Evidence Benchbook
Part of the original Circuit Court Benchbook

By The Honorable J. Richardson Johnson
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Ninth Judicial Circuit
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This original edition was initially published in 2010, and the text has been revised, reordered, and updated through July 17, 2019. 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 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 or overruled is no longer binding precedent, it is less clear when an opinion is not reversed 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). 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 (Joel), 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, which 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 overseen by an Editorial Advisory Committee facilitated by MJI Research Attorney Sarah Roth. MJI gratefully acknowledges the time, helpful advice, and expertise contributed by the Committee members, who are as follows:

- Mr. Timothy Baughman, APA Wayne County
- The Honorable William J. Caprathe
- The Honorable Elizabeth L. Gleicher
- The Honorable William J. Giovan
- The Honorable Elizabeth Pollard Hines
- The Honorable J. Richardson Johnson
- Ms. Anica Letica, AAG, Criminal Appeals Division
- The Honorable Phyllis C. McMillen
- The Honorable Paul E. Stutesman
- The Honorable Randy L. Tahvonen

Many people assisted Judge J. Richardson Johnson in the preparation of the original content of this benchbook: Administrative Assistant Sue King; Law Clerks Douglas Wilcox, Sunny Forton, Jayson Blake, Sarah Stancati, Mark Beougher, Kerri Rapacz and Sharla Comstock; former MJI Judicial Education & Publications Manager, Tobin Miller; former MJI Research Attorney, Jennifer Warner; and Publications Manager, Phoenix Hummel.

In addition, members of the Circuit Court bench also helped in developing the original content of this benchbook. Specifically, members of the 9th Circuit Court raised questions that triggered changes in content and format. Several Circuit Judges reviewed portions of Judge Johnson’s original work. They are: The Honorable George S. Buth, 17th Circuit Court, Grand Rapids; The Honorable William J. Caprathe, 18th
Circuit Court, Bay City; The Honorable Dennis C. Kolenda, 17th Circuit Court (Retired), Grand Rapids; The Honorable M. Richard Knoblock, 52nd Circuit Court, Bad Axe; and The Honorable Richard M. Pajtas, 33rd Circuit Court, Charlevoix.

Most importantly, Judge Johnson would like to thank his family. Their patience made his work possible.

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.
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.
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1.1 Evidence—Overview

The admissibility of evidence is governed by the common law, statutes, and the Michigan Rules of Evidence (MRE). See MRE 101. The rules of evidence cover the vast majority of evidentiary issues and are the beginning point for any analysis. “Generally, all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, the rules of evidence, or other rules adopted by the [Michigan] Supreme Court. Evidence which is not relevant is not admissible. Evidence may also be precluded by statute.” Hecht v Nat’l Heritage Academies, Inc, 499 Mich 586, 618 (2016) (alterations, quotation marks, and citations omitted). See also MRE 402. The exclusionary rules typically state the exclusion and then provide for exceptions to the exclusions. For example, the hearsay rule provides for the exclusion of hearsay (MRE 802) and then provides exceptions to the exclusion (MRE 803, MRE 803A, MRE 804). “[The rules of evidence] are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” MRE 102.

The rules apply to all actions and proceedings in Michigan courts, except for the actions and proceedings listed in MRE 1101(b)(1)–MRE 1101(b)(10). MRE 1101(a). When a conflict exists between a statute and a rule of evidence, the rule of evidence “prevails if it governs purely procedural matters.” Donkers v Kovach, 277 Mich App 366, 373 (2007). Statutory rules of evidence may apply if they do not conflict with the Michigan Rules of Evidence. MRE 101; People v McDonald, 201 Mich App 270, 273 (1993). In McDonald, the Court concluded that MCL 257.625a(7) did not conflict with the rules of evidence because it did not allow admission of the evidence for the purpose of establishing guilt, and it required the court to issue a jury instruction explaining how the evidence was to be used. McDonald, 201 Mich App at 273.

“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).

Standard of Review. A trial court’s decision whether to admit evidence is reviewed for an abuse of discretion. People v Katt, 468 Mich 272, 278 (2003). However, 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); Katt, 468 Mich at 278.

1 This statute has been amended since McDonald. The citation for the section discussed in the case is now MCL 257.625a(9). 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.
“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. However, “[a] decision on a close evidentiary question ordinarily cannot be an abuse of discretion.” *People v Aldrich*, 246 Mich App 101, 113 (2001).

“An error in the admission or 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).

An appeal may not be based on an error admitting or excluding evidence unless a substantial right of a party is affected. See MRE 103(a) and MRE 103(d).

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**Committee Tips:**

The following outline may assist with the analysis of evidentiary issues.

**Test for admissibility:**

- Do the rules of evidence apply? MRE 101; MRE 1101.
- Has the foundation for admission been established?
- Is the evidence relevant as defined by MRE 401? MRE 402.
- Although relevant, is the evidence subject to exclusion under the balancing test of MRE 403?
- Although relevant, is the evidence inadmissible under one of the other rules (for example, hearsay or privilege)? If so, is there an exception to the rule of preclusion that allows admission (for example, the business record exception to the hearsay rule)?
- Is the evidence admissible for a limited purpose? MRE 105.

**Judicial Ruling:**

- Require attorneys to give the reason or the authority for any objections.
• When there is an objection, it may be helpful to ask the other attorney what the evidence is being offered to prove (i.e. how is it relevant?).

• Distinguish between preliminary findings of fact (to which the rules of evidence do not apply) and rulings on evidence (which are covered by the rules). Remember the rules of evidence (except those rules relating to privileges) do not apply to preliminary findings of fact. MRE 104(a) and MRE 1101(b)(1).

• Give the reason for your ruling even for a routine objection and decision. MRE 103.

• Mention discretion when the court has discretion. Discretion under MRE 403 is an example. Remember the court does not have discretion under many rules of evidence.

• Permit an offer of proof outside the presence of the jury, if excluding evidence. MRE 103(a)(2). See Alpha Capital Management, Inc v Rentenbach, 287 Mich App 589, 619 (2010), where the trial court imposed time limitations on witness testimony and subsequently abused its discretion when it refused to allow the plaintiff to submit an offer of proof showing what the plaintiff intended to prove had more time been given for witness testimony. See also Barksdale v Bert’s Marketplace, 289 Mich App 652 (2010).

### 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). Motions in limine are most commonly made before trial; however, they may also be made and decided upon during trial.

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(a), which provides that “[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before 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 of the admissibility of evidence. In
criminal cases, the motion is often a motion to suppress. However, a motion in limine may also be employed by a party seeking to gain admission of certain evidence, rather than suppress it.

The information contained in this section is in table form. However, some e-reader programs or apps do not properly display tables. If the table below appears to have poor formatting or is illegible, you may access the PDF version of this table by clicking here. The following table includes a list of situations where motions in limine are commonly used:

### Table 1: Common Motions in Limine

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### 1.3 Admissibility

#### A. Preliminary Question Concerning Admissibility

“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [conditional relevancy requirement]. In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.” MRE 104(a).
B. Who Decides Specific Admissibility Questions

1. Exhibits

MRE 1008 states:

“When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of [MRE] 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.”

2. Other Evidence

When the evidence is not the “contents of writings, recordings, or photographs,” 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). Preliminary questions of admissibility are to be decided by the court. MRE 104(a). “[P]reliminary questions of conditional relevance envisioned by [MRE] 104(b) 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.” Vega, supra at 778-779, quoting United States v James, 590 F2d 575, 579 (CA 5, 1979) (emphasis added). “The standard for screening evidence under [MRE 104(b)] is quite low.” Howard v Kowalski, 296 Mich App 664, 682 (2012). “[A]s long as some rational jury 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.” Johnson, supra at 683.
1.4 Foundation

A. Lack of Personal Knowledge

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’[s] own testimony. This rule is subject to the provisions of [MRE] 703, relating to opinion testimony by expert witnesses.” MRE 602.

B. Requirement of Authentication or Identification

“The proper foundation for admissibility of evidence is governed by MRE 901(a), which states: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” People v Jambor (Jambor I), 271 Mich App 1, 5 (2006), rev’d on other grounds 477 Mich 853 (2006).2 “[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).

The first question, whether the evidence has been authenticated, “is reserved solely for the trial judge.” Mitchell, 321 Mich App at 154. The proponent bears the burden of showing that a foundation has been established. Jambor I, 271 Mich App at 5. The proponent must provide evidence sufficient to support a finding that the matter in question is what the proponent claims it is. MRE 901; Jambor I, 271 Mich App at 5. 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. at 155. “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.

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2For more information on the precedential value of an opinion with negative subsequent history, see our note.
Mitchell, 321 Mich App at 155. Authentication may be opposed “by arguing that a reasonable juror could not 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; the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage.” Id. at 155.

 “[T]he second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder[.]” Mitchell, 321 Mich App at 156. “When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court.” Id. at 156. “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.” Jambor I, 271 Mich App at 7 n 2, quoting People v White, 208 Mich App 126, 133 (1994). “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.” Mitchell, 321 Mich App at 156.

1. Question 1: Authentication or Identification

The following examples illustrate evidence sufficient for authentication or identification purposes:

- Testimony of a witness with knowledge;
- Nonexpert opinion3 on handwriting;
- Comparison by trier of fact or expert witness;4
- Distinctive characteristics and the like;
- Voice identification;
- Telephone conversations;
- Public records or reports;
- Ancient documents or data compilations;
- Process or system; and
- Methods of authentication or identification provided by statute or rule. MRE 901(b)(1)-(10).

