277 (1992), modified and remanded on other grounds 441 Mich 916 (1993)[44], before the DNA identification evidence is admitted, the prosecution must show that the laboratory conducting the

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[41] The *Davis-Frye* test was derived from *People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 App DC 46 (1923).

[42] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[43] The *Davis-Frye* test was derived from *People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 App DC 46 (1923).

DNA test employed generally accepted procedures. *Lee*, 212 Mich App at 283. See also *People v McMillan*, 213 Mich App 134, 136-137 (1995) (DNA evidence obtained using the PCR method was properly admitted at trial).

3. STRmix Probabilistic Genotype Method

"STRmix probabilistic genotype testing" is "a more recent form of DNA testing and a relatively new method of evaluating complex mixtures." *People v Muhammad*, 326 Mich App 40, 47 (2018). It "is a generally accepted method" of DNA testing. *Id.* at 56. In *Muhammad*, "the trial court did not abuse its discretion in concluding that the DNA evidence [interpreted by using STRmix probabilistic genotype testing performed on the shoe of a robbery suspect] was admissible under MRE 702."[45] *Muhammad*, 326 Mich App at 57. "STRmix uses well-established mathematical and scientific methods and . . . the software has undergone various validation studies," including "manual calculations, true and false donor tests, and tests against other software"; "STRmix has also been validated by four forensic laboratories in the United States and is being validated by other laboratories"; and "STRmix [has been] subjected to peer review and approved for casework by the New York Commission on Forensic Science." *Id.*

D. Statistical Interpretation Evidence of DNA Results

"Statistical evidence of DNA is generally admissible"; "statistics are an integral part of DNA evidence and are necessary to assist the trier of fact." *People v Coy* (*Coy II*), 258 Mich App 1, 11 (2003). "The results of DNA identification testing would be a matter of speculation without the statistical analysis[.]" *People v Adams*, 195 Mich App 267, 279 (1992), modified and remanded on other grounds 441 Mich 916 (1993).[46] See also *People v Coy* (*Coy I*), 243 Mich App 283, 294 (2000) (finding that the evidence of a potential match between a subject's DNA sample and DNA found on evidence is "inadmissible absent some accompanying interpretive evidence regarding the likelihood of the potential match"). "The *Coy* standard requires that when DNA evidence is introduced, it must be accompanied by some qualitative or quantitative interpretation.

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[44]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[45]See Section 4.1(A)(2) for additional information on the trial court's role as gatekeeper regarding expert testimony.

[46]For more information on the precedential value of an opinion with negative subsequent history, see our note.

The descriptive phrase, 'to a reasonable degree of scientific certainty' offers neither." *People v Urban*, 504 Mich 950, 950-951, 951 n 1 (2019) (applying the *Coy* standard "[b]ecause neither party argue[d that it] should be overruled" and declining to "address whether it is the appropriate standard") (citation omitted).

"DNA statistical analysis determines the frequency with which a particular match occurs in a target population—how likely or unlikely it is that an individual other than the defendant has the same DNA bands as those found at the crime scene and in [a] defendant's blood." *People v Chandler*, 211 Mich App 604, 608, 611 (1995) (admission of DNA statistical interpretation evidence does not require a *Davis-Frye* hearing). See also *People v Leonard*, 224 Mich App 569, 591 (1997) ("statistical evidence need not be subjected to a *Davis-Frye* test"; "any challenges to the statistical evidence are relevant to the weight of the evidence and not to its admissibility").

The admission of testimony that there was a "potential match between defendant's DNA and the DNA contained in the mixed blood samples found on the knife blade and the doorknob" violated MRE 702 and MRE 403 because no analytic or interpretive evidence concerning the likelihood or significance of a DNA profile match was admitted and without testimony explaining the statistical significance of a potential match, the testimony about a potential match did not assist the jury in determining whether the defendant contributed DNA to the mixed sample. *Coy I*, 243 Mich App at 301-303.

E. Indigent Defendant's Right to Appointment of DNA Expert

A defendant may be entitled to a court-appointed DNA expert if the defendant can make a particularized showing that there exists a reasonable probability that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. See *People v Kennedy*, 502 Mich 206, 228 (2018). See Section 4.1(K)(2) for more information on appointing an expert for an indigent defendant.

4.13 Postconviction Request for DNA Testing[47]

A defendant does not have a constitutional due process right to postconviction access to the State's evidence for DNA testing. *Dist*

[47]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, for information on postjudgment procedures.

Attorney's Office for the Third Judicial Dist v Osborne, 557 US 52, 55-56, 73-74 (2009).

A defendant serving a prison sentence for a felony, if convicted of that felony at trial *before* January 8, 2001, may petition the circuit court to order two kinds of relief: (1) DNA testing of biological material that was identified during the investigation that led to the defendant's conviction, and (2) a new trial based on the results of the DNA testing. MCL 770.16(1). "A petition under [MCL 770.16] shall be filed in the circuit court for the county in which the defendant was sentenced and shall be assigned to the sentencing judge or his or her successor. The petition shall be served on the prosecuting attorney of the county in which the defendant was sentenced." MCL 770.16(2).

MCL 770.16(1) specifically bypasses the ordinary time limitations prescribed in MCL 770.2 for filing motions for a new trial. MCL 770.16(1) begins: "Notwithstanding the limitations of [MCL 770.2] . . . ." MCL 770.2(1) states: "Except as provided in [MCL 770.16], in a case appealable as of right to the court of appeals, a motion for a new trial shall be made within 60 days after entry of judgment or within any further time allowed by the trial court during the 60-day period."

Under certain circumstances, a defendant convicted of a felony at trial *on or after* January 8, 2001, may also petition the court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that DNA testing. MCL 770.16(1). To petition the court for DNA testing under these circumstances, the defendant must show all of the following:

> "(a) That DNA testing was done in the case or under this act.
>
> (b) That the results of the testing were inconclusive.
>
> (c) That testing with current DNA technology is likely to result in conclusive results." MCL 770.16(1).

A petition filed under MCL 770.16 must satisfy the following requirements:

> "[The petition] shall allege that biological material was collected and identified during the investigation of the defendant's case. If the defendant, after diligent investigation, is unable to discover the location of the identified biological material or to determine whether the biological material is no longer available, the defendant may petition the court for a hearing to determine whether the identified biological material is available. If the court determines that identified biological material was collected during the investigation, the court shall order appropriate

> police agencies, hospitals, or the medical examiner to search for the material and to report the results of the search to the court." MCL 770.16(3).

"MCL 770.16 envisions two main phases; the first phase involves the court assessing whether DNA testing should be ordered, and the second phase entails, if DNA testing was ordered, whether a motion for new trial should be granted." *People v Poole (On Remand)*, 311 Mich App 296, 311 (2015). It is improper for a court "to conflate the two phases" contemplated under MCL 770.16 and to "deny DNA testing on the basis that [the] court concludes that it would deny a future motion for new trial regardless of the results of any DNA testing." *Poole*, 311 Mich App at 311.

"MCL 770.16(1) does not limit requests for DNA testing to those cases in which the biological material *itself* [led] to the defendant's conviction"; rather, MCL 770.16(1) simply requires that the biological material was identified *during the investigation* that led to the defendant's conviction. *People v Hernandez-Orta*, 480 Mich 1101 (2008) (emphasis added). The Court reasoned:

> "The defendant in this case has presented *prima facie* proof that 'the evidence sought to be tested is material to the issue of' his identity as the perpetrator under [MCL 770.16(4)(a)[48]]. If the DNA from semen found in the victim's body shortly after the assault does not match the defendant's DNA profile, this evidence has a tendency to show that defendant is not the perpetrator—particularly if the DNA also does not match that of the victim's boyfriend, with whom the victim acknowledged having sexual relations two days before the alleged offense." *Hernandez-Orta*, 480 Mich at 1101.

The following subsections explain the requirements for a court to order postconviction DNA testing and includes a discussion of the rights and duties established under MCL 770.16.

A. Requirements for Ordering Postconviction DNA Testing

> "[I]f a defendant satisfies the required factors with respect to the question whether DNA testing should be ordered, '[t]he court *shall* order DNA testing[.]' MCL 770.16(4) (emphasis added)." *People v Poole (On Remand)*, 311 Mich App 296, 311 (2015) (alterations in original).

[48] *Hernandez-Orta* references MCL 770.16(3)(a); however, the statute has since been amended and the relevant section is MCL 770.16(4)(a). See 2008 PA 410, effective January 6, 2009.

To qualify for DNA testing under MCL 770.16(4), a defendant must do all of the following:

> "(a) Present[] prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.
>
> (b) Establish[] all the following by clear and convincing evidence:
>
> > (*i*) A sample of identified biological material described in [MCL 770.16(1)] is available for DNA testing.
> >
> > (*ii*) The identified biological material described in [MCL 770.16(1)] was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.
> >
> > (*iii*) The identity of the defendant as the perpetrator of the crime was at issue during his or her trial."

When deciding a petition for DNA testing under MCL 770.16, a court must state its findings of fact on the record or must make written findings of fact supporting its decision. MCL 770.16(5).

The meaning of the term *material* as used in MCL 770.16(4)(a) "means that the 'evidence sought to be tested' must be of some consequence to the issue of identity in the case. In other words, the defendant must provide prima facie proof that there is some logical relationship between the evidence sought to be tested and the issue of identity." *People v Barrera*, 278 Mich App 730, 737 (2008).[49] "[T]he materiality of . . . blood samples to the issue of identity [of a perpetrator] is not affected or lessened by the fact that blood-type evidence excluding [a] defendant as a donor was already presented at [an earlier jury] trial; all of this scientific evidence is material or relevant to defendant's identity as the perpetrator." *Poole*, 311 Mich App at 311. "DNA testing is justified [where] . . . there exists prima facie proof that the blood samples, which will be subjected to DNA testing, are material to defendant's identity as the perpetrator, given

[49] *Barrera* references MCL 770.16(3)(a); however, the statute has since been amended and the relevant section is MCL 770.16(4)(a). See 2008 PA 410, effective January 6, 2009.

that the DNA testing could point to another specific individual as the perpetrator." *Id.* at 312-313.

B. If the Court Grants Petition for DNA Testing

"If the court grants a petition for DNA testing under this section, the identified biological material and a biological sample obtained from the defendant shall be subjected to DNA testing by a laboratory approved by the court. If the court determines that the applicant is indigent, the cost of DNA testing ordered under this section shall be borne by the state. The results of the DNA testing shall be provided to the court and to the defendant and the prosecuting attorney. Upon motion by either party, the court may order that copies of the testing protocols, laboratory procedures, laboratory notes, and other relevant records compiled by the testing laboratory be provided to the court and to all parties." MCL 770.16(6).

C. Reviewing DNA Test Results and Motion for New Trial

1. Results Inconclusive or Show Defendant is Source

"If the results of the DNA testing are inconclusive or show that the defendant is the source of the identified biological material," the court must deny the defendant's motion for new trial, and the defendant's DNA profile must be "provided to the department of state police for inclusion under the DNA identification profiling system act[.]" MCL 770.16(7)(a)-(b).

2. Results Show Defendant Not Source

"If the results of the DNA testing show that the defendant is not the source of the identified biological material, the court shall appoint counsel pursuant to MCR 6.505(A) and hold a hearing to determine by clear and convincing evidence all of the following:

> (a) That only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the identified biological material.
>
> (b) That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot be determined to be identical to the DNA profile of

> the sample initially collected during the investigation described in [MCL 770.16(1)].
>
> (c) That the defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial." MCL 770.16(8).

D. Retesting Biological Material

"[N]o provision set forth in MCL 770.16 prohibits the issuance of an order granting DNA testing of previously tested biological material." *People v Poole*, 497 Mich 1022 (2015), citing MCL 770.16(4)(b)(*ii*).

"Upon motion of the prosecutor, the court shall order retesting of the identified biological material and shall stay the defendant's motion for new trial pending the results of the DNA retesting." MCL 770.16(9).

E. Court Must Make Findings of Fact Regarding Decision to Grant or Deny Motion for New Trial

"The court shall state its findings of fact on the record or make written findings of fact supporting its decision to grant or deny the defendant a new trial under [MCL 770.16]. Notwithstanding [MCL 770.3[50]], an aggrieved party may appeal the court's decision to grant or deny the petition for DNA testing and for new trial by application for leave granted by the court of appeals." MCL 770.16(10).

F. Prosecutor Must Inform Victim of Defendant's DNA Petition

"If the name of the victim of the felony conviction described in [MCL 770.16(1)] is known, the prosecuting attorney shall give written notice of a petition under this section to the victim. The notice shall be by first-class mail to the victim's last known address. Upon the victim's request, the prosecuting attorney shall give the victim notice of the time and place of any hearing on the petition and shall inform the victim of the court's grant or denial of a new trial to the defendant." MCL 770.16(11).

[50] MCL 770.3 governs an aggrieved party's right to appeal in different types of cases.

G. Duty to Preserve Biological Material

"The investigating law enforcement agency shall preserve any biological material identified during the investigation of a crime or crimes for which any person may file a petition for DNA testing under this section. The identified biological material shall be preserved for the period of time that any person is incarcerated in connection with that case." MCL 770.16(12).

4.14 Tracking/Cadaver Dog Evidence[51]

A. Tracking Dog Evidence

1. Foundation

The prosecutor must lay a foundation before the court may admit tracking dog evidence. See *People v Norwood*, 70 Mich App 53, 55 (1976). In laying the foundation, the prosecutor must establish that the following conditions are present:

> "First, it is necessary to show that the handler is qualified to handle the dog. Second, it must be shown that the dog was trained and *accurate* in tracking humans. Third, it is necessary to show that the dog was placed on the trail where circumstances indicate that the culprit was. Fourth, it is necessary to show that the trail had not become stale when the tracking occurred." *Norwood*, 70 Mich App at 55 (citations omitted).

2. Jury Instruction

When tracking dog evidence is used, the court must give M Crim JI 4.14.

B. Cadaver Dog Evidence

"[C]adaver dog evidence is not significantly different from other forms of tracking dog evidence." *People v Lane*, 308 Mich App 38, 53 (2014). Thus, "the lack of scientific verification of the presence of a specific scent is not a reason to exclude cadaver dog evidence in a blanket fashion." *Id.* at 54. Instead, trial courts must "consider the reliability of the cadaver dog evidence in each case." *Id.* "[C]adaver

[51]For more information on dog sniff evidence as it relates to drug searches, see the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 8.

dog evidence is sufficiently reliable under *Daubert*[52] and *Gilbert*[53] if the proponent of the evidence establishes the foundation that (1) the handler was qualified to use the dog, (2) the dog was trained and accurate in identifying human remains, (3) circumstantial evidence corroborates the dog's identification, and (4) the evidence was not so stale or contaminated as to make it beyond the dog's competency to identify it." *Lane*, 308 Mich App at 54.

[52] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).

[53] *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004).

Chapter 5: Hearsay

5.1 Hearsay - Generally

Hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." MRE 801(c). An assertion is something capable of being true or false. See *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204-205 (1998), modified in part and remanded 458 Mich 862 (1998)[1] (concluding that a command is not an assertion because it is incapable of being true or false). Similarly, an "implied" assertion does not actually qualify as an assertion, and therefore, cannot be hearsay. *Jones*, 228 Mich App at 225-226. "For spoken words to qualify as an assertive 'statement' under the hearsay rules, those words must contain an assertion of fact that is—when made—capable of being true or false." *People v Propp (On Remand)*, 340 Mich App 652, 666 (2022) (cleaned up). "Questions are not assertions of fact[.]" *Id.* at 667.

"Hearsay is not admissible unless [the MREs] provide otherwise." MRE 802. "[T]he basic objection to hearsay testimony is that if a witness offers an assertion made by a declarant who does not testify—and if the assertion is offered as evidence of the truth of the matter asserted—the trier of fact is deprived of the opportunity to evaluate the demeanor, responsiveness, and credibility of the declarant, particularly because the declarant cannot be tested by cross-examination." *People v Sykes*, 229 Mich App 254, 261-262 (1998).