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3 See Section 3.15 for a discussion of lay opinions.

4 See Section 4.1 for a discussion of expert opinions.
In *Jambor I*, 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 break-in. *Jambor I*, 271 Mich App at 3. 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.* at 5. 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. 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).

In *People v Muhammad (Elamin)*, 326 Mich App 40, 58 (2018), defendant asserted that a shoe insole from which DNA evidence was obtained had been contaminated when it was photographed. “The trial court did not err in finding that the prosecution introduced sufficient evidence to authenticate the shoe and the insole in accordance with MRE 901” 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.” *Id.* 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.” *Id.* The detective also “testified that defendant’s DNA samples were contained in separate plastic tubes.” *Id.* at 59. “Thus, there was no evidence to show that the shoe insole was contaminated or tampered with, and the trial court did not err as a matter of law in holding that the shoe and the shoe insole were properly authenticated.” *Id.* at 59-60. (holding that “the trial court did not abuse its discretion in denying defendant’s motion to suppress the evidence”).
The trial court did not abuse its discretion by admitting an ultrasound image after concluding that it was properly authenticated or identified 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 [the] plaintiff’s identifying information, the date of the procedure at issue, and the name of the doctor who performed the surgery.” Id. at 156. 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 the 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. at 157.

2. Question 2: Weight or Reliability Given to the Evidence

Where the trial court properly admitted an ultrasound image under MRE 901(a), it “erred by precluding [the] 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 [the] plaintiff from presenting any evidence disputing whether the image actually depicted [the] 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.” *Id.* 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.

C. Self-Authentication

The following items, found in MRE 902(1)-(11), are considered self-authenticating and require no extrinsic evidence to prove their authenticity:

- Domestic public documents under seal.
- Domestic public documents not under seal.
- Foreign public documents.
- Certified copies of public records.
- Official publications.
- Newspapers and periodicals.
- Trade inscriptions and the like.
- Acknowledged documents.
- Commercial paper and related documents.
- Presumptions created by law.
- Certified copies of regularly conducted activity.

1.5 Judicial Notice


A. Of Necessary Elements of an Offense

A court may **not** take judicial notice of the existence of a necessary element of an offense. *People v Taylor (Robbie)*, 176 Mich App 374, 376 (1989). In *Taylor (Robbie)*, the trial court erred when it did not require the prosecution to present evidence of its charges against the defendant (charged with being a habitual offender), but instead
relayed on testimony and evidence from a previous trial to make its decisions. *Id.* at 376-378.

**B. Of Adjudicative Facts**

“A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *MRE 201(b).* See also *Freed v Salas*, 286 Mich App 300, 341 (2009).

A court may take judicial notice during any stage of the proceedings. **MRE 201(e).** If the court takes judicial notice during a civil proceeding, it must “instruct the jury to accept as conclusive any fact judicially noticed.” **MRE 201(f).** If the court takes judicial notice during a criminal proceeding, it must “instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.” *Id.*

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).

A trial court may take judicial notice of the county in which a particular city is situated. See *People v Stokes (Stokes I)*, 312 Mich App 181, 208 (2015), vacated in part on other grounds 501 Mich 918 (2017) (rejecting the defendant’s argument that his defense counsel was ineffective for failing to contest the Wayne 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”).

**C. Of Law**

A court, without request by a party, may take judicial notice of the common law, constitutions, statutes, Michigan ordinances and regulations, private acts and resolutions of the United States

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5 **MRE 201** only governs judicial notice of *adjudicative facts*. It “does not preclude judicial notice of *legislative facts.*” **MRE 201(a)** (emphasis added).

6 For more information on the precedential value of an opinion with negative subsequent history, see our note.
Congress and of the Michigan Legislature, and foreign laws. MRE 202(a). However, judicial notice of these items becomes mandatory when “a party requests it and (1) furnishes the court sufficient information to enable it properly to comply with the request and (2) has given each adverse party such notice as the court may require to enable the adverse party to prepare 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).7

D. Of Newspaper Articles

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, 321 Mich App 1 n 2 (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 focus[ed] 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”).

1.6 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).

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7For 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 his or her 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 fact-finder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence.” *BCBSM 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 fact-finder] 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).

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 [a particular] case.” M Crim JI 3.2(3).
4. Other Burdens of Proof/Persuasion

There are other burdens of proof created by case law, 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(D)(1).
- Unendorsed witnesses. MCR 2.401(I)(2).

Another burden of persuasion is due diligence. Examples include:

- Requests for second summons. MCR 2.102(D).

C. Burden of Production (Burden of Going Forward)

“‘[The burden of production] 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, 428 Mich at 179, quoting McCormick, Evidence (3d ed), §336, p 946.

Presumptions may affect the burden of production. A presumption is “a procedural device which 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, 422 Mich at 289. 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.

See Stokes v Chrysler LLC, 481 Mich 266 (2008), a worker’s compensation case, where the Court concluded that once a claimant sufficiently proves to the court that he or she is disabled, the burden

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8 M Crim JI 3.2 must be given in its entirety in every criminal case. Only subsection (3) is referenced here.
9 See Section 1.7 for a discussion of presumptions.
of production shifts from the claimant to the employer contesting the claim to challenge the claimant’s proof of disability.

D. Standard of Review

“Whether the trial court’s instruction on the applicable burden of proof was proper is a question [of] law that . . . [is] review[ed] de novo.” Stein v Home-Owners Ins Co, 303 Mich App 382, 386-387 (2013).

1.7 Presumptions

A. Civil Case

Presumptions in civil cases are governed by MRE 301:

“In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.”


“[A] presumption is a procedural device that regulates the burden of proceeding with the evidence. The presumption is dissipated, however, once substantial evidence has been submitted by its opponent.

“In Widmayer [v Leonard, 422 Mich 280, 289 (1985)], our Supreme Court clarified some confusion in the law regarding presumptions and the effect of MRE 301:

“‘[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.’

“We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which 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.’

“Thus, an unrebutted presumption can form the basis for a directed verdict or summary disposition in favor of the moving party.”

If evidence is introduced to rebut a presumption, “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.

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:

“(a) Scope. In criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

“(b) Instructing the jury. Whenever the existence of a presumed fact against an accused is submitted to the jury, the court shall instruct the jury that it may, but need not, infer the existence of the presumed fact from the basic facts and that 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.” CJI 2d 3.2(1).

C. Statutory Presumptions

“Legislative [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.” 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. Dorris, supra at 765. The Court concluded that presuming unlawful intent “was neither unreasonable nor unconstitutional” because “[i]ncendiary 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.

“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 Distributing 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, supra at 621. However, this presumption may be rebutted by showing an adequate excuse or justification for the collision. Id.

1.8 Order of Proof

A. Generally

The trial court has the 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.\(^\text{10}\)

\(^\text{10}\) See Section 1.3 on admissibility.
C. Rebuttal Evidence

“[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). “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). “The purpose of rebuttal evidence is to undercut an opponent’s case, and a party may not introduce evidence competent as part of his case in chief during rebuttal unless permitted to do so by the court.” *Lima Twp v Bateson*, 302 Mich App 483, 502 (2013) (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). “The scope of rebuttal in civil cases is within the sound discretion of the trial court.” *Taylor v Blue Cross/Blue Shield of Michigan*, 205 Mich App 644, 655 (1994). “[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.” *Figgures*, 451 Mich at 399. See also *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 348-349 (1991). According to the Michigan Supreme Court:

“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.” *Figgures*, 451 Mich at 399.

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). Relevant in ruling on a motion to reopen proofs is “(1) the timing of the motion, (2) whether the adverse party would be surprised, deceived, or disadvantaged by reopenng the proofs, and (3) whether there would be inconvenience to the court, parties, or counsel.” *Michigan 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).\(^\text{11}\)

\(^{11}\)For more information on the precedential value of an opinion with negative subsequent history, see our note.
1.9 Limitations on Evidence

A. Precluding a Witness From Testifying

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 Michigan, 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. Pastrick, 162 Mich App at 246. In Pastrick, the Court of Appeals concluded 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 experts[.]” Id. The Court also noted that a reasonable condition will also normally include a reasonable time frame. Id. at 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 defendants; (4) actual notice to the defendant of the witnesses and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff’s engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court’s order; (7) an attempt by the plaintiff 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 Development, LLC v Perrin, 288 Mich App 143, 165 (2010), quoting Dean v Tucker, 182 Mich App 27, 32-33 (1990).

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 (2008). According to the Court of Appeals, 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. Without the expert’s testimony, the defendant was also unable to contradict the prosecutor’s assertions regarding the number of pills needed to cause an overdose. Yost, supra at 386. The Court explained:

“[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.

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. The Court further rejected 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.” Cox, 322 Mich App at 306.

B. Limitations on Questioning

“[T]he trial court has a duty to control trial proceedings in the courtroom, and has wide discretion and power in fulfilling that duty.” People v Willis, 322 Mich App 579, 590 (2018). See also 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.
1. **Time Limitations on Witness Testimony**

MRE 403 and MRE 611(a) authorize the court to restrict the length of time a witness may be questioned. See also *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595-596 (1991). In *Hartland Twp*, on the fifth day of trial, the court limited both direct and cross-examination of witnesses to one hour. *Hartland Twp, supra* at 596. The Michigan Court of Appeals concluded that “[t]he record shows that the trial court properly exercised its discretion in limiting the time for examination of witnesses.” *Id.* at 596.