Generally, "a photograph of someone is not a 'statement' for hearsay purposes," although "nonverbal conduct can sometimes be considered a 'statement' for hearsay purposes when that conduct is intended by the person as an assertion[.]" *People v Smith*, 336 Mich App 79, 111-112 (2021) (quotation marks and citation omitted). Where Facebook comments made by non-testifying third parties were coupled with photographs and "offered by the prosecutor to establish the truth of the matter asserted, i.e., that defendant was called Brick Head[, and] [t]here was no exception to the hearsay rule applicable to the comments, . . . the trial court abused its discretion by admitting the comments into evidence." *Id.* (further finding that there was no evidence in the record to support a finding that nonverbal handgun symbols in a photograph "were intended as statements offered for the truth of some matter asserted," and admission of the photograph did not violate the rule against hearsay).

"[T]he admission of evidence in violation of the hearsay rule does not result in automatic reversal." *Smith*, 336 Mich App at 115-116 (holding "that the erroneous admission of . . . exhibits was harmless," "[g]iven the

[1]For more information on the precedential value of an opinion with negative subsequent history, see our note.

cumulative nature of the hearsay evidence, as well as all of the other evidence that placed defendant at the scene of the crime and provided him with motive").

Committee Tip:

In addressing a hearsay objection, the following analysis may be helpful:

• Is the proposed evidence a statement, as defined in MRE 801(a)?

• Was the statement made by someone other than the witness while testifying?

• Is the statement being offered to prove the truth of the matter asserted?

• If the proposed evidence is an out-of-court statement, is it admissible because (1) it is being offered for a nonhearsay purpose (i.e., not for the truth of the matter asserted); (2) it is not hearsay under MRE 801(d);[2] or (3) it falls under an exception contained in MRE 803, MRE 803A, or MRE 804?[3]

5.2 Nonhearsay

Some out-of-court statements are not hearsay. MRE 801(d). Nonhearsay statements include prior statements of a testifying witness and an opposing party's statement. MRE 801(d)(1)-(2). These statements are still subject to relevancy requirements. See MRE 402. The unavailability of a witness is not relevant to whether testimony is admissible under MRE 801. *People v Benson*, 500 Mich 964, 964 (2017).

"Contractual documents with legal effect independent of the truth of any statements contained in the documents are admissible." *People v Abcumby-Blair*, 335 Mich App 210, 239 (2020).

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[2] See Section 5.2 for a discussion of MRE 801(d).

[3] See Section 5.3(B) on MRE 803 hearsay exceptions, Section 5.3(C) on MRE 803A hearsay exceptions, and Section 5.3(D) on MRE 804 hearsay exceptions. See also the Michigan Judicial Institute's *Hearsay Flowchart*.

A. Prior Statement of Testifying Witness

A prior statement of a testifying witness is not precluded as hearsay solely because the declarant and the witness are the same person. See MRE 801(c); MRE 801(d)(1). If the statement falls under one of the categories listed in MRE 801(d)(1), it is considered nonhearsay. MRE 801(d)(1) states that a statement is not hearsay when "[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement:

> (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
>
> (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (C) identifies a person as someone the declarant perceived earlier."

1. Prior Inconsistent Statements[4]

For purposes of MRE 801(d)(1)(A), prior inconsistent statements are "not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position." See *People v Chavies*, 234 Mich App 274, 282 (1999) (quotation marks and citation omitted), overruled in part on other grounds *People v Williams*, 475 Mich 245, 254 (2006).[5] "The word 'inconsistent' is defined as marked by incompatibility of elements, not in agreement with each other, and not consistent in standards of behavior." *People v Green*, 313 Mich App 526, 531 (2015) (quotation marks and citations omitted).

Where a prior inconsistent statement is used for impeachment purposes, it "is not regarded as an exception to the hearsay rule because it is not offered as substantive evidence to prove the truth of the statement, but only to prove that the witness in fact made the statement." *Merrow v Bofferding*, 458 Mich 617, 631 (1998). See also *People v Jenkins*, 450 Mich 249, 256-257, 260-261 (1995), where the Court concluded that a prior inconsistent statement of a testifying witness was hearsay that was

[4] See Section 3.9(F) on impeaching a witness using prior inconsistent statements.

[5] For more information on the precedential value of an opinion with negative subsequent history, see our note.

admissible solely for the purpose of impeaching the witness (although admission of the statement was error due to other issues that arose as a result of the statement's admission).

Committee Tip:

What takes a prior inconsistent statement from being admissible only for impeachment to being substantively admissible is contained in MRE 801(d)(1)(A), i.e., the statement was made by the declarant (witness) under oath subject to the penalty of perjury, or in a deposition.

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2. Prior Consistent Statements[6]

The term "'consistent' . . . is defined as agreeing or accordant; compatible; not self-contradictory, constantly adhering to the same principles, course, form, etc., and holding firmly together; cohering." *People v Green*, 313 Mich App 526, 532 (2015) (quotation marks and citations omitted).

Four elements must be established before admitting a prior consistent statement: "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." *People v Jones*, 240 Mich App 704, 706-707 (2000) (quotation marks and citation omitted). The motive mentioned in elements (2) and (4) must be the same motive. *Id*. at 711. Consistent statements made after the motive to fabricate arises constitute inadmissible hearsay. *People v McCray*, 245 Mich App 631, 642 (2001).

Committee Tip:

The fourth element, the timing of the prior consistent statement, is often at issue. See

[6] See Section 3.9(F) on impeaching a witness using prior consistent statements.

People v Mahone, *294 Mich App 208, 212-214 (2011).*

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3. Prior Statement of Identification

MRE 801(d)(1)(C) requires the party seeking to introduce the evidence to show only that the witness is present and available for cross-examination. *People v Malone*, 445 Mich 369, 377 (1994). "[S]tatements of identification are not limited by whether the out-of-court declaration is denied or affirmed at trial. . . . As long as the statement is one of identification, [MRE] 801(d)(1)(C) permits the substantive use of any prior statement of identification by a witness as nonhearsay, provided the witness is available for cross-examination." *Malone*, 445 Mich at 377. In addition, the declarant is irrelevant; MRE 801(d)(1)(C) does not preclude out-of-court statements from a third party. *Malone*, 445 Mich at 377-378. In *Malone*, a witness previously identified the defendant as the victim's shooter, but denied making the identification while on the stand. *Id.* at 371-372. The trial court allowed an attorney and a police officer, both of whom were present at the prior identification, to testify that the witness had made the identification. *Id.* at 374. The Michigan Supreme Court concluded that this testimony was properly admitted as substantive evidence under MRE 801(d)(1)(C) because "the distinction between first- and third-party statements of prior identification does not limit substantive admissibility." *Malone*, 445 Mich at 390.

Committee Tip:

Statements delineated as nonhearsay under MRE 801(d)(1) must be accompanied by the declarant/witness testifying who is subject to cross-examination concerning the statements. Without this threshold, these hearsay exclusions are not employable for admission.

B. Opposing Party's Statement

A statement is not hearsay if it is an opposing party's statement offered against an opposing party and:

> "(A) was made by the party in an individual or representative capacity, except a statement made in connection with:
>
> > (i) a guilty plea to a misdemeanor motor-vehicle violation; or
> >
> > (ii) an admission of responsibility for a civil infraction under a motor-vehicle law;
>
> (B) is one the party manifested that it adopted or believed to be true;
>
> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
>
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy, if there is independent proof of the conspiracy." MRE 801(d)(2).

The Michigan Supreme Court explained the rationale for admitting an opposing party's statement:

> "[T]he admissibility of [an opposing party's] statement springs from a sense of fundamental fairness captured in the phrase, 'You said it; you're stuck with it.' The hearsay rule operates to prevent a party from being 'stuck' with what *others* have said without an opportunity to challenge them directly before the trier of fact. However, there is no reason, given the adversarial nature of our system, to extend the rule's protection to a party's own statements." *Shields v Reddo*, 432 Mich 761, 775 (1989).

1. A Party's Adoption of Belief or Truth of Statement

Criminal cases. Under MRE 801(d)(2)(B), "[a]dmission of evidence of a defendant's silence as a tacit admission of guilt is prohibited, unless the defendant has shown his adoption of or belief in the truth of the accusation." *People v Greenwood*, 209 Mich App 470, 473 (1995). In *Greenwood*, a detective testified during defendant's trial for larceny that the defendant was invited to come to the police station to give a formal interview, but never did. *Id.* at 472-473. In her closing argument, the prosecutor relied on this testimony to establish the defendant's guilt. *Id.* at 473. The Court of Appeals concluded that admitting

the testimony was improper, and, thus the prosecutor should not have relied on it in her closing argument. *Id.* The Court stated that "there is no evidence that defendant adopted or believed in the truth of the prosecutor's accusation that defendant remained silent and refused to come into the police station 'because he [committed the larceny].'" *Id.*

Medical malpractice cases. In medical malpractice cases, an affidavit of merit constitutes a party admission under MRE 801(d)(2)(B). *Barnett v Hidalgo*, 478 Mich 151, 160-161 (2007). "[B]y filing the affidavit of merit with the court, plaintiff manifests 'an adoption or belief in its truth,'" as required by MRE 801(d)(2)(B). *Barnett*, 478 Mich at 161-162 (plaintiff hired her own experts to prepare the affidavits, was fully aware of their statements in the affidavits, voluntarily submitted those affidavits to support her complaint, and called those experts to testify at trial).

2. Statements by Authorized Persons

Criminal cases. It was proper for a trial court to admit a defendant's notice of alibi under MRE 801(d)(2)(C) to impeach the defendant where it was filed by the defendant's attorney, "who was a person authorized by defendant to make a statement concerning the subject." *People v Von Everett*, 156 Mich App 615, 624-625 (1986).

Medical malpractice cases. In medical malpractice cases, an affidavit of merit constitutes a party admission under MRE 801(d)(2)(C). *Barnett v Hidalgo*, 478 Mich 151, 160 (2007). "An independent expert who is not withdrawn before trial is essentially authorized by the plaintiff to make statements regarding the subjects listed by [MCL 600.2912d(1)(a)-(d)]. Therefore, consistent with the actual language of MRE 801(d)(2)(C), an affidavit of merit is 'a statement by a person authorized by the party to make a statement concerning the subject . . . .'" *Barnett*, 478 Mich at 162.

3. Statements by Agents or Employees

A party should be held "responsible for their choice of an agent or employee, and consequently for words spoken and actions taken by those they have chosen, during the period of time they choose to maintain the relationship." *Shields v Reddo*, 432 Mich 761, 775 (1989). The Court noted that the statement must be made while the relationship still exists; statements made after the relationship is terminated are not admissible under MRE 801(d)(2)(D). *Shields*, 432 Mich at 775-776. In

Shields, the plaintiff urged the Court to admit into evidence the deposition testimony of the defendant's former employee under MCR 2.308(A)(1)(b)[7] without making a showing of unavailability. *Shields*, 432 Mich at 764. The Court stated that "the deposition testimony of a person who was employed by a party at the time of the occurrence out of which an action arose, but who was no longer employed by the party when the deposition was taken, is not admissible in evidence without a finding that the deponent is unavailable to testify at trial." *Id.* at 785.

4. Coconspirator Statements

In order for a statement to be admissible under MRE 801(d)(2)(E), the proponent of the evidence must establish three things:

> (1) by a preponderance of the evidence and using independent evidence, a conspiracy existed;
>
> (2) the statement was made during the course of the conspiracy; and
>
> (3) the statement furthered the conspiracy. *People v Martin*, 271 Mich App 280, 316-317 (2006).

"A conspiracy exists where two or more persons combine with the intent to accomplish an illegal objective." *Martin*, 271 Mich App at 317. In order to establish that a conspiracy existed, the proponent may offer circumstantial or indirect evidence; direct proof of the conspiracy is not required to satisfy the first requirement. *Id.* In satisfying the second requirement, a "conspiracy continues 'until the common enterprise has been fully completed, abandoned, or terminated.'" *Id.*, quoting *People v Bushard*, 444 Mich 384, 394 (1993). Idle chatter will not show that a statement furthered a conspiracy under the third requirement. *Martin*, 271 Mich App at 317. However, "statements that prompt the listener, who need not be one of the conspirators, to respond in a way that promotes or facilitates the accomplishment of the illegal objective will suffice." *Id.*

In *Martin*, the defendant and his brother were charged with crimes arising out of their participation in the operation of an adult entertainment establishment. *Martin*, 271 Mich App at 285. At trial, Angela Martin, the ex-wife of the defendant's

[7] The Supreme Court amended MCR 2.308(A) at the end of this case "to eliminate the overlap and possibility of conflict between MCR 2.308(A) and the Rules of Evidence." *Shields*, 432 Mich at 786.

brother, testified about certain statements she heard her ex-husband make, including his admission that sex acts were occurring at the establishment and that he and the other participants financially benefited from the illegal activities. *Id.* at 316. Angela further testified that she overheard a telephone conversation between the defendant and her ex-husband regarding "the VIP cards necessary to access the downstairs area where acts of prostitution occurred." *Id.* at 318. The defendant was convicted, and on appeal argued that Angela's testimony regarding his brother's statements was inadmissible hearsay. *Id.* at 316.

The Court of Appeals noted that trial testimony given before Angela's testimony provided evidence sufficient to raise an inference that the defendant and his brother conspired to carry out the illegal objectives of maintaining the establishment as a house of prostitution, accepting earnings of prostitutes, and engaging in a pattern of racketeering activity. *Martin*, 271 Mich App at 317-318. The Court further noted that because the conversation about the use of VIP cards clearly concerned the activities covered by the conspiracy, the statements were made in furtherance of the conspiracy. *Id.* at 318-319. Statements made to Angela regarding the financial compensation her ex-husband and the defendant earned from the establishment were also made in furtherance of the conspiracy because the statements informed Angela of her collective stake in the success of the conspiracy and served to foster the trust and cohesiveness necessary to keep Angela from interfering with the continued activities of the conspiracy. *Id.* at 319. Because the statements about which Angela testified satisfied the requirements in MRE 801(d)(2)(E), they were properly admitted against the defendant at trial. *Martin*, 271 Mich App at 316-319.

Committee Tip:

As with MRE 803(d)(1), the MRE 803(d)(2) exclusions have a threshold for one of the described statements, i.e, they must be used against the party making the statement. Also note that although these statements are often called statements by a party opponent, in only MRE 801(d)(2)(A) is the speaker actually a party. Rather the rule is designed to impose statements

made by others on the party. See MRE 801(d)(2)(B)-(E).

5.3 Hearsay Exceptions[8]

Hearsay evidence may be admissible if it comes within an established exception. See MRE 802. There are many exceptions to the hearsay rule. This section only discusses the most common exceptions.

A. Confrontation Issues

Hearsay statements that are admissible pursuant to a hearsay exception may still be inadmissible during trial if admission would violate the defendant's right to confrontation. US Const, Am VI; Const 1963, art 1, § 20. See also *Crawford v Washington*, 541 US 36, 68 (2004) (holding that the Confrontation Clause bars the admission of testimonial statements of an unavailable witness unless the defendant had a prior opportunity for cross-examination).[9] "By its straightforward terms, the Confrontation Clause directs inquiry into two questions: (1) Does the person in controversy comprise a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?" *People v Fackelman*, 489 Mich 515, 562 (2011). "[T]he rules of evidence do not trump the Confrontation Clause." *Id.* at 545. In *Fackelman*, the Michigan Supreme Court concluded that "the rules of evidence cannot override the Sixth Amendment and cannot be used to admit evidence that would otherwise implicate the Sixth Amendment." *Id.* Accordingly, "a defendant's constitutional right of confrontation may be violated when a trial witness's testimony introduces the substance of an out-of-court, testimonial statement by an unavailable witness." *People v Washington*, ___ Mich ___, ___ (2024). Specifically, "the Confrontation Clause is violated when a witness's testimony at trial introduces an out-of-court statement of an unavailable witness if the witness's testimony leads to a clear and logical inference that the out-of-court declarant made a testimonial statement." *Id.* at ___ ("In such a situation, the defendant is not able to cross-examine the veracity of the out-of-court statement, and the

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[8] The provisions previously found in MRE 803(24) and MRE 804(b)(7) now appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024. See Section 5.3(E). See also the Michigan Judicial Institute's *Hearsay Flowchart*.

[9] For a thorough discussion of *Crawford* and its progeny, as well as discussion of the testimonial or nontestimonial nature of a statement, see Section 3.5.

defendant is thereby denied his constitutional right to confront the witness.").

The Confrontation Clause is not violated by admission of every out-of-court, testimonial statement. *Washington*, ___ Mich at ___, fn 8. Indeed, "even if the statement is testimonial, 'the Confrontation Clause applies only to statements used as substantive evidence.'" *Washington*, ___ Mich at ___, quoting *Fackelman*, 489 Mich at 528.

Crawford does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133 (2004). Thus, the admission of an unavailable witness's former testimonial statement is not barred by *Crawford* if the statement is admitted to impeach a witness. *McPherson*, 263 Mich App at 133-135. See also *People v Chambers*, 277 Mich App 1, 11 (2007), where the trial court properly admitted a police officer's testimony regarding a confidential informant's out-of-court identification of the defendant because the testimony was offered to explain how and why the defendant was arrested, not to prove the truth of the informant's tip. But see *People v Henry (After Remand)*, 305 Mich App 127, 154 (2014), where the trial court's admission of the detective's testimony regarding the confidential informant's out of court statements was improper because the detective's testimony "was not limited to show why [the detective] proceeded in a certain direction with his investigation," and was instead used to "establish or prove past events potentially relevant to later criminal prosecution[.]" *Id.* (quotations, alterations, and citation omitted).

"Testifying officers may provide context for their investigation or explain 'background' facts." *Washington*, ___ Mich at ___, n 8 (quotation marks and citation omitted). "Such out-of-court statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain the officer's actions. *These statements often provide necessary context where a defendant challenges the adequacy of an investigation. But absent such claims, there is a questionable need for presenting out-of-court statements because the additional context is often unnecessary, and such statements can be highly prejudicial*. Statements exceeding the limited need to explain an officer's actions can violate the Sixth Amendment—where a nontestifying witness specifically links a defendant to the crime, testimony becomes inadmissible hearsay." *Id.* (quotation marks and citation omitted).

Offering testimony to establish chain of custody is not an exception to the Confrontation Clause. *Id.* at ___. Indeed, "it is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced

must (if the defendant objects) be introduced live." *Id*. at ___ (cleaned up). In *Washington*, the "[d]efendant drove across the border from Michigan into Canada without paying the toll," and a Canadian customs agent "arrested defendant and brought him back to the American side of the bridge" where an American customs agent "took custody of defendant and a bulletproof vest." *Id*. at ___. Subsequently, the "[d]efendant was charged with being a violent felon in possession of body armor." *Id*. at ___. The American officer testified that he and the Canadian officer met on the American side of the bridge and, based on communications between them, the American officer took custody of defendant and took possession of the body armor at the same time. *Id*. at ___. The American officer "acknowledged that defendant was not wearing the vest when he took defendant into custody and that he had no direct knowledge as to whether defendant ever possessed the vest." *Id*. at ___. "[R]egardless of whether the statement was offered merely to establish the chain of custody or to establish that defendant possessed the bulletproof vest as an element of the charged offense, the statement would need to be offered for the truth of the matter asserted, i.e., that defendant actually possessed the bulletproof vest." *Id*. at ___ (The Canadian officer's "statement that defendant possessed the bulletproof vest was substantive proof that he was guilty of being a violent felon in possession of body armor."). "The clear and logical inference from [the American officer's] testimony is that during their 'communications,' [the Canadian officer] made an out-of-court statement regarding his belief that defendant possessed the body armor." *Id*. at ___ (holding that the statement was testimonial, that it was erroneously admitted, and that its admission violated the defendant's constitutional right of confrontation).

"Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Williams v Illinois*, 567 US 50, 58 (2012) (plurality opinion) (opinion by Alito, J.). Thus, the Confrontation Clause was not implicated in the following colloquy between the prosecutor and an expert witness from the police laboratory:

> "'Q Was there a computer match generated of the male DNA profile *found in semen from the vaginal swabs of [the victim]* to a male DNA profile that had been identified as having originated from [the defendant]?
>
> "'A Yes, there was.'" *Williams*, 567 US at 71-72.

The *Williams* Court concluded that the emphasized language did not constitute a statement that was asserted "for the purpose of proving the truth of the matter asserted–i.e., that the matching DNA profile was 'found in semen from the vaginal swabs.' Rather, that

fact was a mere premise of the prosecutor's question, and [the expert witness] simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles. There is no reason to think that the trier of fact took [the expert's] answer as substantive evidence to establish where the DNA profiles came from." *Williams*, 567 US at 72. In addition, assuming the laboratory report of the DNA profile had been referenced to prove the truth of the matter asserted, the report did not violate the defendant's confrontation right because it was not prepared for the purpose of identifying the defendant as the perpetrator, but only for the purpose of "catch[ing] a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." *Id*. at 84. No one at the laboratory could have known that the profile it produced would inculpate anyone whose DNA profile was in the law enforcement database: "Under these circumstances, there was no 'prospect of fabrication' and no incentive to produce anything other than a scientifically sound and reliable profile." *Id*. at 84-85, quoting *Michigan v Bryant*, 562 US 344, 361 (2011). For both of these reasons, the United States Supreme Court concluded that there was no Confrontation Clause violation. *Williams*, 567 US at 86.

Committee Tip:

As with many areas of evidence law, the purpose for admission can drive the question of admissibility under the Confrontation Clause.

The right of confrontation does not apply during a preliminary examination. *People v Olney*, 327 Mich App 319, 331 (2019) (finding that in addition to misunderstanding the law, which alone required reversal, "the circuit court abused its discretion when it granted defendant's motion to quash on the basis that defendant's right of confrontation was violated" during his preliminary examination even though the testimony at the examination would have likely violated the Confrontation Clause and been inadmissible at trial).

"[A] machine is not a witness in the constitutional sense and . . . data automatically generated by a machine are accordingly nontestimonial in nature." *People v Dinardo*, 290 Mich App 280, 290-291 (2010). "A printout of machine-generated information, as opposed to a printout of information entered into a machine by a person, does not constitute hearsay because a machine is not a person and therefore not a declarant capable of making a statement." *Id*. at 291. In *Dinardo*, the Court of Appeals approved the

admissibility of an officer's DI-177 report "[b]ecause the DataMaster breath-test results, printed on the DataMaster ticket, were self-explanatory data produced entirely by a machine and not the out-of-court statements of a witness[.]" *Id.*

See Section 3.5(D)(3) and Section 5.3(D)(4) for information on forfeiture by wrongdoing, and Section 3.5(F) for information on the "language conduit" rule.

B. Rule 803 Exceptions[10]

Generally, MRE 803 does not require a declarant to be unavailable before the evidence will be admitted. However, under *Crawford v Washington*, 541 US 36 (2004),[11] any *testimonial* hearsay that is offered at trial can only be admitted upon a showing that the declarant is unavailable and was previously subject to cross-examination.

1. Present Sense Impression

"A statement describing or explaining an event or condition made while or immediately after the declarant perceived it" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness[.]" MRE 803(1).

The Michigan Supreme Court requires three conditions to be satisfied before evidence may be admitted under the present sense impression exception. *People v Hendrickson*, 459 Mich 229, 235-236 (1998). In *Hendrickson*, the Court stated:

> "The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *Hendrickson*, 459 Mich at 236.

A slight lapse in time between the event and the description may still satisfy the *substantially contemporaneous* requirement. *Hendrickson*, 459 Mich at 236. In *Hendrickson*, the victim called 911 and explained that she had just been beaten by her husband. *Id.* at 232. The Court concluded that her phone call

[10] This subsection addresses selected MRE 803 exceptions; it is not comprehensive. MRE 803 contains 23 hearsay exceptions. MRE 803(1)-(23). See also the Michigan Judicial Institute's *Hearsay Flowchart*.

[11] See Section 5.3(A) on admissibility under *Crawford v Washington*, 541 US 36 (2004).

satisfied the *substantially contemporaneous* requirement because the victim's statement "was that the beating had just taken place" and "the defendant was in the process of leaving the house as the victim spoke." *Id.* at 237. See also *People v Chelmicki*, 305 Mich App 58, 63 (2014) (the victim's police statement was admissible as a present sense impression where the "statement provided a description of the events that took place inside the apartment, . . . the victim perceived the event personally, . . . [and] 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").

Corroboration (independent evidence of the event) is required. *Hendrickson*, 459 Mich at 237-238, 238 n 4 ("strict corroboration *requiring* a percipient witness, such as a neighbor or police officer" is not required; corroboration "will suffice if it assures the reliability of the statement"). In *Hendrickson*, the prosecution sought to introduce photographs of the victim's injuries as independent evidence of the beating. *Id.* at 233. The Court concluded that the photographs provided sufficient corroborating evidence of the event because the "photographs show[ed] the victim's injuries [and] were taken near the time the beating [was] alleged to have occurred. In addition, the injuries depicted in the photographs were consistent with the type of injuries sustained after a beating." *Id.* at 239. "[T]he photographs provide credible independent evidence of the assault, permitting the admission of the victim's statement as a present sense impression." *Id.*

2. Excited Utterance

"A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness[.]" MRE 803(2).

There are two requirements that must be met before a statement may be admitted as an excited utterance:

> (1) there must be a startling event, and
>
> (2) the statement must be made while still under the excitement caused by the startling event. *People v Smith*, 456 Mich 543, 550 (1998).

The *Smith* Court stated that "it is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Smith*, 456 Mich at 551. Although the time between the event and the statement is an important factor to consider, it is not dispositive, and the court should determine if there is a good reason for a delay. *Id.* Some plausible reasons include shock, unconsciousness, or pain. *Id.* at 551-552. "Unlike MRE 803(1), the present sense impression exception, which requires that the 'statement describing or explaining an event or condition [be] made while the declarant was perceiving the event or condition, or immediately thereafter,' there is no express time limit for excited utterances." *Smith*, 456 Mich at 551 (alteration in original). In *Smith*, the victim was sexually assaulted and made a statement about the assault ten hours after it occurred. *Id.* at 548-549. The Court concluded that the statement was admissible as an excited utterance because the victim's uncharacteristic actions during the time between the event and the statement "describe[d] a continuing level of stress arising from the assault that precluded any possibility of fabrication." *Id.* at 552-553.

Admission of an excited utterance under MRE 803(2) "does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement may be admitted. Rather, MRE 1101(b)(1) and MRE 104(a) instruct that when a trial court makes a determination under MRE 803(2) about the existence of a startling event or condition, the court may consider the out-of-court statement itself in concluding whether the startling event or condition has been established." *People v Barrett*, 480 Mich 125, 139 (2008).

The trial court did not abuse its discretion by admitting several statements made by the complainant as excited utterances. *People v Green*, 313 Mich App 526, 536 (2015). First, the two incidents of sexual contact between the defendant and the complainant constituted startling events despite the fact that "neither physical coercion nor violence was alleged in either occurrence" because "both occurred in the context of defendant's investigating [the complainant] for child abuse and neglect," and testimony established that the complainant was "very upset and crying during both conversations." *Id.* The first statements "were made within a few minutes of defendant's leaving the apartment, so there was no time to contrive and misrepresent his actions," and the second statements "were made within hours of defendant leaving the

apartment, so there was little time to contrive and misrepresent his actions." *Id.* at 536-537. Finally, the statements "were clearly related to the circumstances surrounding defendant's actions, which were the startling events." *Id.* at 536.

3. Then-Existing Mental, Emotional, or Physical Condition

"A statement of the declarant's then-existing state of mind or emotional, sensory, or physical condition (such as intent, plan, motive, design, 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 declarant's will" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness[.]" MRE 803(3).

a. State of Mind

Before a statement may be admitted under MRE 803(3), the court must conclude that the declarant's state of mind is relevant to the case. *Int'l Union UAW v Dorsey (On Remand)*, 273 Mich App 26, 36 (2006). For example, a "victim's state of mind is usually only relevant in homicide cases when self-defense, suicide, or accidental death are raised as defenses to the crime." *People v Smelley*, 285 Mich App 314, 325 (2009), vacated in part on other grounds 485 Mich 1019 (2010).[12] In *Smelley*, the Court concluded that the trial court abused its discretion in admitting statements that purported to show the victim's state of mind before he was killed because the victim's "state of mind was not a significant issue in this case and did not relate to any element of the crime charged or any asserted defense." *Smelley*, 285 Mich App at 325 (the defendant did not assert self-defense, suicide, or accidental death as a defense, but contended he was not the person who murdered the victim).

Where the declarant states that he or she is afraid, the statement may be admissible to show the declarant's state of mind. *In re Utrera*, 281 Mich App 1, 18-19 (2008). In *Utrera*, the respondent appealed the trial court's order terminating her parental rights and argued that hearsay testimony was improperly admitted. *Id.* at 14. The Michigan Court of Appeals affirmed the trial court's

[12]For more information on the precedential value of an opinion with negative subsequent history, see our note.

decision to admit statements the child declarant made to her therapist and to a guardianship investigator regarding the fear the child felt towards her mother because these hearsay statements were relevant and pertained to the declarant's then-existing mental or emotional condition. *Id.* at 18-19.

In *People v Propp (On Remand)*, 340 Mich App 652, 667 (2022), the Michigan Court of Appeals held that "all of the victim's statements regarding defendant's pattern of stalking, threats, and domestic violence were admissible as evidence concerning the victim's state of mind—and her fear of defendant—under MRE 803(3)." The Court further observed that the "statements were also admissible for several valid nonhearsay purposes, including the effect that they might have had in motivating defendant to kill the victim." *Id.* at 667. Accordingly, the Court concluded that "the statements of the victim-wife [were] admissible to show the effect they had on the defendant-husband." *Id.*

b. Physical Condition

A declarant's statement that he or she is in pain from an accident may be admissible under MRE 803(3). *Duke v American Olean Tile Co*, 155 Mich App 555, 571 (1986). However, statements that describe the circumstances of the accident are not admissible under this rule. *Id.* Similarly, statements about the declarant's symptoms may be admissible, but for purposes of MRE 803(3), it is irrelevant where the trauma occurred. *Cooley v Ford Motor Co*, 175 Mich App 199, 203-204 (1988).

4. Statements Made for Purposes of Medical Treatment or Diagnosis

A statement that "is made for—and is reasonably necessary to—medical treatment or diagnosis in connection treatment" and "describes medical history, past or present symptoms or sensations, their inception, or their general cause" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness[.]" MRE 803(4).

"In order to be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the

injury. Traditionally, further supporting rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *People v Meeboer (After Remand)*, 439 Mich 310, 322 (1992). "'Particularly in cases of sexual assault, in which the injuries might be latent . . . a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment.'" *People v Johnson*, 315 Mich App 163, 193 (2016), quoting *People v Mahone*, 294 Mich App 208, 215 (2011). But see *People v Shaw*, 315 Mich App 668, 675 (2016) (holding that the victim's statements to a pediatrician regarding alleged sexual abuse were not admissible under MRE 803(4) where the pediatrician's examination "did not occur until seven years after the last alleged instance of abuse, thereby minimizing the likelihood that the complainant required treatment," and "the complainant did not seek out [the pediatrician] for gynecological services[; r]ather, she was specifically referred to [the pediatrician] by the police in conjunction with the police investigation into the allegations of abuse by defendant").