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 Management, Inc v Rentenbach*, 287 Mich App 589, 616-618 (2010). The Court of Appeals 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.” *Alpha Capital Management*, 287 Mich App at 618 n 12. However, because the court used a time limitation suggested by the plaintiff, it was not arbitrary. *Id.* But, see *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. In *Barksdale*, both sides quickly picked a jury, delivered opening statements, and the plaintiff’s attorney quickly examined the plaintiff, “without repetitive or irrelevant questions.” *Barksdale*, 289 Mich App at 657. The Court of Appeals concluded that the facts in *Barksdale* were distinguishable from those in *Alpha Capital Management*, 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. Thus, the trial court “imposed[ed] an utterly arbitrary time limit for witness examinations,” which resulted in an abuse of discretion. *Id.*
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).

3. **Limitations on Cross-Examination**

In controlling trial proceedings, a trial court may impose reasonable limits on cross-examination, even in a criminal case where the defendant has a constitutional right to confrontation. *Willis*, 322 Mich App at 590, 591.

**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 [the] 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 [the] defendant’s personal cross-examination would cause [the children] significant trauma and emotional stress[.]”) (quoting MRE 611(a); additional 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 “[t]rial court’s remarks were not of such a nature as to unduly influence the jury.” *Willis*, 322 Mich App at 591.12 The trial court “appropriately exercised its

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12 For a detailed discussion of judicial impartiality see the *Civil Proceedings Benchbook*, Chapter 6 and the *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.
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 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; People v Blackston, 481 Mich 451, 461 (2008). 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, where two witnesses recanted their trial testimony after the defendant’s first trial, evidence of the recantations during the defendant’s second trial was not cumulative impeachment testimony despite the fact that during the first trial the credibility of the witnesses was impeached with prior inconsistent statements. Blackston v Rapelje, 780 F3d 340, 354 (CA 6, 2015) (holding that “the fact that some impeachment occurred at the first trial does not mean that the thwarted impeachment would have been immaterial or cumulative[,]” and finding that “the state court was objectively unreasonable” in excluding the evidence of the recantations where “no other evidence gave the jury any specific reason to believe that the witnesses were lying on the stand during the first trial[)]”, citing Napue v Illinois, 360 US 264, 269 (1959).

“Any error resulting from the exclusion of cumulative evidence is harmless.” Badiee v Brighton Area Schools, 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).

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13The Sixth Circuit Court of Appeals affirmed the district court’s grant of a conditional writ of habeas corpus to the defendant in People v Blackston, 481 Mich 451 (2008); Blackston v Rapelje, 780 F3d 340, 344 (CA 6, 2015). Although they may be persuasive, lower federal court decisions are not binding on Michigan courts. Abela v Gen Motors Corp, 469 Mich 603, 607 (2004).

14Although they may be persuasive, lower federal court decisions are not binding on Michigan courts. Abela, 469 Mich at 607.
1.10 Privileges

A. Source and Scope

“Privilege[s are] governed by the common law, except as modified by statute or court rule.” MRE 501.

The Michigan Supreme Court explained the purpose of the privilege statutes:

“Unlike other evidentiary rules that exclude evidence because it is potentially unreliable, privilege statutes shield potentially reliable evidence in an attempt to foster relationships. 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.” People v Stanaway, 446 Mich 643, 658 (1994) (internal citations omitted).

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 (Floyd)*, 310 Mich App 328, 344 (2015), rev’d on other grounds 499 Mich 307 (2016). 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.*, quoting *United States v Brock*, 724 F3d 817, 823 (CA 7, 2013).

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’[s] 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

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15For more information on the precedential value of an opinion with negative subsequent history, see our note.
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).

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**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 permits before making a determination on the validity of the claim.*

“[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 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). 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.” *Ibid.* 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.” *Ibid.* 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

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16For more information on the precedential value of an opinion with negative subsequent history, see our note.
defense counsel with an opportunity to further question [the witness's] appointed counsel regarding [the witness's] intent to assert his Fifth Amendment rights, but defense counsel did not avail himself of that opportunity.” *Id.*

3. **Discovery**

In civil cases, privileged material may not be obtained through discovery. MCR 2.302(B)(1). If a party knows 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. MCR 2.306(D)(5).

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, 658, 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).

In criminal cases, privileged information is generally not discoverable. MCR 6.201(C)(1) (specifically applicable to felony cases, see MCR 6.001). 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). See also *People v Stanaway*, 446 Mich 643, 649-650 (1994) (requiring an essentially identical showing before an in camera review of privileged material and noting that privileged material should only be provided to the defendant if the trial court finds material information necessary to the defense after an in camera

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17For additional discussion of protection from self-incrimination, see Section 3.11(A)(2).
review). MCR 6.201(C)(2)(a)-(e) explain how the court should proceed once an in camera inspection has been conducted.

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), quoting Stanaway, 446 Mich at 680 (additional quotation marks and citation 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.” Davis-Christian, 316 Mich App at 208, quoting Stanaway, 446 Mich at 681. 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 trial court “failed to apply the law as articulated in Stanaway and MCR 6.201(C)(2)[,]” and its “articulated standard would [impermissibly] allow an in camera review of most, if not all, of alleged sexual assault victims’ counseling records.”18 The defendant did not demonstrate that the records “would be ‘necessary to the defense[‘]” as required under MCR 6.201(C)(2); rather, he was “attempting to . . . access privileged information in order to ‘fish’ for evidence that [might have] enhance[d] his defense strategy.” Davis-Christian, 316 Mich App at 212-213 (noting that “[the d]efendant [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[‘]”) (citations omitted). Similarly, in Stanaway, the defendant asserted 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.” Stanaway, 446 Mich at 681. The Court rejected the defendant’s request, finding that he was “fishing” and that he 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.” Id.

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18The 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 “free” the defendant or to “put[] him behind bars[,]” Id. Accordingly, the trial court stated that it was “going to read [the records] and say yea or nay,” Id.
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)–MCL 600.2162(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.* (citation omitted) “[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. 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 (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 the attorney-client privilege in Michigan.” Nash Estate v Grand Haven, 321 Mich App 587, 598 (2017). “[T]he common interest doctrine extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances[,]” 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 (quoting United States v BDO Seidman, LLP, 492 F3d 806, 815-816 (CA 7, 2007), and 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).

D. Recognized Privileges

The following table is a nonexhaustive list of commonly recognized confidential communications and the authority that governs each communication:

<table>
<thead>
<tr>
<th>Privilege</th>
<th>Authority</th>
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</thead>
<tbody>
<tr>
<td>Attorney-client privilege</td>
<td>MRPC 1.6</td>
</tr>
<tr>
<td>Attorney work product privilege¹</td>
<td>MCR 2.302(B)(3)(a)</td>
</tr>
<tr>
<td>Clergy-penitent privilege²</td>
<td>MCL 767.5a(2)</td>
</tr>
<tr>
<td>Confidential communication to crime stoppers org.</td>
<td>MCL 600.2157b</td>
</tr>
<tr>
<td>Confidential informant (for journalists)</td>
<td>MCL 767.5a</td>
</tr>
<tr>
<td>Confidential informant (for police)</td>
<td>People v Underwood, 447 Mich 695, 703-707 (1994)</td>
</tr>
<tr>
<td>CPA-client privilege</td>
<td>MCL 339.732</td>
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<tr>
<td>Dentist-patient privilege</td>
<td>MCL 333.16648</td>
</tr>
<tr>
<td>Hospital records-peer review privilege</td>
<td>MCL 333.21515</td>
</tr>
</tbody>
</table>
1.11 Missing Physical Evidence

A. Civil Case

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 or 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 Consolidated Rail Corp, 472 Mich 77, 84-86 (2005). “A jury may draw an adverse inference against a

Table 2: Common Privileges

<table>
<thead>
<tr>
<th>Privilege</th>
<th>Authority</th>
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<tbody>
<tr>
<td>Mediation communications</td>
<td>MCR 2.411(C)(5); MCR 2.412</td>
</tr>
<tr>
<td>Physician-patient privilege</td>
<td>MCL 600.2157 MCL 767.5a(2)</td>
</tr>
<tr>
<td>Polygraph examiner privilege</td>
<td>MCL 338.1728(3)</td>
</tr>
<tr>
<td>Privilege against self-incrimination</td>
<td>US Const, Am V; Const 1963, art 1, § 17</td>
</tr>
<tr>
<td>Probation records and reports</td>
<td>MCL 791.229</td>
</tr>
<tr>
<td>Psychologist-patient privilege</td>
<td>MCL 333.18237</td>
</tr>
<tr>
<td>School official-student privilege</td>
<td>MCL 600.2165</td>
</tr>
<tr>
<td>Spousal communication privilege</td>
<td>MCL 600.2162</td>
</tr>
<tr>
<td>Trade secrets</td>
<td>MCR 2.302(C)(8)</td>
</tr>
</tbody>
</table>

1. The work-product privilege extends to “notes, working papers, memoranda or similar materials” that were prepared in anticipation of litigation[,]” and the privilege applies “without regard to whether [the material] was prepared by an attorney or by some other person and whether such other person was engaged by an attorney.” D’Alessandro Contracting Group, LLC v Wright, 308 Mich App 71, 77, 78 (2014), quoting Leibel v Gen Motors Corp, 250 Mich App 229, 245 (2002).

2. The Michigan Court of Appeals found that MCL 600.2156 (a provision often cited as one of the clergy-penitent privileges) “does not qualify as an evidentiary privilege.” People v Bragg, 296 Mich App 433, 453 (2012).
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. 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 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 (2003). 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.” Bloemendaal, 255 Mich App 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. However, 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. Bloemendaal, 255 Mich App at 214.

**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).19 quoting People v Hanks, 276 Mich App 91, 95 (2007). “In other words, the critical issue in determining whether government conduct deprived a criminal defendant of a fair trial is the nature of the evidence that was withheld; it emphatically is not the mental state of the government official who suppressed the evidence.” Moldowan v City of Warren, 578 F3d 351, 384 (CA 6, 2009).20 The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. Hanks, 276 Mich App at 95. It is the trial 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,21 and the prison lacked the equipment to preserve saliva for DNA testing purposes. Id. at 583.

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, 5 (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 6. However, the “defendant concede[d] that the balloon was only ‘potentially exculpatory.’” Id. 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 [that type of]

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19For more information on the precedential value of an opinion with negative subsequent history, see our note.

20 Though persuasive, Michigan state courts “are not . . . bound by the decisions of the lower federal courts.” People v Gillam, 479 Mich 253, 261 (2007).

21Testimony 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.
evidence.” Id. “Moreover, the overwhelming evidence at trial established that [the] defendant possessed and passed the heroin to [a prisoner]. Consequently, even if the balloon had been DNA-tested and someone else’s DNA (rather than [the] defendant’s) was found on it, the test results would have made no difference to the outcome of the case.” Id.

1.12 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). “A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes.” Musser, 494 Mich at 348. “However, if an evidentiary error is a nonconstitutional, preserved error, then it ‘is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative.’” Id., quoting People v Krueger, 466 Mich 50, 54 (2002). “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, quoting Krueger, 466 Mich at 54 (quotation marks and citations omitted).
Chapter 2: Relevancy

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2.1 Relevant Evidence

A. Relevant Evidence Defined

As it relates to admissibility of evidence, there are two types of relevance: legal relevance and logical relevance. See Rock v Crocker, 499 Mich 247, 256 (2016). MRE 401 and MRE 402 contemplate logical relevance. Rock, 499 Mich at 256. MRE 402 states that evidence must be relevant to be admissible. MRE 401 defines relevant evidence as “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.”

There are two separate questions that must be answered in determining whether evidence is logically relevant:

“First, [the court] must determine the ‘materiality’ of the evidence. In other words, [the court] must determine 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.

“Materiality, under Rule 401, is the requirement that the proffered evidence be related to ‘any fact that is of consequence’ to the action. . . . 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.’

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“In addition to determining the materiality of the evidence, [the court] must also consider the principle of probative force. 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) (internal citations omitted).

“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 404.¹ Rock, 499 Mich at 256, quoting People v VanderVliet, 444 Mich 52, 61-62 (1993). “Legal relevance, as a limiting rule, concerns the purpose for which evidence is used.” Id.

B. Relevant Evidence Admissible

Relevant evidence is generally admissible. MRE 402. In People v Hampton, 407 Mich 354, 367 (1979), the Michigan Supreme Court addressed the issue of admissibility as follows:

“Under MRE 402, all relevant evidence is admissible unless otherwise excluded. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence, MRE 401. 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[.]” (Internal citations omitted.)

C. Exclusion of Relevant Evidence (Balancing Test)

MRE 403 states that relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

“Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony” by the trial court. People v VanderVliet, 444 Mich 52, 81 (1993). “In determining admissibility [under MRE 403] the court must balance many factors including: the time necessary for presenting the evidence and the potential for delay; how directly it tends to prove the fact in support of which it is offered; whether it would be a needless presentation of cumulative evidence; how important or trivial the fact sought to be proved is; the potential for confusion of the issues or misleading the jury; and whether the fact sought to be proved can be proved in another way involving fewer harmful collateral effects.” People v Oliphant, 399 Mich 472, 490 (1976).² See also People v Blackston, 481 Mich 451, 462 (2008).³

¹ See Section 2.2(F) for more information on MRE 404.
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).

The trial court did not abuse its discretion or unfairly prejudice the defendant by admitting 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. Murphy (On Remand), 282 Mich App at 573-574. The trial court properly admitted evidence of the defendant’s subsequent participation in a separate carjacking because (1) it connected the defendant to the vehicle and weapon used to rob the victim, (2) the prosecutor never argued to the jury that the defendant’s participation in the subsequent carjacking established his guilt in

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2 A slightly different approach should be taken for evidence that is admissible under MCL 768.27a. See Section 2.2(F)(1)(c) for more detail.

the armed robbery, and (3) the judge issued a cautionary instruction to the jury limiting the possibility of undue prejudice. *Id.* at 583.

**Committee Tip:**

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, subsequent remedial measures, settlement negotiations, payment of medical expenses, plea discussions, and insurance coverage. Although these matters may be relevant, they are generally excluded by MRE 403 because they are generally more prejudicial than probative as a matter of law.

D. Caselaw

1. Evidence Relevant

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, 145-46 (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 [the] 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.* at 146 (noting further that the probative value of the evidence was not outweighed by the danger of unfair prejudice).

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,
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.\textsuperscript{4} \textit{Id.} at 332, 333 (further holding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice).

The victim’s testimony that the defendant “said Islamic prayers and ‘Muslim things’ in Arabic[,]” and that the victim “‘hated the fact that [the defendant] felt he was a bad person’ and ‘the fact that [Muslims had] made him [that] way[,]’” and that he “was becoming 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 was alleged to have unlawfully confined her.” \textit{People v Urban}, 321 Mich App 198, 209-210 (2017). “The prosecution’s theory of the case that [the] defendant committed the crimes because he had become upset at recent losses in his life; [the victim’s] testimony reflects [the] defendant’s emotional turmoil.” \textit{Id.} at 210 (further holding that the testimony was not unfairly prejudicial because “evidence that [the] 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 they 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 painting on the walls – “was . . . relevant to the prosecution’s theory that [the] defendant’s deteriorating emotional state, as evidenced by his neglecting and defacing of his home, contributed to his commission of the charged crimes.” \textit{Urban}, 321 Mich App at 213-214 (finding that the defendant’s trial counsel was not ineffective for failing to object to the evidence where the trial court had previously allowed similar testimony).

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 and not unfairly prejudicial. \textit{People v Dixon-Bey}, 321 Mich App 490, 514 (2017). The testimony was relevant because it provided a “conflicting portrayal of [the] defendant

\footnote{See Section 2.2(D) for discussion of admissibility under MCL 750.520].}
after the victim’s death[,]” and “reflected” testimony from the defendant’s daughters that the prosecution contended was influenced by the defendant. *Id.* at 513, 514. Further, the testimony, “which had a tendency to affect whether the jury believed [the] defendant’s daughters’ testimony and reflected [the] defendant’s state of mind shortly after the victim was killed,” 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 [the] 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 [the] defendant’s mindset shortly after the victim was killed.” *Id.* at 514, 515 (noting that the defendant did not make any argument regarding whether the testimony constituted improper character evidence under MRE 404).

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) (noting that any error in the admission of evidence regarding the trust was waived by the defendant’s failure to object to the inclusion of the evidence and his own references to the evidence during cross-examination and closing argument).

2. **Evidence Irrelevant**

“In the absence of evidence connecting [a] fracture to [the] 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.’” *People v McFarlane*, 325 Mich App 507, 530 (2018) (further holding that even if the evidence was relevant to

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5See Section 4.2(C) for additional information on physically abused child syndrome.
another component of the expert’s testimony, it was likely inadmissible under MRE 403, and concluding that defendant’s ineffective assistance of counsel claim failed because he did not establish that defense counsel lacked a sound trial strategy for not objecting to the testimony), quoting MRE 401.

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 she gave the defendant permission to use her car on the day he was arrested. Henry, 315 Mich App at 146-147. 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 on appeal 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 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 [the] defendant’s mother’s potential wrong-doing.” Id. at 147-148 (quotation marks and citation omitted).

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).

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.

### 2.2 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 other crimes, wrongs, or acts are generally not admissible for the purpose of showing action in conformity with the person’s character. MRE 404(a) and MRE 404(b). “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 ‘is a rule of legal relevance, defined as a rule limiting the use of evidence that is logically relevant[,]’” and thus, “[e]ven if logically relevant under MRE 401 and MRE 402, evidence may still be excluded under MRE 404.” Rock v Crocker, 499 Mich 247,
256 (2016). MRE 404 applies to both criminal and civil cases. Rock, 499 Mich at 256 n 5.

1. Exceptions

MRE 404(a) contains exceptions that permit the admission of evidence of a person’s character or a character trait to prove action in conformity with such character on a specific occasion. They include:

- **MRE 404(a)(1)** — Character of the accused (under very specific circumstances—when offered by the accused, for example)
- **MRE 404(a)(2)** — Character of an alleged victim of homicide
- **MRE 404(a)(4)** — Character of a witness

MRE 404(a)(3) allows use of specific acts of the alleged victim in criminal sexual conduct cases for specified purposes other than to prove character:

- Evidence of the alleged victim’s past sexual conduct with the accused.
- Evidence of the alleged victim’s past sexual conduct with others, where offered to show the source or origin of pregnancy, semen, or disease.