Generally, statements of identification are not admissible under MRE 803(4) because "the identity of an assailant cannot be fairly characterized as the '*general cause*' of an injury." *People v LaLone*, 432 Mich 103, 111-113 (1989). In *LaLone*, the statement of identification was not admissible because it was not necessary to the declarant's *medical* diagnosis or treatment, and the statement was not sufficiently reliable because it was made to a psychologist, not a physician. *Id.* at 113-114. However, the *Meeboer* Court determined that statements of identification from a *child*-declarant alleging sexual abuse are "necessary to adequate medical diagnosis and treatment." *Meeboer*, 439 Mich at 322. Identification statements from a child allow the medical health care provider to (1) assess and treat any sexually transmitted diseases or potential pregnancy, (2) structure an appropriate examination in relation to the declarant's pain, (3) prescribe any necessary psychological treatment, and (4) know whether the child will be returning to an abusive home or will be given an opportunity to heal from the trauma. *Id.* at 328-329.

Where the declarant is a child, the court should "consider the totality of the circumstances surrounding the declaration of the out-of-court statement." *Meeboer*, 439 Mich at 324. Further, considering certain factors may be helpful in determining the trustworthiness of the child's statement. See *Meeboer*, 439 Mich

at 324-325, for a list of 10 factors the court may consider to determine the trustworthiness of a child's statement.

5. Recorded Recollection

A record that "is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately," "was made or adopted by the witness when the matter was fresh in the witness's memory," and "accurately reflects the witness's knowledge" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness[.]" MRE 803(5). "If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party." *Id.*

In order to admit evidence pursuant to MRE 803(5), the following foundational requirements must be met:

> "'(1) The document must pertain to matters about which the declarant once had knowledge;
>
> (2) The declarant must now have an insufficient recollection as to such matters; [and]
>
> (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory.'" *People v Daniels*, 192 Mich App 658, 667-668 (1992), quoting *People v J D Williams (After Remand)*, 117 Mich App 505, 508-509 (1982).

See also *People v Dinardo*, 290 Mich App 280, 288 (2010), where the Court of Appeals concluded that a DI-177 breath-test report is a hearsay document that may be admitted as a recorded recollection under MRE 803(5) if it satisfies the requirements in *Daniels*, 192 Mich App at 667-668. In *Dinardo*, the defendant was arrested for drunk driving and was tested for alcohol using a DataMaster machine. *Dinardo*, 290 Mich App at 283. The officer testified that he wrote the results of the alcohol test on a DI-177 report at the time of the test, that he no longer recalled the specific results of the test, and that he did not have a copy of the original DataMaster ticket.[13] *Id.* at 283-

[13] "A Datamaster ticket apparently states the blood alcohol percentage for each sample, the time when the testing procedure began (including the observation period before the test), and the exact time when each sample was taken and analyzed." *Dinardo*, 290 Mich App at 283 n1.

284. The Court concluded that "the DI-177 report plainly satisfies all three requirements for admissibility [under MRE 803(5)]. [The officer] saw the DataMaster ticket and therefore had personal knowledge of the breath-test results at the time he recorded them onto the DI-177 report. Furthermore, [the officer] indicated that he no longer [had] any independent recollection of the specific results printed on the DataMaster ticket. Lastly, it is undisputed that [the officer] personally prepared the DI-177 report." *Dinardo*, 290 Mich App at 293. Therefore, the officer was permitted to read the contents of the report into evidence at trial. *Id.* at 294.

"MRE 803(5) does not require a showing that the witness was totally unable to recall the memorandum's contents, but only that the witness 'now has insufficient recollection to enable him to testify fully and accurately.'" *People v Missias*, 106 Mich App 549, 554 (1981).

The trial court did not abuse its discretion in admitting the victim's statement, written down for police shortly after they responded to an incident of domestic violence, when, at trial, the victim "recalled certain events after reading [her written statement], but otherwise testified that the statement did not refresh her recollection." *People v Chelmicki*, 305 Mich App 58, 62 (2014). The statement was admissible under MRE 803(5) because the 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." *Chelmicki*, 305 Mich App at 64.

"Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of the depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read." MCR 2.513(F).

Committee Tip:

Recorded recollection, sometimes called past recollection recorded, is one of just a few evidence rules that prescribe a limited format of admissibility. The document may be read to the jury by the proponent but not physically

introduced. Introducing the document is left to the opposing party.

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6. Records of Regularly Conducted Activity

"A record of an act, transaction, occurrence, event, condition, opinion, or diagnosis" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness" if:

> "(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule prescribed by the Supreme Court or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." MRE 803(6).

The Michigan Supreme Court summarized the business records hearsay exception as follows:

> "In order to ensure the same high degree of accuracy and reliability upon which the traditional, but narrowly construed business records exception was founded, the current rules also recognize that trustworthiness is the principal justification giving rise to the exception. Thus, . . . MRE 803(6) provide[s] that trustworthiness is presumed, subject to rebuttal, when the party offering the evidence establishes the requisite foundation. Even though proffered evidence may meet the literal requirements of the rule, however, the presumption of trustworthiness is rebutted where the source of information or the method or

> circumstances of preparation indicate lack of trustworthiness." *Solomon v Shuell*, 435 Mich 104, 125-126 (1990) (quotation marks and citation omitted).

If a party makes a timely objection, the court must determine whether the proffered evidence lacks trustworthiness, and if so lacking, refuse to admit the evidence under MRE 803(6). *Solomon*, 435 Mich at 126. "[T]rustworthiness is . . . an express condition of admissibility." *Id.* at 128. In *Solomon* (a wrongful death action), the defendant-police officers offered four police reports into evidence detailing a shooting that resulted in the death of the decedent. *Id.* at 108. The Michigan Supreme Court held that the circumstances under which the reports were generated clearly indicated a lack of trustworthiness because the defendants had an obvious motive to misrepresent the facts (they were under investigation for the death). *Id.* at 126-127.

"MRE 803(6) gives the trial court discretion to consider whether any particular circumstances undercut the indicia of trustworthiness that is generally presumed to apply to business records." *People v Fontenot*, ___ Mich ___, ___ (2022). "[N]owhere in MRE 803(6) is there any limitation on the meaning of 'trustworthiness' or specification of how or why a record might lack trustworthiness." *Fontenot*, ___ Mich at ___ (quotation marks and citation omitted). "[T]rustworthiness is, under MRE 803(6) an express condition of admissibility." *Fontenont*, ___ Mich at ___ (cleaned up). "The lack of a direct employer-employee relationship, without more, does not indicate a lack of trustworthiness." *Id.* at ___ (holding that the trial court "erred by determining that the MRE 803(6) exception did not apply because the DataMaster technician was employed by a contractor rather than directly by the state of Michigan" and remanding so "the trial court may consider further arguments on the issue of trustworthiness").

"The hearsay exception in MRE 803(6) is based on the inherent trustworthiness of business records. That trustworthiness is undermined when the records are prepared in anticipation of litigation." *People v McDaniel*, 469 Mich 409, 414 (2003) (concluding that a police laboratory report that had been used at trial to identify a seized substance was inadmissible hearsay under MRE 803(6) due to the source of the information, or the methods or circumstances of preparation of the report, which indicated a lack of trustworthiness). However, fingerprint cards may be admissible under MRE 803(6) as long as they are not prepared in anticipation of litigation. *People v Jambor (On Remand)*, 273 Mich App 477, 483-484 (2007). In *Jambor*, the

Court concluded that fingerprint cards were admissible under MRE 803(6) because an adversarial relationship did not exist between the defendant and law enforcement at the time the fingerprint cards were prepared. *Jambor*, 273 Mich App at 483-484. "[T]he fingerprint cards were prepared during the normal course of investigating a crime scene." *Id.* at 483.

Pursuant to MRE 805 (hearsay within hearsay), the proponent of the evidence must "establish an appropriate foundation for each independent hearsay statement to fall within a hearsay exception[.]" *Solomon*, 435 Mich at 129.

Under certain circumstances, records of regularly conducted activity may be self-authenticating. See MRE 902(11).

Committee Tip:

Note that in the first five hearsay exceptions under MRE 803, trustworthiness is implicit and is the governing principle. In MRE 803(6), trustworthiness is expressly mentioned and the lack thereof can violate use of the exception. See also MRE 803(7).

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7. Absence of Record

"Evidence that a matter is not included in a record described in" MRE 803(6) is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness" if:

> "(A) the evidence is admitted to prove that the matter did not occur or exist;
>
> (B) a record was regularly kept for a matter of that kind; and
>
> (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness." MRE 803(7).

MRE 803(7) permits admission of evidence that there were no recorded reports of an allegation of sexual assault because such evidence is "of a kind of which a memorandum, report, record, or data compilation [is] regularly made and preserved, . . . [and] evidence that no report was ever made was admissible to prove the nonoccurence or nonexistence of the

matter[.]" *People v Marshall*, 497 Mich 1023, 1023 (2015) (first alteration in original) (quotation marks and citation omitted).

8. Public Records

"A record or statement of a public office" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness" if it sets out:

> "(A) the office's activities; or
>
> (B) a matter observed while under a legal duty to report, but not including:
>
> (i) in a criminal case, a matter observed by law-enforcement personnel; and
>
> (ii) information to which the limitations in MCL 257.624 apply." MRE 803(8).[14]

"[T]he principle justification for excepting public records from the hearsay rule is trustworthiness, which is generally ensured when records are prepared under circumstances providing an official duty to observe and report."*Solomon v Shuell*, 435 Mich 104, 131 (1990). Where documents are prepared in anticipation of litigation or the preparer or source of information has a motive to misrepresent the information, they are not admissible under MRE 803(8) because they lack trustworthiness. *Solomon*, 435 Mich at 131-132. Pursuant to MRE 805 (hearsay within hearsay), the proponent of the evidence must "establish an appropriate foundation for each independent hearsay statement to fall within a hearsay exception[.]" *Solomon*, 435 Mich at 129.

In *Solomon* (a wrongful death action), the defendant-police officers offered four police reports into evidence detailing a shooting that resulted in the death of the decedent. *Solomon*, 435 Mich at 108. The Michigan Supreme Court held that the circumstances under which the reports were generated clearly indicated a lack of trustworthiness because the defendants had an obvious motive to misrepresent the facts (they were under investigation for the death). *Id.* at 132-133.

Police reports may be admissible under MRE 803(8), as long as they are not prepared in a setting that is adversarial to the defendant. *People v McDaniel*, 469 Mich 409, 413 (2003). In

[14] A motor vehicle accident report required by Chapter 6 of the Michigan Vehicle Code "shall not be available for use in a court action[.]" MCL 257.624(1).

McDaniel (a drug case), a police laboratory report was inadmissible under MRE 803(8) because it was adversarial; "[i]t was destined to establish the identity of the substance—an element of the crime for which defendant was charged[.]" *McDaniel*, 469 Mich at 413.

Under certain circumstances, public records may be self-authenticating. See MRE 902(1)-(4).

9. Judgment of a Previous Conviction

"Evidence of a final judgment of conviction" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness" if:

> "(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea unless allowed by MRE 410;[15]
>
> (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
>
> (C) the evidence is admitted to prove any fact essential to the judgment; and
>
> (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant." MRE 803(22).

"The pendency of an appeal may be shown but does not affect admissibility." *Id*.

C. Rule 803A Exception: Child's Statement[16] About Sexual Act[17]

In criminal and delinquency proceedings only,[18] MRE 803A(a), a child's "statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding if:

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[15] See Section 2.10 for discussion of MRE 410 and plea discussions.

[16] See Section 3.6 on child witnesses.

[17] See Section 5.3(A) on admissibility under *Crawford v Washington*, 541 US 36, 68 (2004). See also the Michigan Judicial Institute's *Hearsay Flowchart*.

[18] See also MCR 3.972(C), which applies to child protective proceedings and contains a rule similar to MRE 803A.

> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance;
>
> (4) the statement is introduced through the testimony of someone other than the declarant; and
>
> (5) the proponent of the statement makes known to the adverse party the intent to offer it and its particulars sufficiently before the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." MRE 803A(b).

"If the declarant made more than one corroborative statement about the incident, only the first is admissible under [MRE 803A]." *Id.*

Committee Tip:

Notice that this is one of the few rules of evidence requiring advance notice for its use as a hearsay exception. Moreover, the rule has multiple necessary "elements," the absence of which will relegate the request for admission unsatisfied.

Spontaneity. Generally, in order for a statement to be spontaneous under MRE 803A, "the declarant-victim [must] initiate the *subject of sexual abuse*." *People v Gursky*, 486 Mich 596, 613 (2010). Statements subject to analysis under MRE 803A fall into three groups: (1) purely impulsive statements (those that "come out of nowhere" or "out of the blue"); (2) non sequitur statements (those made as a result of prompt, plan, or questioning, but "are in some manner atypical, unexpected, or do not logically follow from the prompt"); and (3) statements made in answer to open-ended and nonleading questions but "include answers or information outside the scope of the questions" (these are the most likely to be nonspontaneous and require extra scrutiny). *Gursky*, 486 Mich at 610-612. To find spontaneity in statements falling into the third category of possible spontaneous statements, "the child must broach the

subject of sexual abuse, and any questioning or prompts from adults must be nonleading and open-ended[.]" *Id.* at 614.

The Michigan Supreme Court emphasized that this holding does *not* automatically preclude a statement's admissibility under MRE 803A simply because the statement was made as a result of adult questioning. *Gursky*, 486 Mich at 614. "When questioning is involved, trial courts must look specifically at the questions posed in order to determine whether the questioning shaped, prompted, suggested, or otherwise implied the answers." *Id.* at 615. In *Gursky*, the facts of the case showed that (1) the victim did not initiate the subject of sexual abuse; (2) the victim "did not come forth with her statements on her own initiative, and thus that the statements were not necessarily products of her creation"; and (3) the adult questioning the victim "specifically suggested defendant's name to [the victim.]" *Id.* at 616-617. Therefore, the Court concluded that the victim's statements were not spontaneous and, thus, inadmissible under MRE 803A. *Gursky*, 486 Mich at 617.

The *Gursky* Court went on to stress that spontaneity is not the only factor a court must look at in order to determine the admissibility of a statement pursuant to MRE 803A; even after finding that a statement is spontaneous, the trial court "must nevertheless also conduct the separate analyses necessary to determine whether the statement meets the other independent requirements of MRE 803A." *Gursky*, 486 Mich at 615-616.

Multiple corroborative statements. "MRE 803A . . . permits only the first corroborative statement as to each incident that included a sexual act performed with or on the declarant by the defendant. Though the [rule] does not define the term incident, it is commonly understood to mean an occurrence or event, or a distinct piece of action, as in a story." *People v Douglas*, 496 Mich 557, 575 (2014) (quotation marks and citation omitted). Consequently, a child-victim's disclosure to a forensic interviewer of a sexual act that is inadmissible under MRE 803A because it was not the child's first corroborative statement "does not become admissible under MRE 803A simply because her first disclosure of [a separate] incident followed shortly after it." *Douglas*, 496 Mich at 576, 582-583 (also holding that the evidence was inadmissible under the residual hearsay exception (MRE 807),[19] and ultimately

[19]The provisions previously found in MRE 803(24) now appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024. See Section 5.3(E) for information on the residual exception to the hearsay rule.

concluding that the evidentiary errors required reversal and a new trial).

However, a statement that is inadmissible under MRE 803A because it is a subsequent corroborative statement, is not precluded from being admitted via another hearsay exception. *People v Katt*, 468 Mich 272, 294-297 (2003) (holding the statement was admissible under the residual hearsay exception).