MRE 404(b) lists examples of instances where evidence of other crimes, wrongs, or acts may be admitted for purposes other than to show propensity to commit the crime charged, when those purposes are relevant to an issue in the case. See People v VanderVliet, 444 Mich 52, 74 (1993). Those purposes include:

- Motive,
- Opportunity,
- Intent,
- Preparation,

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6 See Section 2.2(C).
7 See Section 2.2(D)(1).
8 See Section 2.2(E).
9 See Section 2.2(F) for a detailed discussion of MRE 404(b).
• Scheme, plan, or system in doing an act,
• Knowledge,
• Identity, or
• Absence of mistake or accident when the same is material.

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 (Calvin), 317 Mich App 637, 646 n 3 (2016).

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

• Prior listed offenses committed against a minor. MCL 768.27a(1).10
• Prior domestic violence or sexual assault offenses. MCL 768.27b.11

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 . . . 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 happenstance.” Id. at 617.

In Mardlin, the defendant’s home was damaged by fire after which he filed an insurance claim for the damage to his home. Id. at 612. 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

10 See Section 2.2(F) on MCL 768.27a. “Listed offenses” are contained in MCL 28.722.
11 See Section 2.2(F) on MCL 768.27b.
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 Court explained that the evidence “need not bear striking similarity to the offense charged if the theory of 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, quoting *VanderVliet*, 444 Mich at 69, 79-80, 80 n 36.

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 [the] defendant.” *People v Kelly (Calvin)*, 317 Mich App 637, 646 n 4 (2016).

### B. Presenting Character Evidence

#### 1. Reputation and Opinion

MRE 405(a) states:
“In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.”

Evidence of the “[r]eputation of a person’s character among associates or in the community” is not excluded by the hearsay rule. MRE 803(21).

a. **Reputation in the Community**

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). “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.” *Bieri*, supra at 713. In *Bieri*, the Court found 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. *Id.*

b. **Basis for Witness’s Knowledge of Reputation**

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. *King*, supra at 678.

c. **Opinion Testimony**

A party may call a witness “to offer testimony concerning [his] personal opinion of [a] person’s character” *Roper*, 286 Mich App at 97. The witness’s opinion must be derived from his 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 will not satisfy MRE 405(a); the opinion must come from knowing the person and how he or she lived his life. *Dobek*, supra at 102.
d. **Extrinsic Evidence**

Generally, MRE 405(a) does not permit a party to prove character through evidence of specific instances of conduct. *Roper*, 286 Mich App at 104. 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.” *Roper*, supra at 102, citing *People v Vasher*, 449 Mich 494 (1995). Notwithstanding the limitations in MRE 405, rebuttal evidence involving specific conduct may be introduced to prove a defendant’s character if all of the following are true:

- during direct examination, the defendant placed his or her character at issue;
- 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, citing *Vasher*, 449 Mich at 504-506.

2. **Specific Instances of Conduct**

MRE 405(b) states:

“In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.”

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 employed [made] character an essential element.” *People v Williams (Terry)*, 134 Mich App 639, 642 (1984). The Court stated, “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 (Terry), 134 Mich App at 642. 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-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.

“[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 (William), ___ Mich App ___, ___ (2019). The trial court erred in precluding defendant from admitting “evidence of the decedent’s specific acts 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 great bodily harm to himself,” and the evidence was “directly relevant to an ultimate issue in his defense.” Id. at ___. 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 as it may bear on the defendant’s state of mind at the time of the shooting.” Id. at ___ (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”).

C. Evidence of Character of Defendant

1. Offered by Defendant

Evidence of a defendant’s pertinent character trait may be offered by the defendant to prove that he or she acted in conformity with that trait on a particular occasion. MRE 404(a)(1). See also People v Whitfield, 425 Mich 116, 130-131 (1986), where the Court stated:

“MRE 404(a)(1) . . . allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime.[12] MRE 404(a)(1) allows the introduction of ‘[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.’ The latter part of MRE 404(a)(1) is the source of the doubt about the wisdom of presenting character evidence as part of an accused’s defense: Once a defendant introduces character testimony, the prosecution can then rebut that testimony. Under MRE 405(a), the accused can only present favorable character evidence in the form of reputation [and opinion] testimony.”[13]

2. Offered by Prosecution

The prosecution may present evidence of a pertinent character trait of a defendant only to rebut character evidence presented by the defense; or, if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under MRE 404(a)(2), evidence of a trait of character for aggression of the accused may be offered by the prosecution. MRE 404(a)(1). Whitfield, 425 Mich at 130. “Where . . . the defendant does not offer character evidence, a prosecutor’s attempt to elicit character evidence regarding the

12 However, failure to allow the defendant to introduce admissible character evidence may be harmless error where “after an examination of the entire cause, it does not affirmatively appear that it is more probable than not that the error was outcome determinative.” People v King (Raymond), 297 Mich App 465, 472 (2012).

13 In 1991, MRE 405 was amended to also permit the admission of character evidence in the form of an opinion. See Section 2.2(B)(1)(d) for more information on MRE 405.
defendant on cross-examination of another witness is not permitted by MRE 404(a)(1)” People v Wilder (Darrell), 502 Mich 57, 67-68 (2018) (remanding to the trial court to determine whether the error in admitting the evidence was harmless).

The prosecution may present testimony about a defendant’s specific instances of conduct to rebut a defendant’s assertion that “I’m not the person that . . . would want to do anything like that [react with violence], especially to a friend[,]” and the same defendant’s denial that he reacted with violence to other situations in which he was confronted by an unhappy person. Roper, 286 Mich App at 94-105.

The prosecution is limited to rebutting the trait or traits introduced by the defendant. People v Johnson (Johnnie), 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.” Johnnie Johnson, supra at 561.

D. Evidence of Character of Victim

1. Homicide Victim

a. Offered by Defendant

“[E]vidence of a trait of character for aggression of the alleged victim of the crime” may be offered by a defendant when he or she is asserting self-defense in a homicide case. MRE 404(a)(2).

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 (Jerry), 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.* In *Orlewicz*, the Court of Appeals found 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.” *Id.* at 105.

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 the defendant is claiming self-defense in a homicide case, the prosecution may offer (1) rebuttal evidence against the defendant’s claim that the alleged victim possessed an aggressive character trait, or (2) evidence of the alleged victim’s peaceful character to rebut any evidence that he or she was the first aggressor. MRE 404(a)(2).

2. Sexual Assault Victim

**MCL 750.520j (Rape Shield Act)**14 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 sections 520b to 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.

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14 See the Michigan Judicial Institute’s *Sexual Assault Benchbook*, Chapter 7, for more information on the rape shield provisions.
(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)."

“[A] specific instance of the victim’s sexual conduct 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)(3), which permits “evidence of the alleged victim’s past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.” “MRE 404(a) only excludes character evidence used to prove conformity to a character trait”; it is error to exclude evidence under MRE 404(a)(3) where a valid, nonpropensity explanation for the admission of the evidence has been articulated. Sharpe, 502 Mich at 332 n 11.

“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

“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 [their] 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.

3. 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 incidences 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.” *Id.*

**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* [*15*] hearing was erroneous because such testimony is permitted as an offer of proof where 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 [during trial] under the exception to the rape shield statute[.]” *Id.* at 680 (finding that “defense counsel’s failure to ask the boyfriend about these issues fell below an objective standard of reasonableness[”]).

**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 pregnancy and abortion are not evidence regarding a specific instance of sexual conduct.” *Id.* at 328. 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 abortion as inadmissible character evidence because the prosecutor identified a valid nonpropensity explanation for its admission.

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Id. at 332 n 11 (evidence of the abortion “definitively demonstrat[ed] that sexual penetration occurred” and also “explain[ed] why the prosecutor [was] unable to offer DNA evidence to prove the identity of 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. Id. 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. at 328. 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 properly admitted evidence of the complainant’s pregnancy. Id. at 334, 335 (evidence of the pregnancy was probative of the issue of whether sexual penetration occurred).

E. Evidence of Character of Witness (Impeachment)16

1. Reputation or Opinion

MRE 608(a) states:

“The credibility of a witness may be attacked or supported by evidence in the form of opinion or

16 See Section 3.9 on impeachment.
reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.”

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, during his opening statement, asserted that the complainant had emotional problems which affected her ability to describe the alleged sexual assaults. *Lukity*, *supra* 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 Court of Appeals 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. *Id.* at 491.

It may be error for a court to allow character testimony that goes “beyond [the witness’s] reputation for truthfulness and encompass[es] [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 [the] plaintiff’s truthfulness, as it suggested that [the] plaintiff’s residual injuries were not as extensive or limiting as alleged.” *Ykimoff*, *supra* at 102. However, admitting the evidence was harmless error because witness testimony tended to prove the same things that the videotape showed. *Id.*

2. **Specific Instances of Conduct**

MRE 608(b) states in relevant part:

“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’[s] credibility, other than conviction of crime as provided in [MRE] 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the
witness’s character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.”

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. *Guerrero, supra* 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 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, supra* 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.” *Id.* 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 (Darrell)*, 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 2.2(F) for more information on the admission of other acts evidence under MRE 404(b).
F. Other Acts Evidence

1. Rules and Statutes

a. MRE 404(b)

MRE 404(b)(1) states:

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.”

“[E]vidence that is logically relevant under MRE 401 and MRE 402 may be excluded under MRE 404(b)(1) for lacking legal relevance if it does not have a proper purpose[;]” therefore, “[b]efore applying MRE 403 to determine if the logically relevant evidence may be excluded because its probative value is substantially outweighed by other considerations, the trial court must consider whether . . . [there is] a proper purpose for admitting other-acts evidence as specified in the second sentence of MRE 404(b)[1].” Rock v Crocker, 499 Mich 247, 259 (2016), vacating “that portion of the Court of Appeals’ judgment[, 308 Mich App 155 (2014),] ruling on the admissibility of [proposed other-acts evidence]” without “first consider[ing] whether the evidence was legally relevant under MRE 404(b).” (Citations omitted.) “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. Thus, a trial court should first determine logical relevance under MRE 401 and MRE 402, then address legal relevance under MRE 404(b)(1) by determining if there is a proper purpose for admission, and finally only apply MRE 403 if it finds a proper purpose under MRE 404(b)(1). Rock, 499 Mich at 256-259. See also People v Denson, 500 Mich 385, 401 (2017) (emphasizing the importance of scrutinizing logical...
relevance when determining the admissibility of other-acts evidence).

**MRE 404(b)(2)** requires the prosecution to “provide written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown, of the general nature of any [other crimes, wrongs, or acts] evidence it intends to introduce at trial and the rationale . . . for admitting the evidence.” Where the prosecution fails to provide notice of its intent to offer other-acts evidence as required under **MRE 404(b)(2)**, the defendant is not entitled to relief unless he or she “demonstrate[s] that this error ‘more probably than not . . . was outcome determinative.’” *People v Jackson (Timothy)*, 498 Mich 246, 278, 281 (2015) (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”) (citations and quotation marks 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 in admitting [MRE 404(b)] evidence . . . [because] there was [no] good cause to excuse the non-compliance.” *People v Felton*, ___ Mich App ___, ___ (2018). Regarding evidence of the defendant’s prior conviction, the prosecution’s claim that it did not timely provide notice of its intent to present this evidence because it did not know the prior bad act evidence existed “[held] no weight” because “it [was] undisputed that the prosecution was aware of [the] conviction . . . at the time the Information was filed.” *Id.* at ___. Further, “the prosecution’s claim that it did not have the police report . . . until the day before it filed the MRE 404(b) notice [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*, ___ Mich App at ___. Regarding 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 prior bad acts.” *Id.* at
“It was only in response to [the defendant’s] objection that the prosecution explained the general content of [the] expected testimony[.]” *Felton, ___ Mich App* at ___. The prosecutor’s argument that it did not know it would need the witness’s testimony until another witness took flight “carried little weight since no MRE 404(b) notice was ever filed for [that] witness either.” *Felton, ___ Mich App* at ___. 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 __ (alteration in original). Additionally, “the [trial] court improperly put 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, ___ Mich App* at ___.

“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 (Darrell)*, 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).

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), where the Court stated:

“[T]he trial court’s failure to conduct an evidentiary hearing regarding the admissibility of the evidence does not require reversal. Neither *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), nor *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990), mandates that an evidentiary hearing be held where, as in this case, no motion in limine has been made by the defense.”

However, a trial court may not circumvent MRE 404(b)(1) by taking judicial notice of the respondent’s past conduct. *In re Kabanuk*, 295 Mich App 252, 260 (2012). In *In re Kabanuk*, the trial court took judicial notice of the defendant’s husband’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. *In re Kabanuk*, 295 Mich App at 260. The Court of Appeals found that the trial court’s consideration of the husband’s prior acts violated MRE 404(b)(1), but concluded the error did not determine the outcome and therefore, did not require reversal. *Id*.

b. **MCL 768.27**

MCL 768.27 provides for the admission of other acts evidence. MCL 768.27 states:

“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 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.”

“[W]hile MRE 404(b) and MCL 768.27 certainly overlap, they are not interchangeable.” *People v Jackson (Timothy)*, 498 Mich 246, 269 (2015). MCL 768.27 authorizes the admission of other-acts evidence for the same purposes listed in MRE 404(b)(1) when one or more of the matters “is material.” MCL 768.27. “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 (Timothy)*, 498 Mich at 269. Accordingly, “MCL 768.27 does not purport to define the limits of admissibility for evidence of uncharged conduct.” *Jackson (Timothy)*, 498 Mich at 269.

c. **MCL 768.27a**

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. It applies only to criminal cases. MCL 768.27a(1) states in part:

“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.”

“Listed offenses” are contained in MCL 28.722. MCL 768.27a(2)(a).

“MCL 768.27a permits the admission of evidence that MRE 404(b) precludes.” People v Watkins (Watkins II), 491 Mich 450, 470 (2012). Specifically, “the 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.” Watkins II, 491 Mich at 470.

“MCL 768.27a irreconcilably conflicts with MRE 404(b) and . . . the statute prevails over the court rule.” Watkins II, 491 Mich at 496. 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 (2007), 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.
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 (noting “there are ‘several considerations’ that may properly inform a court’s decision to exclude [MCL 768.27a] evidence under MRE 403, including but not limited to ‘the dissimilarity between the other acts and the charged crime’ and ‘the lack of reliability of the evidence supporting the occurrence of the other acts[,]’”), citing Watkins II, 491 Mich at 487-488.

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 (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 (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, Minor, 323 Mich App 407, 414, 415 (2018) (citation omitted) (the Court of Appeals held that the trial court erred by concluding that MCL 768.27a did not apply to juvenile-delinquency trials, “vacated the trial court’s order excluding the other-acts evidence and directed the trial court to make its MRE 403 determination in accordance with the principles set forth in [People v Watkins, 491 Mich 450, 486-490 (2012)],” i.e., “weigh[ing] the propensity inference in favor of the probative value of the evidence rather than in favor of its prejudicial effect”).

In People v Pattison, 276 Mich App 613 (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.” Pattison, 276 Mich App at 619.

In order to conform to the Legislature’s intent in enacting MCL 768.27a, the statute should be used as a rule of inclusion, not exclusion. Smith (Anthony), 282 Mich App at 205. 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 (Anthony), 282 Mich App at 205. In examining the admissibility of an offense committed against a minor, the Michigan Court of Appeals 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 (Anthony), supra at 205-206.

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

d. **MCL 768.27b**

MCL 768.27b governs the admissibility of evidence of acts of 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).

“[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). 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

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17 MCL 768.27b is only applicable “to trials and evidentiary hearings commenced or in progress on or after May 1, 2006.” MCL 768.27b(7).

18 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).

19 Effective March 17, 2019, 2018 PA 372 amended MCL 768.27b to include offenses involving sexual assault.
admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE] 403.

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(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.

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

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). Subject to the requirements listed there, MCL 768.27b permits the prosecution to introduce a defendant’s guilty plea from an earlier case. 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
Schultz 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 Michigan
Supreme] Court’s authority to establish rules of ‘practice
and procedure’ under Const 1963, art 6, § 5.” People v

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

2. VanderVliet Test

MRE 404(b) codifies the requirements set forth in VanderVliet,
444 Mich 52. The admissibility of other acts evidence under
MRE 404(b), except for modus operandi evidence used to
prove identity,20 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. “[T]he prosecution must
articulate its evidential hypothesis with precision and
‘the trial court must identify specifically the purpose
for which the evidence is admitted[,]’” People v
Denson, 500 Mich 385, 399 n 5 (2017), quoting People v
Crawford, 458 Mich 376, 386 n 6 (1998) (alterations in
original, quotation marks and citation omitted in
original).

- The evidence must be relevant under MRE 402 to an
issue or fact of consequence at trial. VanderVliet, 444
Mich at 74. Trial courts must “vigilantly weed out

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20 See Section 2.2(F)(1)(C) for a discussion on how modus operandi evidence used to prove identity may be
admissible.
character evidence that is disguised as something else.” Denson, 500 Mich at 400 (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 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. “Other-acts evidence is logically relevant if two components are present: materiality and probative value.” Id. at 401. See Section 2.1 for a detailed discussion of logical relevance.

- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, 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\(^\text{21}\) under MRE 105, cautioning the jury to use the evidence 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 Rule 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 Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.

\(*\*)

\(^{21}\) The jury instruction is M Crim JI 4.11.
“Rule 404(b) permits the judge to admit other acts evidence whenever it is relevant on a noncharacter theory.” VanderVliet, 444 Mich at 65.

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.

The prosecution bears the burden of establishing that the evidence is admissible for a proper noncharacter purpose. Denson, 500 Mich at 398. A “‘mechanical recitation’ of a permissible purpose, ‘without explaining how the evidence relates to the recited purpose[,] is insufficient to justify admission under MRE 404(b).’” Denson, 500 Mich at 400, quoting Crawford, 458 Mich at 387 (alteration in Denson).

“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.

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*, 463 Mich 43, 56 (2000). The trial court has no duty to give a limiting instruction sua sponte. *People v Chism*, 390 Mich 104, 120-121 (1973). However, the Michigan Supreme Court stated that the trial court *should* give a limiting instruction even in the absence of a party’s request. *Chism*, 390 Mich at 120-121.

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

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**Committee Tip:**

*It is the best practice to conduct the VanderVliet analysis on the record; however, the court is not required to do so. People v Vesnaugh*, 128 Mich App 440, 448 (1983).

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3. **Golochowicz Test**

Another test for admission of other acts evidence results from *People v Golochowicz*, 413 Mich 298, 309 (1982). Generally speaking, the *VanderVliet* 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 Ho*, 231 Mich App 178, 186 (1998). Therefore, when the proponent is seeking admission of other acts evidence based on a *modus operandi theory to establish identity*, the trial court should employ the test enunciated in *Golochowicz*, 413 Mich at 309. See *VanderVliet, supra* at 66.