D. Rule 804 Exceptions[20]

Hearsay exceptions that apply only when the declarant is unavailable are set forth in MRE 804(b). A declarant is not unavailable as a witness "if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying." MRE 804(a). The plain language of MRE 804(a) "mandates that the court consider whether the conduct of the proponent of the statement was *for the purpose of* causing the declarant to be unavailable." *People v Lopez*, 501 Mich 1044, 1044 (2018) (although the trial court "found that the witness was unavailable because he felt threatened by the prosecutor," it "did not consider whether the prosecutor intended to cause the declarant to refuse to testify when engaging in that conduct").

"The trial court did not abuse its discretion by declaring [two child-witnesses] to be unavailable" where the witnesses' father refused to allow them to testify after they were threatened. *People v Garay*, 320 Mich App 29, 36-37 (2017), rev'd and vacated in part on other grounds 506 Mich 936 (2020).[21] Although this situation "is not expressly addressed under MRE 804(a), . . . it is of the same character as other situations outlined in the rule." *Garay*, 320 Mich App at 36. The testimony about the dangerous character of the witnesses' neighborhood, a Facebook threat against one of the witnesses, and the fact that the father's refusal to allow them to testify was out of fear for their safety showed "that the reason for the refusal to testify was self-preservation." *Id.* at 37. "While the better practice would have been to make a record of their unavailability by examining each [witness] as to any threats received and the factors that influenced their refusal to testify, the

[20] See Section 5.3(A) on admissibility under *Crawford v Washington*, 541 US 36, 68 (2004). See also the Michigan Judicial Institute's *Hearsay Flowchart*. The following sub-subsections discuss selected exceptions to the rules against hearsay when the declarant is unavailable as a witness; see MRE 804(b)(1)-(6) for a complete list of these exceptions.

[21] For more information on the precedential value of an opinion with negative subsequent history, see our note.

trial court's decision to declare [the witnesses] unavailable was within the range of reasonable and principled outcomes." *Id.*

A witness who abruptly leaves the courthouse before testifying may be unavailable for purposes of MRE 804(a)(2). *People v Adams*, 233 Mich App 652, 658-659 (1999). See also *People v Wood*, 307 Mich App 485, 517-518 (2014), vacated in part on other grounds 498 Mich 914 (2015),[22] where the trial court properly found that the witness was unavailable based on "'then existing physical . . . illness or infirmity'" because the witness was under a "doctor's order confining her to 'bed rest as a result of complications associated with her pregnancy'"; *People v Garland*, 286 Mich App 1, 7 (2009), where the trial court properly found that the victim was unavailable as defined in MRE 804(a)(4), where "the victim was experiencing a high-risk pregnancy, that she lived in Virginia, and that she was unable to fly or travel to Michigan to testify[.]"

"The language of MRE 804(a)(4) includes within its list of individuals who are unavailable those witnesses who are mentally infirm at the time they are called to give testimony." *People v Duncan*, 494 Mich 713, 730 (2013). "[W]hen 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." *Duncan*, 494 Mich at 717. In *Duncan*, 494 Mich at 730, the four-year-old criminal sexual conduct victim "was unable to testify because she could not overcome her significant emotional distress, a result of the unique limitations of her youth and, therefore, she was mentally infirm at the time of her trial testimony." "As could be expected from a young child, especially in the context of alleged criminal sexual conduct, [the child-victim] simply did not have the mental maturity to overcome her debilitating emotions while on the stand." *Id.* at 728. Accordingly, the lower courts erred by concluding that the child-victim was not unavailable under MRE 804(a)(4). *Duncan*, 494 Mich at 729-730.

Committee Tip:

Unavailability under MRE 804(a) is a prerequisite to use of the hearsay exception under MRE 804(b). Observe, however, that absence and

[22]For more information on the precedential value of an opinion with negative subsequent history, see our note.

unavailability are not necessarily to be equated. Only in MRE 804(a)(5) is absence required.

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1. Former Testimony

Former testimony that "was given as a witness at a trial or hearing whether given during the current proceeding or a different one" and "is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, or cross, or redirect examination" is "not excluded by the rule against hearsay if the declarant is unavailable as a witness[.]" MRE 804(b)(1)(A)-(B).

Former testimony must meet two requirements to be admissible under MRE 804(b)(1): (1) the proffered testimony must have been made at "another hearing," and (2) the party against whom the testimony is offered must have had an opportunity and similar motive to develop the testimony. *People v Farquharson*, 274 Mich App 268, 272, 275 (2007). In *Farquharson*, the Court concluded that an investigative subpoena hearing is similar to a grand jury proceeding and thus, constitutes "another hearing" under MRE 804(b)(1). *Farquharson*, 274 Mich App at 272-275. "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony is presented at each proceeding." *Id.* at 275. The Court adopted a nonexhaustive list of factors that courts should use in determining whether a similar motive exists under MRE 804(b)(1):

> "(1) whether the party opposing the testimony 'had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue';
>
> (2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and
>
> (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities)." *Farquharson*, 274 Mich App at 278.

The "defendant had 'an opportunity and similar motive to develop the testimony' at [his] preliminary examination"

where (1) the testimony was presented at the preliminary examination for the same reason it was presented at the trial (to show the defendant conspired to shoot at certain gang members and that he shot a particular person), (2) the defendant had the same motive to cross-examine the witnesses at both proceedings (to show that their testimony lacked credibility or was not accurate), and (3) the defendant actually did cross-examine the witnesses with regard to their credibility at the preliminary examination. *People v Garay*, 320 Mich App 29, 37-38 (2017), rev'd and vacated in part on other grounds 506 Mich 936 (2020).[23]

A trial court does not violate MRE 804(b)(1) by "allowing the reading of [a witness's] preliminary examination testimony at trial" where the witness is properly deemed unavailable at trial and where "[the] defendant enjoyed a prior, similar opportunity to cross-examine [the witness.]" *People v Wood*, 307 Mich App 485, 516 (2014), vacated in part on other grounds 498 Mich 914 (2015).[24] See also *Garay*, 320 Mich App at 39 (holding the trial court properly admitted the preliminary examination testimony of the witnesses under MRE 804(b)(1) and that the admission of the preliminary examination testimony did not violate the defendant's right of confrontation where the witnesses were unavailable for trial and the defendant cross-examined them at the preliminary examination).

2. Deposition Testimony

"A witness's testimony given in a lawful deposition during the same or another proceeding, if the party against whom the testimony is now offered had—or in a civil case, a predecessor in interest had—an opportunity and similar motive to develop the testimony by direct, or cross, or redirect examination" is "not excluded by the rule against hearsay if the declarant is unavailable as a witness[.]" MRE 804(b)(2).

For MRE 804(b)(2) only, "'unavailability of a witness' also includes situations in which:

> (A) the witness is more than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the witness's absence

[23]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[24]The Court found that the reading of the preliminary examination testimony at trial did not violate the Confrontation Clause for the same reasons. *Wood*, 307 Mich App at 516, vacated in part on other grounds 498 Mich 914 (2015). For more information on the precedential value of an opinion with negative subsequent history, see our note.

was procured by the party offering the deposition; or

(B) on motion and notice, exceptional circumstances make it desirable—in the interests of justice and with due regard to the importance of presenting witnesses' testimony orally in open court—to allow the deposition to be used." *Id*.

3. Dying Declaration

"In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances" is "not excluded by the rule against hearsay if the declarant is unavailable as a witness[.]" MRE 804(b)(3). MRE 804(b)(3) permits the admissibility of statements made by a declarant at a time when the declarant believed his or her death was imminent. The rule does not require that the declarant actually die in order for the statements to be admissible; the declarant needs only to have believed that his or her death was imminent. *People v Orr*, 275 Mich App 587, 594-596 (2007).

"A declarant's age alone does not preclude the admission of a dying declaration." *People v Stamper*, 480 Mich 1, 5 (2007). In *Stamper*, the declarant was a four-year-old child who stated that he was dead and identified the defendant as the person who inflicted his fatal injuries. *Id*. at 3. The Court affirmed admission of the child's statement, rejecting the defendant's argument that a four-year-old could not be aware of impending death. *Id*. at 5.

Committee Tip:

The rule does not demand the declarant to say anything in particular, e.g., "I know I am dying," to establish the belief of imminent death. Surrounding circumstances can supply the relevant context.

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4. Statement Against Proprietary or Penal Interest

When a declarant is unavailable as a witness, the rule against hearsay will not exclude "[a] statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) must be supported by corroborating circumstances that clearly indicate its trustworthiness, if it tends to expose the declarant to criminal liability." MRE 804(b)(4).

a. Proprietary Interest

A declarant's statement that he shared ownership of a strip of land with the plaintiffs was admissible as a statement against proprietary interest. *Sackett v Atyeo*, 217 Mich App 676, 684 (1996). In *Sackett*, the defendants purchased a home owned by the declarant and his wife who had always maintained a shared driveway with their neighbors, the plaintiffs. *Id.* at 677-679. Based on a survey conducted before the defendants bought the property that said they owned the entire driveway, the defendants erected a fence along their property line, which encompassed the driveway. *Id.* at 679-680. The plaintiffs filed an action to quiet title to half of the driveway and based their suit on the theory of acquiescence. *Id.* at 680. The plaintiff-husband testified that the former owner (who had subsequently died) told him that no matter what the survey indicated, the plaintiffs owned half of the driveway. *Id.* at 678, 684. The Court concluded that the statement was admissible under MRE 804(b)(4)[25] because the declarant's "statement was contrary to his proprietary interest in his property because the statement was a statement against his ownership interest in a portion of his property. A reasonable person would not make such a statement unless he believed it to be true." *Sackett*, 217 Mich App at 684.

Statements made against a declarant's proprietary interest are not required to be supported by corroborating evidence. *Davidson v Bugbee*, 227 Mich App 264, 267 (1997). The Court stated:

[25]The provisions previously found in MRE 804(b)(3) now appear in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

> "By enacting [MRE 804(b)(4)[26]], the Supreme Court specifically provided that statements against *criminal interests* that are offered to exculpate the accused must be supported by corroborating evidence. The Court did not apply any such restriction on the admission of statements against *proprietary interests* in a civil case, regardless of the circumstances under which the statement was made." *Davidson*, 227 Mich App at 267 (emphasis added).

b. Penal Interest

Providing a hearsay exception for statements against penal interests is premised "on the assumption that people do not generally make statements about themselves that are damaging unless they are true." *People v Washington*, 468 Mich 667, 671 (2003). Where the statement is testimonial,[27] the Confrontation Clause is implicated. *Crawford v Washington*, 541 US 36 (2004). However, the admissibility of a *nontestimonial* statement is governed solely by MRE 804(b)(4)[28] because it does not implicate the Confrontation Clause. *People v Taylor*, 482 Mich 368, 374 (2008).

"Whether to admit or exclude a statement against a witness's penal interest offered under [MRE 804(b)(4)[29]] is determined by considering '(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement.'" *People v Steanhouse*, 313 Mich App 1, 23 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017),[30] quoting *People v Barrera*, 451 Mich 261, 268 (1996). Trial courts must consider the relationship between MRE 804(b)(4)[31] and a defendant's constitutional due process

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[26] *Id.*

[27] For a thorough discussion on what constitutes a testimonial statement under *Crawford*, see Section 3.5(D)(2).

[28] The provisions previously found in MRE 804(b)(3) now appear in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

[29] *Id.*

[30] For more information on the precedential value of an opinion with negative subsequent history, see our note.

right to present exculpatory evidence when exercising discretion to admit evidence under MRE 804(b)(4).[32] *Steanhouse*, 313 Mich App at 23.

"A statement against a declarant's penal interest is 'not limited to direct confessions,' 'need not by itself prove the declarant guilty,' and 'need not have been incriminating on its face, as long as it was self-incriminating when viewed in context.'" *Steanhouse*, 313 Mich App at 23, quoting *Barrera*, 451 Mich at 270-271.

A statement that one intends to commit a crime is inadmissible under MRE 804(b)(4).[33] *People v Brownridge*, 225 Mich App 291, 303-304 (1997), rev'd in part on other grounds 459 Mich 456 (1999).[34] In *Brownridge*, the statements were made before the alleged offense was committed, and thus, were not against the declarant's penal interest. *Brownridge*, 225 Mich App at 304.[35] "The declaration must be against one's pecuniary interest *at the time the statement is made* or it fails to qualify as an exception to the hearsay rule." *Id.* (quotation marks and citation omitted).

The trial court properly concluded that the declarant's statement to the police that he was present during the crime was not a statement against penal interest where the declarant made the admission after a detective informed him that the defendant blamed him for planning and committing the crime and the detective claimed to know the declarant was present at the scene. *Steanhouse*, 313 Mich App at 23. Further, the declarant's admission to being present at the scene of the crime was in the context of "an extensive explanation of the way in which *defendant* planned and executed the [crime.]" *Id.* (emphasis added). The Court concluded that in context, the declarant's statement did not subject him to liability to the extent that a reasonable person would not have made

[31]The provisions previously found in MRE 804(b)(3) now appear in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

[32]*Id.*

[33]*Id.*

[34]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[35] On remand, the Court of Appeals found that admitting the statement was harmless error because it was admissible as a statement of the declarant's then existing state of mental, emotional, or physical condition under MRE 803(4). *People v Brownridge (On Remand)*, 237 Mich App 210, 216-217 (1999). Note that the provisions previously found in MRE 804(b)(3) now appear in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

the statement unless believing it to be true; rather, it appeared the statement was made "in order to emphasize that he was merely present during the offense and had no role in its commission." *Id.* at 24. Moreover, the Court noted that "the mere fact that the declarant invoked his Fifth Amendment right not to testify does not make the statement against penal interest." *Id.* (quotation marks and citation omitted).

Inculpatory statements. "[W]here . . . the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to [MRE 804(b)(4)[36]]." *People v Poole*, 444 Mich 151, 161 (1993), overruled in part on other grounds by *Taylor*, 482 Mich 368.[37]

In *Taylor*, the declarant made two nontestimonial statements during two separate telephone calls: the first statement implicated himself, the defendant, and another individual named King; the second statement only implicated King. *Taylor*, 482 Mich at 379-380. The *Taylor* Court concluded that the two statements were admissible as statements against penal interest because they were "a pattern of impugning communications volunteered spontaneously and without reservation to a friend, not delivered to police, and without any apparent secondary motivation other than the desire to maintain the benefits of the relationship's confidence and trust—and according to the record, to brag"; this constituted a *narrative of events* as required by *Poole* and [MRE 804(b)(4)].[38] *Taylor*, 482 Mich at 380 (quotation marks and citation omitted).

The declarant's inculpatory statement was inadmissible because "there were no corroborating circumstances clearly indicating the trustworthiness of the statement" and the "statement was not crucial to defendant's theory of defense because it clearly implicated defendant in the

[36]The provisions previously found in MRE 804(b)(3) now appear in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

[37]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[38]The provisions previously found in MRE 804(b)(3) now appear in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

[crime]." *Steanhouse*, 313 Mich App at 24.[39] Specifically, the totality of the circumstances did not demonstrate that the statement was trustworthy because the statement was not spontaneous and was only provided to the police after the detective reiterated that the defendant implicated the declarant in the crime and that the detective knew the declarant was present; the statement was inconsistent with statements previously made by the declarant and the statement was made four months after the crime while the declarant was in custody for a separate offense. *Id.* at 26-27.

Exculpatory statements. If a statement "tends to expose the declarant to criminal liability," it "must be supported by corroborating circumstances that clearly indicate its trustworthiness." MRE 804(b)(4)(B). The court has discretion whether to admit an exculpatory statement under MRE 804(b)(4),[40] and "[i]n exercising its discretion, the trial court must conscientiously consider the relationship between [MRE 804(b)(4)[41]] and a defendant's constitutional due process right to present exculpatory evidence." *Barrera*, 451 Mich at 269.[42] According to the Michigan Supreme Court:

> "[T]he defendant's constitutional right to present exculpatory evidence in his defense and the rationale and purpose underlying [MRE 804(b)(4)[43]] of ensuring the admission of reliable evidence must reach a balance. We believe they may be viewed as having an inverse relationship: the more crucial the statement is to the defendant's theory of defense, the less corroboration a court may constitutionally require for its admission. In contrast, the more remote or tangential a statement is to the defense theory, the more

[39]The Court initially concluded that the declarant's statement was not against his penal interest; however, it also analyzed the admissibility of the statement construing it as being against the declarant's penal interest in light of earlier inconsistent statements made to the police by the declarant. *Steanhouse*, 313 Mich App at 24.

[40]"The provisions previously found in MRE 804(b)(3) now appear in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

[41]*Id.*

[42]"However, whether a statement was against a declarant's penal interest is a question of law" reviewed de novo. *Steanhouse*, 313 Mich App at 22.

[43]The provisions previously found in MRE 804(b)(3) now appear in MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024.

> likely other factors can be interjected to weigh against admission of the statement." *Barrera*, 451 Mich at 279-280 (citations omitted).

In order to determine whether the declarant's exculpatory statement was actually against his or her penal interest, "the statement [must] be probative of an element of a crime in a trial against the declarant, and . . . a reasonable person in the declarant's position would have realized the statement's incriminating element." *Barrera*, 451 Mich at 272. In *Barrera*, the declarant stated that he was not promised anything in return for his statement and was advised of his *Miranda*[44] rights before giving the statement. *Id.* at 280-281. The Court concluded that any reasonable person in the declarant's position "would have realized that any admissions by him could implicate him in a crime." *Id*. at 281.

In order to determine if the statement was sufficiently corroborated by other evidence, the *Barrera* Court adopted the totality of the circumstances test enumerated in *Poole*, 444 Mich at 165. The *Poole* Court stated:

> "The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth." *Poole*, 444 Mich at 165.[45]

[44] *Miranda v Arizona*, 384 US 436 (1966).

The *Barrera* Court further indicated that an additional three-factor inquiry must be made when a statement is made to the authorities while the declarant is in custody. *Barrera*, 451 Mich at 276.

> "[F]irst consider the relationship between the confessing party and the exculpated party and whether it was likely that the confessor was fabricating his story for the benefit of a friend. Thus, if the two involved parties do not have a close relationship, one important corroborating circumstance exists. The second factor is whether the confessor made a voluntary statement after being advised of his *Miranda*[46] rights. The third is whether there is any evidence that the statement was made in order to curry favor with authorities." *Barrera*, 451 Mich at 275 (quotation marks, alterations, and citations omitted).

In *Barrera*, the Michigan Supreme Court found that the statement in question was critical to the defendant's defense theory, and "his constitutional right to present [the exculpatory evidence] limited the threshold of corroborating circumstances that the court could require of [the declarant's] statement." *Barrera*, 451 Mich at 289. Additionally, the Court found that applying the three-factor analysis for custodial statements "further corroborated the trustworthiness of [the declarant's] statement." *Id.* Specifically, the declarant did not have a close relationship with the defendant, the declarant made a voluntary statement after being given his *Miranda* rights, and there was no evidence that he gave the statement to curry favor with the authorities. *Id.* at 289-290.

Cautionary instruction. Where the statement against interest involves accomplice testimony, the trial court has discretion whether to give a cautionary instruction[47] on accomplice testimony. *People v Young*, 472 Mich 130, 135 (2005). The court may give the instruction no matter who

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[45] *Taylor*, 482 Mich at 368, overruled *Poole* to the extent that *Poole* applied these factors to its confrontation analysis because *Crawford*, 541 US at 36, had been decided and had become the new standard in confrontation issue analysis. However, it does not appear that the Michigan Supreme Court intended to overrule the use of these factors in analyzing issues other than confrontation.

[46] *Miranda v Arizona*, 384 US 436 (1966).

[47] See M Crim JI 5.6.

calls the witness. *People v Heikkinen*, 250 Mich App 322, 331 (2002). In *Heikkinen* (an aggravated assault case), the defendant's son testified that the defendant acted in self-defense. *Id.* at 324. The trial court instructed the jury under M Crim JI 5.5 (witness is a disputed accomplice) and M Crim JI 5.6 (accomplice testimony). *Heikkinen*, 250 Mich App at 325-326. The Court concluded that these instructions may be warranted in cases where the defendant offers potential exculpatory accomplice testimony; the instructions are not limited to inculpatory accomplice testimony. *Id.* at 327-337. The instructions were appropriate in *Heikkinen* because, under the facts of the case, the son's testimony was "inevitably suspect[.]" *Id.* at 337-338.

A cautionary instruction should not be given regarding accomplice testimony when the testimony is from a codefendant in a joint trial, and the codefendant would be prejudiced by the instruction. See *People v Reed*, 453 Mich 685, 687 (1996). In *Reed*, the codefendant in a joint trial took the stand in his own defense; the defendant's attorney failed to request a cautionary instruction on accomplice testimony, and the trial court did not issue an instruction sua sponte. *Id.* at 686-690. The Michigan Supreme Court concluded that giving such an instruction would have constituted an error requiring reversal because it would have asked the jury to view the codefendant's testimony suspiciously, thereby prejudicing his defense. *Id.* at 693-694.

5. Statement By Declarant Made Unavailable By Opponent

"A statement offered against a party that wrongfully caused—or encouraged—the declarant's unavailability as a witness, and did so intending that result" is "not excluded by the rule against hearsay if the declarant is unavailable as a witness[.]" MRE 804(b)(6).

"MRE 804(b)(6) is 'a codification of the common-law equitable doctrine of forfeiture by wrongdoing,' and '[u]nder the doctrine, a defendant forfeits his or her constitutional right of confrontation if a witness's absence results from wrongdoing procured by the defendant[.]'" *People v McDade*, 301 Mich App 343, 354 (2013), quoting *People v Jones*, 270 Mich App 208, 212 (2006) (citations omitted; alterations in original). "[E]vidence offered under the forfeiture exception will very regularly be testimonial and subject to Sixth Amendment scrutiny. As

forfeiture by wrongdoing is the only recognized exception to the Sixth Amendment's guarantee of the right to cross-examine adverse witnesses, the constitutional question will often go hand-in-hand with the evidentiary question[.]" *People v Burns*, 494 Mich 104, 113-114 (2013).

"MRE 804(b)(6) incorporates a specific intent requirement. For the rule 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." *Burns*, 494 Mich at 113 (quotation marks and citation omitted) (emphasis added). See also *McDade*, 301 Mich App at 354-355 (holding that the trial court's admission of an unavailable witness' recorded interview did not violate the defendant's right of confrontation where the defendant forfeited that right by wrongdoing when he conveyed a note to the witness that contained "language that could be construed as threatening" and that "reflect[ed] an effort specifically designed to prevent [the witness] from testifying"; i.e., to make the witness unavailable). Because "the plain language of [MRE 804(b)(6)] . . . incorporates [a] specific intent requirement[,] . . . evidence properly admitted under MRE 804(b)(6) will likely also not be barred by the constitutional requirement imposed by the Sixth Amendment." *Burns*, 494 Mich at 114, 114-115 n 35. In *Burns*, it was "alleged that during the alleged [sexual] abuse defendant instructed [the child-victim] 'not to tell' anyone and warned her that if she told, she would 'get in trouble.'" *Id.* at 115. Those threats, "made contemporaneously with the abuse but before any report or investigation, require a finding that defendant intended to . . . procure the unavailability of [the child-victim] as a witness." *Id.* (quotation marks and citation omitted). The Supreme Court "interpret[ed] 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 [the child-victim's] unavailability, rather than mere knowledge that the wrongdoing may cause the witness's unavailability." *Burns*, 494 Mich at 117. Accordingly, the trial court abused its discretion by admitting the hearsay statements of the child-victim under MRE 804(b)(6), because "the prosecutor failed to establish by a preponderance of the evidence that defendant's conduct both was intended to, and did, cause [the child-victim's] unavailability." *Burns*, 494 Mich at 120.

See also *People v Roscoe*, 303 Mich App 633, 641 (2014), where the trial court abused its discretion in "fail[ing] to make a factual finding that defendant had the requisite specific intent"

to render the witness unavailable to testify. "Although there was evidence from which to infer that defendant killed the victim because [the defendant] was caught trying to steal . . ., this does not support an inference that defendant specifically intended to kill the victim to prevent him from testifying at trial, particularly given that there were no pending charges against defendant." *Id*. In *Roscoe*, "the victim was hit in the head before the breaking and entering had been reported, and there was no evidence that the victim said that he was going to call the police." *Id*. "[W]ithout specific findings by the trial court regarding intent, defendant's action[s] 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." *Id*. Accordingly, it was error to admit the victim's statement that identified the defendant as the attacker. *Id*. at 642. However, because there was "ample other evidence from which [the] jury could conclude, beyond a reasonable doubt, that defendant killed the victim," the error was not outcome determinative, and reversal of the defendant's convictions was not warranted. *Id*. at 642-643.

Committee Tip:

Resist the temptation to simply blame the accused for the abuse of the witness involved with the threats. Attention to detail here, accompanied by a slow, methodical approach, better serves the analytical record for review.

See Section 3.5(D)(3) for discussion of the forfeiture by wrongdoing doctrine in context of the Confrontation Clause.

E. Residual Exception[48]

Even if a hearsay statement is not admissible under an exception in MRE 803 or MRE 804, the statement may be admitted under the following conditions:

> "(1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;

[48]See the Michigan Judicial Institute's *Hearsay Flowchart*.

> (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 serve the purposes of these rules and the interests of justice." MRE 807(a).[49]

"The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name and address—so that the party has a fair opportunity to meet it." MRE 807(b).

The residual exception is designed to be used as a safety valve in the hearsay rules and allows "evidence to be admitted that is not specifically covered by any of the categorical hearsay exceptions under circumstances dictated by the rules." *People v Katt*, 468 Mich 272, 281 (2003).[50] The *Katt* Court rejected the *near miss* theory, which precludes the admission of evidence under a residual hearsay exception when the evidence "was inadmissible under, but related to, a categorical exception." *Id.* at 282-286. In determining equivalent trustworthiness, the court must look at the totality of the circumstances. *Id.* at 290-291. Although no complete list of factors exist for making this determination, the court should consider anything relevant to the statement's reliability except for "corroborative evidence . . . in criminal cases if the declarant does not testify at trial." *Id.* at 291-292 (using this evidence is forbidden by the Confrontation Clause). Some factors relevant to the trustworthiness of a statement include:

> "(1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he [or she] spoke, (7) to whom the statements were made . . . , and (8) the time frame within which the statements were made." *People v Steanhouse*, 313 Mich App 1, 26 (2015), aff'd in part and rev'd in part on other

[49] The provisions previously found in MRE 803(24) and MRE 804(b)(7) now appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

[50] The *Katt* Court analyzed the evidence under former MRE 803(24). However, former MRE 803(24) contains language identical to former MRE 804(b)(7). The only difference is that former MRE 804(b)(7) requires the declarant to be unavailable. See *People v Welch*, 226 Mich App 461, 464 n 2 (1997). Note that the provisions previously found in MRE 803(24) and MRE 804(b)(7) now appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

grounds 500 Mich 453 (2017)[51] (quotation marks and citation omitted; alteration in original).

F. Statements Narrating, Describing, or Explaining the Infliction or Threat of Physical Injury in Domestic Violence Case[52]

MCL 768.27c is a substantive rule of evidence that allows admission of certain statements in domestic violence cases. See *People v Meissner*, 294 Mich App 438, 445 (2011). A declarant's statement may be admitted under MCL 768.27c if all of the following circumstances exist:

> "(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under [MCL 768.27c] is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer." MCL 768.27c(1).

MCL 768.27c(1)(a) "places a factual limitation on the admissibility of statements," and MCL 768.27c(1)(c) "places a temporal limitation on admissibility." *Meissner*, 294 Mich App at 446. Together, these provisions "indicate that a hearsay statement can be admissible if the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury." *Id.* at 447. In *Meissner*, the victim gave a verbal statement and prepared a written statement for the police that she had been threatened by the defendant (1) on previous occasions, (2) that morning at her home, and (3) again that same day, via text message, after telling the defendant she had contacted the police. *Id.* at 443. The Court of Appeals found that "[t]he [trial] court could . . . determine that [the

[51]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[52]See the Michigan Judicial Institute's *Hearsay Flowchart*.

victim's] statements met the requirements of [MCL 768.27a](1)(a) because the statements described text messages that threatened physical injury, and met the requirements of [MCL 768.27c](1)(c) because [the victim] made the statements at or very near the time she received one or more of the threatening text messages." *Meissner*, 294 Mich App at 447.

For purposes of MCL 768.27c(1)(d), "circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

> (a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
>
> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section." MCL 768.27c(2).

MCL 768.27c(2) expressly states that the court is not limited to the listed factors when determining "circumstances relevant to the issue of trustworthiness"; the listed factors are merely "a nonexclusive list of possible circumstances that may demonstrate trustworthiness." *Meissner*, 294 Mich App at 449.

The reference in MCL 768.27c(2)(a) to statements made in contemplation of "pending or anticipated litigation" "pertains to litigation in which the declarant could gain a property, financial, or similar advantage, such as divorce, child custody, or tort litigation." *Meissner*, 294 Mich App at 450. In cases where the declarant is an alleged victim of domestic violence, that provision "does not pertain to the victim's report of the charged offense." *Id.*

MCL 768.27c(3) requires the prosecuting attorney to disclose evidence he or she intends to offer under the statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

"MCL 768.27c contains no requirement that the complainant-declarant be unavailable in order to admit evidence of a statement that otherwise satisfies the statutory requirements." *People v Olney*, 327 Mich App 319, 326-328 (2019) (concluding that when ruling on defendant's motion to quash bind-over, the "circuit court erred as a

matter of law in holding that there is an 'unavailability' requirement under MCL 768.27c," thereby "impos[ing] an additional condition not found in the plain and unambiguous language of MCL 768.27c"). "[I]mposing an unavailability requirement would essentially nullify the statute." *Olney*, 327 Mich App at 327.

"MCL 768.27c . . . appl[ies] to preliminary examinations." *People v Olney (On Remand)*, 333 Mich App 575, 582 (2020). "[T]he plain language of MCL 768.27c(6) unambiguously applies at trials and evidentiary hearings. The preliminary examination is a type of evidentiary hearing, and thus, the statute applies at that stage." *Olney*, 333 Mich App at 585, 587 (noting that MCR 6.110(D)(2) does not "conclud[e] that preliminary examinations are wholly distinct from evidentiary hearings"; MCR 6.110(D)(2) "addresses the necessity for a separate evidentiary hearing to decide questions concerning the admissibility of evidence," and "[t]hat does not mean that preliminary examinations are not a type of evidentiary hearing"). Additionally, because "MCL 766.11b(1)[53] addresses the foundational and authentication requirements for certain reports and records at the preliminary examination," and "MCL 768.27c does not contain any reference to admission of records or other documents," but "addresses statements pertaining to physical injury or domestic violence," "[t]he omission of MCL 768.27c from MCL 766.11b(1) does not support [an] attempt to preclude hearsay statements pertaining to domestic violence from admission at the preliminary examination." *Olney*, 333 Mich App at 586-587.

G. Statutory Exceptions for Hearsay at the Preliminary Examination[54]

"The rules of evidence apply at the preliminary examination except that the 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.

[53] See Section 5.3(G) for information on MCL 766.11b(1).

[54] See the Michigan Judicial Institute's *Hearsay Flowchart*.

> (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 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." MCL 766.11b(1).