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 and, in light of the slightly different language of MRE 404(b) we add, 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, supra at 309.

4. Harmless Error Analysis

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.”22 Denson, 500 Mich at 409 (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.

Other-acts evidence in particular has “a high risk of confusion and misuse[]” and “there is a substantial danger that the jury will overestimate the probative value of the evidence.” Denson, 500 Mich at 410 (quotation marks and citation omitted). There is also a severe risk that “the jury will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he did it before he probably did it again.” Id. (quotation marks and citation omitted).

The Court found that erroneous admission of other-acts evidence regarding the defendant’s prior conviction of assault with intent to do great bodily harm less than murder was not harmless in the defendant’s trial for an unrelated assault with intent to do great bodily harm less than murder, where the defendant claimed self-defense and defense of others. Denson, 500 Mich at 413. The defendant and the victim testified to “highly conflicting accounts of the same incident, but the

22Harmless-error review is applied to all preserved nonconstitutional error. See People v Denson, 500 Mich 385, 409 (2017).
introduction of the inadmissible evidence tipped the scales, buoying [the victim’s] credibility while helping to sink [the] defendant’s.”  *Id.* at 410. In an effort to rebut the defendant’s claims of self-defense and defense of others in order to prove the elements of the charged offense, the prosecutor used the other acts evidence to “evoke the very propensity inference that MRE 404(b) forbids.” *Denson*, 500 Mich App at 411. 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 [the victim from the assault that resulted in his prior assault conviction, and . . .] it was ‘not a coincidence’ that ‘[the defendant] pounded on [the victim in this case].”  *Id.* at 411-412. The prosecutor argued that “[b]ecause there was no viable self-defense claim in the 2002 incident[ . . .] there could be no viable self-defense claim [in the current case].”  *Id.* at 412. Further, the “defendant’s version of events was not wholly inconsistent with the injuries [the victim] sustained.”  *Id.* at 413. 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.*

“Although 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. Otherwise, [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,” *Denson*, 500 Mich App at 412-413, citing *Crawford*, 458 Mich at 399-400.

### 5. Evidence Subject to Scrutiny Under MRE 404(b)

“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 (Timothy)*, 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)).

“[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 (Timothy), 498 Mich at 268 n 9, 274, overruling any conflicting Court of Appeals caselaw “[t]o the extent that such caselaw holds that there is a ‘res gestae exception’ to MRE 404(b)[.]” (Citations omitted).

6. Examples of Application of MRE 404(b) and MCL 768.27

A defendant accused of criminal sexual conduct may introduce testimony under MRE 404(b) to show that the complainant’s father previously induced him to make false allegations of sexual abuse against other persons disliked by the father. People v Jackson (Nicholas), 477 Mich 1019 (2007). 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.” Parks, 478 Mich at 910.

Establishing motive is a proper purpose for which similar acts evidence is admissible. MRE 404(b). Motive is “[s]omething, esp[ecially] willful desire, that leads one to act.” Black’s Law Dictionary (8th ed). See also People v Hoffman, 225 Mich App 103, 106 (1997).

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 year old was admissible for the purpose of establishing the defendant’s motive for killing the girlfriend. People v Edwards (William), ___ Mich App ___, ___ (2019). In explaining 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 ___. These reasons 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. \textit{Id.} at \_\_\_. Accordingly, admission of the previous sexual assault of the defendant’s daughter was admissible under MRE 404(b) for a proper purpose. \textit{Edwards (Williams)}, ___ Mich App at \_\_.

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). \textit{People v Martzke}, 251 Mich App 282, 292 (2002).

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 [the] 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. \textit{People v Henry}, 315 Mich App 130, 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. [The] [d]efendant’s behavior demonstrated an intent to place his victims in fear that he was armed with a dangerous weapon.” \textit{Id.} at 142. Further, the Court concluded 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 [the] defendant was armed.” \textit{Id.} at 142.

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.” \textit{People v Pattison}, 276 Mich App 613, 617 (2007). In \textit{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. \textit{Pattison}, 276 Mich App 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. \textit{Id.} at 617. Furthermore, the workplace incident involved “surprise, ambush, and force,” while the defendant’s conduct toward his daughter involved “manipulation and parental authority.” \textit{Id.}

Prior acts may be admissible under MRE 404(b) when they are offered to show opportunity, scheme, or plan. \textit{People v Smith (Anthony)}, 282 Mich App 191, 195 (2009). In \textit{Smith (Anthony)}, the defendant was convicted of two counts of CSC-I and one count of CSC-II against his daughter when she was 10 or 11 years old. Specifically, on two occasions, the defendant entered the victim’s bedroom, pulled down her pants and underwear, and penetrated her vagina with his penis. \textit{Smith (Anthony)}, 282 Mich App at 193. Under MRE 404(b)(1) (and presumably MCL 768.27), 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. \textit{Smith (Anthony)}, 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. \textit{Id.} at 197-198. Relying on \textit{People v Sabin (After Remand)}, 463 Mich 43 (2000), the Court found that the evidence was offered for the proper purposes of showing opportunity, scheme, or plan. \textit{Smith (Anthony)}, 282 Mich App at 197. The Court also found that while “[t]he evidence was damaging to defendant . . ., [] MRE 403 seeks to avoid unfair prejudice, which was not shown here.” \textit{Smith (Anthony)}, 282 Mich App at 198.

“[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).” \textit{People v Felton}, ___ Mich App ___, ___ (2018). In \textit{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. \textit{Id.} at ___. 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). 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 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*, ___ Mich App at ___.

In *Felton*, ___ Mich App at ___, “[t]he overwhelming effect of the prior-bad-acts testimony . . . was the inference that defendant had a propensity for distributing drugs, i.e., that because defendant sold drugs in the past, he was acting in conformity with that propensity[.]” “This is precisely the inference forbidden under MRE 404(b). Thus, the probative value of the other acts evidence was substantially outweighed by unfair prejudice to defendant.” *Felton*, ___ Mich App at ___. Admission of the other acts evidence was not harmless because the case against defendant otherwise rested “exclusively on the testimony of [the driver/co-defendant],” who received a plea deal in exchange for his testimony against defendant; “[t]hat testimony was self-serving, and [the co-defendant’s] credibility was far from sterling[.]” *Id.* at ___.

The trial court did not abuse its discretion by admitting 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 to prove that the defendant had a common scheme or plan when the defendant was on trial for charges stemming from the fact that he allegedly broke into a car dealership and stole paint and chemical hardeners. *People v Roscoe*, 303 Mich App 633, 645-647 (2014). The evidence was properly admitted under MRE 404(b)(1) because (1) it was offered for a proper purpose—“to prove that [the] defendant had a common scheme or plan,” (2) it “was relevant in that it show[ed] [the] 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.” *Roscoe*, 303 Mich App at 646 (because the previous larcenies showed that the defendant breaks into businesses and steals items that when sold together have a higher resale value 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 (Alan)*, 307 Mich App 485, 502-503 (2014), vacated in part on other grounds 498 Mich 914 (2015). 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. *Id.* at 502-503. The evidence was properly admitted because “[t]he bulk of the other acts evidence . . . shared several common features with the offenses in the instant case.” *Id.* at 502. Specifically, the evidence regarding the robbery of the two disabled women “demonstrated that [the] defendant targeted vulnerable women . . . by offering to work around their homes” 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. *Id.* at 503.

Where the defendant was charged with second-degree murder and other offenses involving driving while intoxicated, “prior acts evidence . . . involv[ing] incidents in which [the] defendant either drove unsafely, was passed out in her vehicle, or was involved in an accident while impaired or under the influence

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

24 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 [the] defendant was charged.” *People v Wood (Alan)*, 307 Mich App 485, 501 (2014), vacated in part on other grounds 498 Mich 914 (2015).
of prescription substances, or was in possession of pills” was admissible under MRE 404(b)(1) “to show [the] defendant’s knowledge and absence of mistake, and was relevant to the malice element [of] second-degree murder because it was probative of [the] 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 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”).

Moreover, 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). Bergman, 312 Mich App at 495, 496 (holding that “the trial court did not abuse its discretion in admitting” the prior acts evidence because the “defendant’s offer to stipulate that she had a suspended 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”).

MRE 404(b) governed the admissibility of testimony in the defendant’s trial for first-degree criminal sexual conduct where “the prior sexual relationships to which [the witness’s] testimony referred plainly did not constitute the ‘conduct at issue’ . . . [or] directly evidence or contemporaneously facilitate its commission[].” People v Jackson (Timothy), 498 Mich 246, 275 (2015). Rather, the testimony was “offered to provide inferential support for the conclusion that the ‘conduct at issue’ occurred as alleged,” and was accordingly subject to MRE 404(b).

25The Bergman Court explained that “[i]n Old Chief, the United States Supreme Court held that the trial court abused its discretion in [admitting the full record of a prior judgment of conviction into evidence after] 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.” Bergman, 312 Mich App at 494, citing Old Chief, 519 US at 174. 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, citing Old Chief, 519 US at 185-186.
404(b), including its notice requirement. *Jackson (Timothy)*, 498 Mich at 275-276.