MCL 766.11b irreconcilably conflicts with MCR 6.110(C) (providing that the Michigan Rules of Evidence apply at preliminary examinations) because it permits the admission of evidence that would be excluded under the Michigan Rules of Evidence. *People v Parker*, 319 Mich App 664, 667 (2017). "MCL 766.11b is an enactment of a substantive rule of evidence, not a procedural one. Accordingly, the specific hearsay exception in MCL 766.11b takes precedence over the general incorporation of the Michigan Rules of Evidence found in MCR 6.110(C)." *Parker*, 319 Mich App at 674 (holding that "[t]he district court properly admitted the laboratory report [of the defendant's blood draw at his preliminary examination on a charge of operating while intoxicated] pursuant to the statutory hearsay exception in MCL 766.11b," and "[t]he circuit court abused its discretion by remanding defendant's case to the district court for continuation of the preliminary examination").

"The magistrate shall allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under this section on a satisfactory showing to the magistrate that live testimony will be relevant to the magistrate's decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony." MCL 766.11b(2).

5.4 Negative Evidence

A. Generally

"Negative evidence is evidence to the effect that a circumstance or fact was not perceived or that it was, or is, unknown. It is generally of no probative value and, hence, inadmissible. However, a negative response to a question does not necessarily constitute negative evidence." *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810 (1979) (citations omitted). Negative evidence is problematic because it presents two conflicting inferences: (1) the event never occurred,

or (2) the event occurred but the witness did not perceive it. *Dalton v Grand Trunk Western R Co*, 350 Mich 479, 485 (1957). The *Dalton* Court went on to state that "[t]he mere fact of nonhearing, standing alone, ordinarily has no probative value whatever as to the occurrence, or nonoccurrence, of the event." *Id.* at 485. As an example, the Court cited the bombing of Pearl Harbor: most people did not hear the bombing, but that does not mean the bombing did not occur. *Id.* at 485-486. Therefore, the party relying on the evidence bears the burden of proving its probative value:

> "[The party] must show the circumstances pertaining to the nonobservance, the witness' activities at the time, the focus of his attention, his acuity or sensitivity to the occurrence involved, his geographical location, the condition of his faculties, in short, all those physical and mental attributes bearing upon his alertness or attentiveness at the time.
>
> * * *
>
> [T]he weight to be accorded the testimony of a witness, his credibility, whether or not his testimony is affirmative and convincing, rests with the jury." *Dalton*, 350 Mich at 486.

B. Absence of Record

The following are not excluded by the hearsay rule, "regardless of whether the declarant is available as a witness:

> * * *
>
> (7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in [MRE 803(6)] if:
>
> > (A) the evidence is admitted to prove that the matter did not occur or exist;
> >
> > (B) a record was regularly kept for a matter of that kind; and
> >
> > (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.
>
> * * *

> (10) Absence of a Public Record. Testimony—or a certification under [MRE 902]—that diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:
>
> > (A) the record or statement does not exist; or
> >
> > (B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind." MRE 803(7); MRE 803(10).

C. Examples

Testimony that there were no recorded reports of an allegation of sexual assault was admissible under MRE 803(7) because it was "relating to the absence of a matter . . . of a kind of which a memorandum, report, record, or data compilation [is] regularly made and preserved"; thus, "evidence that no report was ever made was admissible to prove the nonoccurence or nonexistence of the matter[.]" *People v Marshall*, 497 Mich 1023, 1023 (2015) (quotation marks and citation omitted; first alteration in original). Moreover, the evidence was relevant under MRE 401 because the evidence "was probative of the complainant's credibility; specifically, the complainant's claim that she had reported the abuse to her school teacher." *Marshall*, 497 Mich at 1024.

Testimony that the location where the plaintiff fell had been used for years without accident was inadmissible as negative evidence because proving an absence of accidents does not tend to prove an absence of negligence. *Larned v Vanderlinde*, 165 Mich 464, 468 (1911).

"[M]ere testimony that a sound was not heard, by itself, does not present an issue of fact as to whether or not the sound existed. Such 'negative evidence' must be preceded by a showing that the witness had been in a position to hear the sound if it occurred." *Beasley v Grand Trunk Western R Co*, 90 Mich App 576, 584 (1979) (citation omitted). In *Beasley*, six witnesses testified that they did not hear a train whistle or any other warning device, and one of the witnesses was "positive" that the train did not blow its whistle. *Id.* at 585. In light of these facts, the Court concluded that the evidence was admissible as a question of fact for the jury to decide. *Id.* 585-586.

Chapter 6: Exhibits

6.1 Receipt, Custody, and Return of Exhibits

"Except as otherwise required by statute or court rule, materials that are intended to be used as evidence at or during a trial shall not be filed with the clerk of the court, but shall be submitted to the judge for introduction into evidence as exhibits." MCR 2.518(A). "Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by Michigan Supreme Court trial court records management standards."[1] *Id.* Exhibits received and accepted into evidence under MCR 2.518 are not court records. MCR 2.518(A).

At the conclusion of a trial or hearing, the court must "direct the parties to retrieve the exhibits submitted by them[.]" MCR 2.518(B). However, any weapons and drugs must be "returned to the confiscating agency for proper disposition." *Id.* If the parties do not retrieve their exhibits "as directed, within 56 days of the conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties." *Id.*

"If the court retains discovery materials filed pursuant to MCR 1.109(D) or an exhibit submitted pursuant to this rule after a hearing or trial and the material is confidential as provided by law, court rule, or court order pursuant to MCR 8.119(I), the court must continue to maintain the material in a confidential manner." MCR 2.518(C).

6.2 Chain of Custody

A. Foundation

An adequate foundation for the admission of proffered tangible evidence must contain verification that the object was involved in the matter at hand and that the condition of the object is substantially the same. *People v Prast (On Rehearing)*, 114 Mich App 469, 490 (1982). In evaluating the foundation presented, the trial court should consider the nature of the object, the circumstances surrounding the preservation and custody of the object, and the possibility of an individual tampering with the object while it is in custody. *Id.*

B. Break in the Chain of Custody

A court is not required to automatically exclude proffered evidence because of a break in the chain of custody of the evidence. *People v Herndon*, 246 Mich App 371, 405 (2001). A break in the chain of custody of the object affects the weight of the evidence, not its

[1] See http://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

admissibility. *People v Ramsey*, 89 Mich App 260, 267 (1979). It is not an abuse of discretion to admit evidence where there are alleged deficiencies concerning the collection and preservation of the evidence as long as there is no missing vital link in the chain of custody or there is no sign of tampering with the evidence. See *People v Muhammad*, 326 Mich App 40, 59 (2018).

6.3 Demonstrative Evidence

"Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case. The demonstrative evidence must be relevant and probative. Further, when evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event." *People v Bulmer*, 256 Mich App 33, 35 (2003) (citations omitted).

If the evidence bears a "substantial similarity" to an issue of fact in the case, it may be admissible. *Lopez v General Motors Corp*, 224 Mich App 618, 627-634 (1997). In *Lopez*, the trial court did not abuse its discretion in admitting two videotapes that depicted crash tests with conditions similar to, but not exactly, like those of the accident at issue. *Id*. at 620, 625, 634-635. The Court noted the difference between re-creation evidence and demonstrative evidence and when each type of evidence is appropriate, stating:

> "[T]he distinction between demonstrative evidence and re-creation evidence, and the standards of admission associated with each, is important. When evidence is offered to show how an event occurred, the focus is upon the conditions surrounding that event. Consequently, it is appropriate that those conditions be faithfully replicated. By contrast, when the evidence is being offered not to re-create a specific event, but as an aid to illustrate an expert's testimony concerning issues associated with the event, then there need not be as exacting a replication of the circumstances of the event." *Lopez*, 224 Mich App at 628 n 13 (citations omitted).

"The burden . . . is on the party presenting the evidence to satisfy the court that the necessary similar conditions exist." *Duke v American Olean Tile Co*, 155 Mich App 555, 561 (1986).

6.4 Best Evidence Rule[2]

A. Requirement of Original

"An original writing, recording, or photograph is required in order to prove its content unless [the MREs] or a statute provides otherwise." MRE 1002. In order for the best evidence rule to apply, the contents of the evidence must be at issue. *People v Lueth*, 253 Mich App 670, 686 (2002).

Committee Tip:

Keep in mind that MRE 1001, et seq., concern proof of the contents of a writing, recording, or photograph, not necessarily their existence. As such, the best evidence rule does not apply when a party seeks to prove the existence of a writing, recording, or photograph. See People v Tucker, 504 Mich 934, 936 (2019).

B. Photographs

In order to lay a proper foundation for the admission of photographs, "someone who is familiar from personal observation of the scene or person photographed [must] testif[y] that the photograph is an accurate representation of the scene or person. Photographs are admissible despite changes in the condition of the scene or person where a person testifies as to the extent of the changes." *In re Robinson*, 180 Mich App 454, 460-461 (1989) (citations omitted).

As with all evidence, the trial court has discretion to admit or exclude photographs. *People v Mills*, 450 Mich 61, 76 (1995), modified and remanded 450 Mich 1212 (1995). "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the

[2] Because MRE 1002 is commonly referred to as the "Best Evidence Rule" in many Michigan courts, this benchbook will also refer to the court rule as such. However, the common name may be misleading. "[T]here is no hierarchy of evidence in Michigan and the best evidence rule only requires that the 'original' document be produced." *Baker v Gen Motors Corp*, 420 Mich 463, 509 (1984).

probative value of the photographs is substantially outweighed by unfair prejudice." *Mills*, 450 Mich at 76 (citations omitted).

In *Mills*, the victim was intentionally set on fire by the defendants, and the prosecution sought to introduce color slides depicting the extent of the victim's injuries. *Mills*, 450 Mich at 64, 68-69. The Court found that the photographs were relevant under MRE 401 because they "affect[ed] two material facts: (1) elements of the crime, and (2) the credibility of witnesses." *Mills*, 450 Mich at 69. Additionally, the probative value of the slides was not substantially outweighed by unfair prejudice because, despite their graphic nature, they were an "accurate factual representation[] of the [victim's] injuries" and they "did not present an enhanced or altered representation of the injuries." *Id.* at 77-78.

"Photographs that are relevant are not inadmissible merely because they vividly depict shocking details." *In re Piland Minors*, 336 Mich App 713, 734 (2021). Where "[o]ne of the disputes was whether, prior to her death, [the decedent's] jaundice improved," autopsy photographs "were highly probative as to how yellow [the decedent] appeared before her death." *Id.* at 733-734. "The photographs, although taken after her death, depicted the yellowness of her body, her eyes, and her gums. Expert testimony supported that the yellow pigment shown in the photographs would not have increased after her death." *Id.* at 733-734.

"[A] relevant photograph is not inadmissible merely because it may arouse emotion," and "[t]he prosecution is not obligated to use the least prejudicial evidence possible." *People v Baskerville*, 333 Mich App 276, 288-289 (2020). "[T]he 'unfairness' of potentially emotionally inflammatory evidence is mitigated when the proponent lacks any less prejudicial way to establish a critical issue." *Id.* at 288. In *Baskerville*, the trial court properly admitted photographs that "served as corroboration of [a witness's] testimony concerning what she observed and her own actions during the incident, and also served as illustration and corroboration for the testimony provided by an evidence technician and the medical examiner." *Id.* at 288-289 (the court was "unconvinced that the emotional impact of the . . . photographs would have been appreciably diminished had they been rendered in black and white rather than in color," and "[t]he prosecutor explained that the color photographs were necessary for visual 'clarity'").

"[S]exually explicit photographs used as evidence of a sexual assault of a minor *cannot be unfairly prejudicial per se*." *People v Brown*, 326 Mich App 185, 194 (2019). "[T]rial courts must weigh the prohibitive value against the danger of any unfair prejudice that

admission might cause. A decision on the admissibility of photographs in such cases cannot be based solely on the graphic nature of the photographs." *Id*. Although "shocking, indecent, and unsettling," the trial court acted within its discretion in admitting photos (located on defendant's cellphone) that depicted the minor victim's vagina, breasts, and buttocks because the photos were illustrative of the acts depicted and the propensities of the person who took them (defendant), and they were also introduced for purposes other than to merely shock or inflame the jurors. *Id*. at 193 (the trial court also vastly limited the number of photographs admitted at trial to those in which the victim could identify defendant's hands). The photographs "corroborate the victim's testimony . . . because they [were] the only direct evidence confirming any part of the victim's testimony." *Id*. at 194. "Therefore, any prejudicial taint [was] more than overcome by their probative value, regardless of how lurid and despicable the photographs themselves [were]." *Id*.

"[T]he trial court did not abuse its discretion by admitting . . . photographs into evidence" where "the photographs . . . corroborated testimony regarding the cause of the victim's death and the nature and extent of his fatal injuries" and "were helpful in establishing the mental state that the prosecutor was required to prove for some of the offenses." *People v Head*, 323 Mich App 526, 541-542 (2018). "The nature and extent of [the victim's] injuries revealed the powerful nature of the short-barreled shotgun and were thus probative of defendant's gross negligence and recklessness in storing this loaded, deadly weapon in a place that was readily accessible to his unsupervised children," and "[a]lthough some of the pictures may appear gruesome, their admission into evidence was useful in establishing the mental state that the prosecutor was required to prove, and gruesomeness alone does not require exclusion." *Id*. at 542.

The trial court did not abuse its discretion by admitting photographs of the victim lying in a hospital bed with a severely bruised face and wearing a neck brace during the defendant's trial for aggravated domestic assault and assault with intent to do great bodily harm less than murder. *People v Davis*, 320 Mich App 484, 487-489 (2017), vacated in part on other grounds 503 Mich 984 (2019).[3] The photographs were "highly relevant and probative to establish an essential element of aggravated domestic assault," and "were not so prejudicial as to warrant exclusion under MRE 403" because "the nature and placement of [the victim's] bruises and lacerations corroborated her testimony about the assault and

[3]For more information on the precedential value of an opinion with negative subsequent history, see our note.

depicted the seriousness of her injuries." *Davis*, 320 Mich App at 488-489. Further, "[e]ven if the neck brace was 'precautionary' only, as argued by defendant, this precaution was required by defendant's actions," and "was part and parcel of the medical treatment [the victim] received for injuries sustained after defendant repeatedly punched her in the face." *Id.* at 489.

In *Robinson*, the defendant challenged the admission of photographs taken twenty days after the victim died and after the victim had been embalmed and buried, because they did not accurately depict the victim at the time of death. *Robinson*, 180 Mich App at 460. The Court of Appeals concluded that admission was proper because testimony established that, although the photographs did not depict the victim at the time of death, the trauma the victim suffered was more likely to show after being embalmed and the photos *did* depict the victim at the time of the autopsy. *Id.* at 461 (noting that the extent of the bruises in the photographs were probative of malice).

C. Exceptions

MRE 1003–MRE 1007 provide exceptions to the best evidence rule. However, because no published case law exists on MRE 1005 (copies of public records) and MRE 1007 (testimony or statement of a party), the rules themselves are quoted for reference purposes.[4]

1. Admissibility of Duplicates

MRE 1003 permits the admission of duplicates, unless there are genuine questions about the original's authenticity or admitting a duplicate make it unfair.

Admitting a true *copy* of a defendant's default judgment of divorce, for purposes of deciding whether to bind him over, "was not inherently unfair . . . because it only served to establish that defendant was ordered to pay child support, a fact that defendant [did] not contest." *People v Monaco*, 262 Mich App 596, 609 (2004), rev'd in part on other grounds 474 Mich 48 (2006).[5]

[4] See Section 6.4(C)(3) and Section 6.4(C)(5).

[5] For more information on the precedential value of an opinion with negative subsequent history, see our note.

2. Admissibility of Other Evidence of Contents

MRE 1004 does not require an original and provides that "other evidence of the content of a writing, recording, or photograph is admissible if:

> (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
>
> (b) an original cannot be obtained by any available judicial process;
>
> (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
>
> (d) the writing, recording, or photograph is not closely related to a controlling issue."

Where the defendant was charged with CSC-I, and testimony established that the defendant looked at child pornography on his computer before and during the sexual assaults, it was proper to admit photographs from his computer that were similar to, but not exactly like, those that the defendant looked at during the assaults. *People v Girard*, 269 Mich App 15, 18-19 (2005). In *Girard*, the defendant argued that admission of the images violated the best evidence rule because witnesses identified the images only "as being similar to the images they had seen on defendant's computer." *Id*. at 19. According to the Court, testimony about the computer images explained the circumstances under which the sexual assaults occurred, and therefore, with regard to the CSC-I charges against the defendant, the images of child pornography found on the defendant's computer were a collateral matter unrelated to a controlling issue. *Id*. at 20. Therefore, the similar photographs were properly admitted against the defendant pursuant to MRE 1004(d).[6] *Girard*, 269 Mich App at 20.

3. Public Records

"The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are

[6]The provision previously found in MRE 1004(4) now appears in MRE 1004(d). See ADM File No. 2021-10, effective January 1, 2024.

met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with [MRE 902(4) (self-authenticating evidence)] or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content." MRE 1005. See Section 1.4 for information about judicial notice.

4. Charts, Diagrams, and Summaries

A summary, chart, or calculation may be used "to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." MRE 1006. "The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court." *Id.*

To be admissible under MRE 1006, the underlying materials "must themselves be admissible" and the "summary must be an *accurate* summarization of the underlying materials." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 100 (1995) (quotation marks and citation omitted).

5. Testimony or Written Admissions of Party

The content of a writing, recording, or photograph may be proved "by the testimony, deposition, or written statement of the party against whom the evidence is offered." MRE 1007. "The proponent need not account for the original." *Id.*

6.5 Loss of Evidence

See Section 1.10 for information on missing physical evidence.

Glossary

B

Business

- For purposes of MRE 803(6), *business* "includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." MRE 803(6).

C

Civil case

- For purposes of the Michigan Rules of Evidence, *civil case* "means a civil action or proceeding." MRE 101(c)(1).

Controlled substance

- For purposes of MCL 766.11b, *controlled substance* "means that term as defined under . . . MCL 333.7104." MCL 766.11b(3). MCL 333.7104 defines *controlled substance* as "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201, *et seq.*]" MCL 333.7104(3).

Conviction

- For purposes of the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, *conviction* "means a plea of guilty, guilty but mentally ill, or nolo contendere if accepted by the court, or a jury verdict or court finding that a defendant is guilty or guilty but mentally ill for a criminal law violation, or a juvenile adjudication or disposition for a criminal law violation that if committed by an adult would be a crime." MCL 28.172(a).

County juvenile agency

- For purposes of MCL 28.173(a)(*iii*), *county juvenile agency* is "that term as defined in . . . MCL 45.622." MCL 28.173(a)(*iii*). MCL 45.622 defines *county juvenile agency* as "a county that has approved a resolution in accordance with [MCL 45.623]." MCL 45.622(a).

Court records

- For purposes of the Michigan Court Rules, *court records* "are defined by MCR 8.119 and [MCR 1.109(A)]" and "are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules.

  (a) Court records include, but are not limited to:

  (*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,

  (*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records.

  (b) For purposes of this subrule:

  (*i*) Documents include, but are not limited to, pleadings, orders, and judgments.

  (*ii*) Recordings refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records.

  (*iii*) Data refers to any information entered in the case management system that is not ordinarily reduced to a document but that is still recorded information, and any data entered into or created by the statewide electronic-filing system.

  (*iv*) Other recorded information includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be

maintained on paper or digital image." MCR 1.109(A)(1)

Court records do not include discovery materials that are not filed with the clerk of the court or exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930 during the pendency of a proceeding. MCR 1.109(A)(2).

Courtroom support dog

- For purposes of MCL 600.2163a, *courtroom support dog* "means a dog that has been trained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog prior to September 27, 2018." MCL 600.2163a(1)(a).

Crime

- For purposes of the Michigan Penal Code, MCL 750.1 *et seq.*, *crime* "means an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by any 1 or more of the following:

  (a) Imprisonment

  (b) Fine not designated a civil fine.

  (c) Removal from office.

  (d) Disqualification to hold an office of trust, honor, or profit under the state.

  (e) Other penal discipline." MCL 750.5.

Criminal case

- For purposes of the Michigan Rules of Evidence, *criminal case* "includes a criminal proceeding." MRE 101(c)(2).

Custodial detention

- For purposes of MCL 763.8–MCL 763.10, *custodial detention* "means an individual's being in a place of detention because a law enforcement official has told the individual that he or she is under arrest or because the individual, under the totality of the circumstances, reasonably could believe that he or she is under

a law enforcement official's control and is not free to leave." MCL 763.7(a).

D

Dating relationship

- For purposes of MCL 768.27b(6)(b)(*iv*) and MCL 768.27c(5)(c)(*iv*), *dating relationship* "means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 768.27b(6)(b)(*iv*); MCL 768.27c(5)(c)(*iv*).

Declarant

- For purposes of MRE 801–MRE 807, *declarant* "means the person who made the statement." MRE 801(b).

- For purposes of MCL 768.27c, *declarant* "means a person who makes a statement." MCL 768.27c(5)(a).

Department

- For purposes of the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, *department* "means the department of state police." MCL 28.172(b).

Developmental disability

- For purposes of MCL 600.2163a, *developmental disability* "means that term as defined in . . . MCL 330.1100a, except that, for the purposes of implementing [MCL 600.2163a], developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment." MCL 600.2163a(1)(c).

- For purposes of MCL 750.145m, *developmental disability* "means that terms as defined in . . . MCL 330.1500." MCL 750.145m(d). **Note** that MCL 330.1500 does not include a definition for *developmental disability*.

DNA identification profile

- For purposes of the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, *DNA identification profile* "means the results of the DNA identification profiling of a sample, including a paper, electronic, or digital record." MCL 28.172(c). See also MCL 750.520m(9)(a).

DNA identification profiling

- For purposes of the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, *DNA identification profiling* "means a validated scientific method of analyzing components of deoxyribonucleic acid molecules in a biological specimen to determine a match or a nonmatch between a reference sample and an evidentiary sample." MCL 28.172(d). See also MCL 750.520m(9)(a).

Document

- For purposes of the Michigan Court Rules, *document* "means a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 81/2 x 11 inch paper without manipulation." MCR 1.109(B).

Domestic violence

- For purposes of MCL 768.27b and MCL 768.27c, *domestic violence* "means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(6)(a); MCL 768.27c(5)(b).

Duplicate

- For purposes of MRE 1001–MRE 1008, *duplicate* "means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." MRE 1001(e).

F

Family

- For purposes of MCL 600.2155, *family* "means spouse, parent, grandparent, stepmother, stepfather, child, adopted child, grandchild, brother, sister, half brother, half sister, father-in-law, or mother-in-law." MCL 600.2155(3).

Family or household member

- For purposed of MCL 768.27b and MCL 768.27c, *family or household member* "means any of the following:

  (*i*) A spouse of former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a child in common.

  (*iv*) An individual with whom the person has or has had a dating relationship." MCL 768.27b(6)(b); MCL 768.27c(5)(c).

Felony

- For purposes of the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, *felony* "means a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 28.172(e).

- For purposes of the Code of Criminal Procedure, *felony* "means a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(f).

Filed with the court

- For purposes of the Michigan Court Rules, *filed with the court* means "[p]leadings and other documents and materials filed with the court as required by these court rules must be filed with the clerk of the court in accordance with MCR 1.109(D), except that the judge to whom the case is assigned may accept materials for filing when circumstances warrant. A judge who does so shall note the filing date on the materials and immediately transmit them to the clerk. It is the responsibility of the party who presented the materials to the judge to confirm that they have been filed with the clerk. If the clerk records the receipt of materials on a date other than the filing date, the clerk shall record the filing date in the case history." MCR 1.109(C).

H

Hearsay

- For purposes of MRE 801–807, *hearsay* "means a statement that:

  (1) the declarant does not make while testifying at the current trial or hearing; and

  (2) a party offers in evidence to prove the truth of the matter asserted in the statement." MRE 801(c).

I

Interrogation

- For purposes of MCL 763.8–MCL 763.10, *interrogation* "means questioning in a criminal investigation that may elicit a self-incriminating response from an individual and includes a law enforcement official's words or actions that the law enforcement official should know are reasonably likely to elicit a self-incriminating response from the individual." MCL 763.7(b).

Investigating law enforcement agency

- For purposes of the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, *investigating law enforcement agency* "means the law enforcement agency responsible for the investigation of

the offense for which the individual is arrested or convicted" and "includes the county sheriff but does not include a probation officer employed by the department of corrections." MCL 28.172(f).

L

Law enforcement official

- For purposes of MCL 763.8–MCL 763.10, *law enforcement official* "means any of the following:

  (*i*) A police officer of this state or a political subdivision of this state as defined in . . . MCL 28.602.

  (*ii*) A county sheriff or his or her deputy.

  (*iii*) A prosecuting attorney.

  (*iv*) A public safety officer of a college or university.

  (*v*) A conservation officer of the department of natural resources and environment.

  (*vi*) An individual acting under the direction of a law enforcement official described in subparagraphs (*i*) to (*v*)." MCL 763.7(c).

Listed offense

- For purposes of MCL 768.27a, *listed offense* "means that term as defined in . . . MCL 28.722." MCL 768.27a(2)(a). MCL 28.722(i) defines *listed offense* as "a tier I, tier II, or tier III offense." Tier I, II, and IIII offenses are further defined in MCL 28.722.

M

Major felony

- For purposes of MCL 763.8–MCL 763.10, *major felony* "means a felony punishable by imprisonment for life, for life or any term of years, or for a statutory maximum of 20 years or more, or a violation of . . . MCL 750.520d." MCL 763.7(d).

Major felony recording

- For puposes of MCL 763.8–MCL 763.10, *major felony recording* "means the interrogation recording required under [MCL 763.8] or a duplicate of that recording." MCL 763.7(e).

Mental illness

- For purposes of MCL 750.145m, *mental illness* "means that term as defined in . . . MCL 330.1400." MCL 750.145m(i). MCL 330.1400 defines *mental illness* as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g).

Minor

- For purposes of MCL 768.27a, *minor* "means an individual less than 18 yeas of age." MCL 768.27a.

O

Offense involving domestic violence

- For purposes of MCL 768.27b and MCL 768.27c, *offense involving domestic violence* "means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(6)(a); MCL 768.27c(5)(b).

Original

- For purposes of MRE 1001–MRE 1008, "an *original* of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person

who executed or issued it. For electronically-stored information, *original* means any printout—or other output readable by sight—if it accurately reflects the information. An *original* of a photograph includes the negative or any print from it." MRE 1001(d) (quotation marks omitted) (emphasis added).

P

Participants

- For purposes of subchapter 2.400 of the Michigan Court Rules, *participants* "include, but are not limited to, parties, counsel, and subpoeanaed winesses, but do not include the general public." MCR 2.407(A)(1).

Personal care

- For purposes of MCL 750.145m, *personal care* "means assistance with eating, dressing, personal hygiene, grooming, or maintenance of a medication schedule as directed and supervised by a vulnerable adult's physician." MCL 750.145m(m).

Photograph

- For purposes of MRE 1001–MRE 1008, *photograph* "means a photographic image or its equivalent stored in any form." MRE 1001(c).

Place of detention

- For purposes of MCL 763.8–MCL 763.10, *place of detention* "means a police station, correctional facility, or prisoner holding facility or another governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual." MCL 763.7(f).

Preferred mode

- For purposes of MCR 6.006, *preferred mode* means "scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by [MCL 780.752(1)(m)], or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)." MCR 6.006(B)(2); MCR 6.006(C)(1).

Public office

- For purposes of the Michigan Rules of Evidence, *public office* "includes a public agency." MRE 101(c)(3).

R

Record

- For purposes of the Michigan Rules of Evidence, *record* "includes a memorandum, report, or data compilation." MRE 101(c)(4).

Recording

- For purposes of MRE 1001–MRE 1008, *recording* "consists of letters, words, numbers, or their equivalent recorded in any manner." MRE 1001(b).

Relevant evidence

- For purposes of the Michigan Rules of Evidence, *relevant 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." MRE 401.

Rule prescribed by the Supreme Court

- For purposes of the Michigan Rules of Evidence, *rule prescribed by the Supreme Court* "means a rule adopted by the Michigan Supreme Court." MRE 101(c)(5).

S

Sample

- For purposes of the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, *sample* "means a portion of an individual's blood, saliva, or tissue collected from the individual." MCL 28.172(g).

Sexual assault

- For purposes of MCL 768.27b, *sexual assault* "means a listed offense as that term is defined in . . . MCL 28.722." MCL 768.27b(6)(c). MCL 28.722(i) defines *listed offense* as "a tier I, tier II, or tier III offense." Tier I, II, and IIII offenses are further defined in MCL 28.722.

Standardized field sobriety test

- For purposes of the Michigan Vehicle Code, *standardized field sobriety test* "means 1 of the standardized tests validated by the National Highway Traffic Safety Administration. A field sobriety test is considered a standardized field sobriety test under this section if it is administered in substantial compliance with the standards prescribed by the National Highway Traffic Safety Administration." MCL 257.62a.

Statement

- For purposes of MRE 801–MRE 807, *statement* means "a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion." MRE 801(a).

U

Unavailability as a witness

- For purposes of MRE 804, a declarant is *unavailable as a witness* "if the declarant:

  (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

  (2) refuses to testify about the subject matter despite a court order to do so;

  (3) testifies to not remembering the subject matter;

  (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

  (5) is absent from the trial or hearing, and

    (A) the statement's proponent has not been able, by process or other reasonable means, to procure:

(i) the declarant's attendance, in the case of a hearsay exception under [MRE 804(b)(1) or MRE 804(b)(6)]; or

(ii) the declarant's attendance or testimony, in the case of a hearsay exception under [MRE 804(b)(2)-(4)]; and

(B) in a criminal case, the proponent shows due diligence.

But [MRE 804(a)] does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying." MRE 804(a).

- For purposes of MRE 804(b)(2), *unavailability of a witness* "also includes situations in which:

(A) the witness is more than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the witness's absence was procured by the party offering the deposition; or

(B) on motion and notice, exceptional circumstances make it desirable—in the interests of justice and with due regard to the importance of presenting witnesses' testimony orally in open court—to allow the deposition to be used." MRE 804(b)(2)(A)-(B).

V

Videoconferencing

- For purposes of subchapter 2.400 of the Michigan Court Rules, *videoconferencing* "means the use of an interactive technology, including a remote digital platform, that sends video, voice, and/or data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers. It includes use of a remote video platform through an audio-only option." MCR 2.407(A)(2).

Videorecorded statement

- For purposes of MCL 600.2163a, *videorecorded statement* "means a witness's statement taken by a custodian of the

videorecorded statement as provided in [MCL 600.2163a](7). Videorecorded statement does not include a videorecorded deposition taken as provided in [MCL 600.2163a](20) and [MCL 600.2163a](21)." MCL 600.2163a(1)(e).

Vulnerable adult

- For purposes of MCL 600.2163a, *vulnerable adult* "means that term as defined in . . . MCL 750.145m." MCL 600.2163a(1)(f). MCL 750.145m(u) defines *vulnerable adult* as "(*i*) [a]n individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently, (*ii*) [a]n adult as defined in . . . MCL 400.703, [or] (iii) [a]n adult as defined in . . . MCL 400.11."

W

Witness

- For purposes of MCL 600.2163a, *witness* "means an alleged victim of an offense listed under subsection (2) who is any of the following:

  (*i*) A person under 16 years of age.

  (*ii*) A person 16 years of age or older with a developmental disability.

  (*iii*) A vulnerable adult." MCL 600.2163a(1)(g).

Writing

- For purposes of MRE 1001–MRE 1008, *writings* "consists of letters, words, numbers, or their equivalent set down in any form." MRE 1001(a).

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