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 the defendant’s scheme, plan, or system. *Bass*, 317 Mich App 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 [the] 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 [the] 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 attempted murder other-acts evidence was properly admitted because it was relevant to “whether [the] defendant [was] the person who shot and killed the victim, then tried to dispose of her body using fire,” and it tended “to show [the] defendant’s scheme, plan, or system in committing the charged offenses.” *Id.* at 260. There were significant factual similarities between the attempted murder 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.*

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 (Calvin), 317 Mich App 637, 647-48 (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[].”26 Further, “the trial court . . . abdicated the necessary relevancy analysis based on 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 (Calvin)*, 317 Mich App at 645. “[T]here was considerable evidence that the sexual acts in question occurred and that [the] defendant was the actor[;] [t]he only issue [was] whether that conduct was consensual as claimed by [the] 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.” *Kelly (Calvin)*, 317 Mich App at 645-646.

In the defendant’s prosecution 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 [his] claims of self-defense and

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26See Section 2.1(C) for a discussion of the MRE 403 balancing test.
defense of others[,] . . . the trial court erred when it admitted [the] prior act because the prosecution failed to establish that it was logically relevant to a proper noncharacter purpose.” People v Denson, 500 Mich 385, 389 (2017). “[T]he prosecution built a theory of relevance centered upon the supposed similarity between the [prior] incident and the charged offense to rebut [the] defendant’s claims of self-defense and defense of others[,] consequently, to prove sufficient similarity, the prosecution [was required to] show ‘striking similarity’ between the other act and the charged offense.” Id. at 406, quoting VanderVliet, 444 Mich at 67. 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 [the] 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”).

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[,]” the other-acts evidence was admitted “not to demonstrate criminal propensity, but to disprove [the] defendant’s claim that her decision to stab the victim was emotional and made in self-defense, i.e., to prove her intent, MRE 404(b)(1).” People v Dixon-Bey, 321 Mich App 490, 517-518, 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).

“[T]he 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 [the] 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 [the] 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 [the] defendant was the party who first pursued the substantive allegations
involving the [earlier CPS] petition,” she opened the door to the CPS petition testimony, and “any prejudice flowing from the evidence was of [the] defendant’s own making.” *Id.* at 172.

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 “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). 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 KR.” *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”).

The trial court abused its discretion by allowing the prosecutor to introduce defendant’s prior conviction(s) 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 (Darrell)*, 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.* at 65. The Michigan Supreme 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).
7. Examples of Application of MCL 768.27a and MCL 768.27b

a. MCL 768.27a

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 (Jacob), 288 Mich App 114, 118 (2010). In Mann (Jacob), “[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.” Mann (Jacob), 288 Mich App at 118. 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. Buie (On Remand), 298 Mich App at 73. On appeal, the Michigan Court of Appeals noted that “[a]lthough the evidence was highly prejudicial, it was also highly probative of [the] defendant’s propensity for sexually assaulting young girls.” Id. The Court held that the defendant failed to “demonstrate[] that the probative value of the evidence was substantially outweighed by the danger of undue prejudice[,]” and that “[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 eight year 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). 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 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), it tended to make the victim’s story more believable, 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-nine-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 nine 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 nine-year-old relative made it more probable that he committed the charged offense against his son, who was also related to the defendant and nine years old. Id. at 193. Further, “the evidence was relevant to the victim’s credibility because “[t]he fact that [the] 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. 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 [the] 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.” *Solloway*, 316 Mich App at 194-195. 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]hus, 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 [the] defendant’s theories in regard to the physical evidence of the crime, there was a need for evidence beyond [the victim’s] and [the] defendant’s testimony.” *Id.* at 196.

b. **MCL 768.27b**

MCL 768.27b allows for admission of prior acts of domestic violence or sexual assault27 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). To make this determination, the court must first decide whether introduction of the evidence would be unfairly prejudicial, then “‘weigh the probativeness or relevance of the evidence’ against the unfair prejudice.” *Cameron*, 291 Mich App at 611, quoting *People v Fisher*, 449 Mich 441, 452 (1995). Relevant evidence of domestic violence or sexual assault acts that satisfies this standard must be admitted by the trial court. *People v Daniels*, 311 Mich App 257, 274 (2015)28 (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 he committed against them,” because “(1) it [was] relevant; (2) it describe[d] acts of ‘domestic violence’ under [MCL 768.27b(6)(a)]29; and (3) its probative value [was] not outweighed by the risk of unfair prejudice under MRE

27Effective March 17, 2019, 2018 PA 372 amended MCL 768.27b to include offenses involving sexual assault.

28Effective March 17, 2019, 2018 PA 372 amended MCL 768.27b to include offenses involving sexual assault.
Evidence was highly probative because it demonstrated the 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 of Appeals 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. Cameron, 291 Mich App 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[.]” Id. 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 Mich App 438, 452 (2011) (the defendant’s “prior acts of domestic violence[, although different from the charged offense,] illustrated the nature of [the] 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 for the alleged sexual abuse of his minor daughter that occurred repeatedly over two years while she lived with him. In an interlocutory appeal, the Court of Appeals affirmed the trial court’s order allowing the prosecutor to introduce evidence of the defendant’s
other alleged sexual assaults against his ex-fiancee (which constituted domestic violence under MCL 768.27b). *Pattison*, 276 Mich App at 615-616. However, rather than reviewing the evidence’s admissibility under MRE 404(b), as did the trial court, the Court of Appeals relied on MCL 768.27b in making its determination. *Pattison*, 276 Mich App at 615-616. The Court concluded that evidence of first-degree criminal sexual conduct 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*, 288 Mich App at 220, 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. The Court concluded that their testimony described “behavior [that] clearly meets the definition of ‘domestic violence’ under [MCL 768.27b], [behavior that] occurred within ten years of the charged offense as required by [MCL 768.27b(4)], and [behavior that] would be highly relevant to defendant’s tendency to assault [the victim] as charged.” *Railer*, 288 Mich App at 220.

MCL 768.27b(4) provides that:

> “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.

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30 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.” *People v Pattison*, 276 Mich App 613, 615 (2007). 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.
(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.

(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”).

8. Notice Requirement

a. MRE 404(b)(2)

MRE 404(b)(2) provides in relevant part:

“The prosecution in a criminal case shall provide written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1),[32] for admitting the evidence.”

31Note 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.

32 Proof of notice, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material.
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).

b. **MCL 768.27a**

MCL 768.27a, which governs the admissibility of evidence of sexual offenses against minors in criminal cases, requires the prosecuting attorney to disclose evidence admissible under that 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.”

c. **MCL 768.27b**

MCL 768.27b, which governs the admissibility in criminal cases of evidence of other acts of domestic violence or sexual assault committed by a defendant, 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).

### 2.3 Habit or Routine Practice

#### A. Rule

MRE 406 states:

“Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”
B. Requirements

Habit or routine practice evidence is generally admissible to demonstrate comparable conduct on the occasion in question. *People v Unger*, 278 Mich App 210, 227 (2008). In *Unger*, 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. *Unger, supra* at 227. 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.*

Evidence of habit or routine practice must demonstrate a pattern, establish that the action was standard practice, 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. *Laszko, supra* at 256.

2.4 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. 33 *Freed v Simon*, 370 Mich 473, 475 (1963). This evidence may also be used to show that the defendant was negligent since he or she had notice or knowledge of the defect and should be “held to a higher degree of care by reason of his notice of such dangerous condition than he otherwise would be.” *Freed, supra* at 475. Evidence of a prior similar accident that occurred in the same place at issue is also admissible to show that a defect or dangerous condition in fact existed. *Id.* “The requisite foundation for such admissibility is a showing of similarity of conditions and reasonable proximity in time.” *Maerz v United States Steel Corp*, 116 Mich App 710, 723 (1982), citing *Freed, supra* at 475.

2.5 Subsequent Remedial Measures

MRE 407 states:

“When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to

33 See Section 5.4 on negative evidence.
prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.”

In Denolf v Frank L Jursik Co, 395 Mich 661, 667 (1976), 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.” 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, supra at 669-670.

### 2.6 Settlements and Settlement Negotiations

MRE 408 states:

“Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”

Evidence of a settlement made by a party with a nonparty is inadmissible to prove liability. Windemuller Elec 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). Windemuller, supra 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). In *Chouman*, supra at 439, the Court found that the defendant’s consent “was [not], itself, a compromise of a dispute [that] defendant had with any party or nonparty[’]” and thus, not subject to exclusion under MRE 408.34

“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.” *Oesterle v Wallace*, 272 Mich App 260, 264 (2006). The Court of Appeals concluded that this absolute privilege applies 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*, supra at 261, 268. However, MRE 408 is not limited to precluding evidence of settlements and settlement negotiations in only 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 Management, Inc v Rentenbach*, 287 Mich App 589, 621 (2010), where the Court of Appeals concluded that “[t]he 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.”

### 2.7 Medical Expenses

MRE 409 states:

“Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.”

### 2.8 Plea Discussions

Generally, the following pleas and statements are inadmissible, in any civil or criminal proceeding, against a defendant who made the plea or participated in the plea discussions:

(1) A guilty plea that was later withdrawn. MRE 410(1).

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34 Ultimately, the *Chouman* Court concluded that this evidence was inadmissible under MRE 401 and MRE 403. *Chouman*, 293 Mich App at 439-440.
(2) A nolo contendere plea. However, “to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea[.]” MRE 410(2).

(3) Any statement made during plea proceedings pursuant to either “MCR 6.302 or comparable state or federal procedure regarding either [guilty or nolo contendere] pleas.” MRE 410(3).

(4) Any statement “made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.” MRE 410(4).

However, the preceding pleas and statements are admissible “(i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.” MRE 410.

A defendant may waive the protections provided by MRE 410, “as long as [he is] 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).

“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), quoting People v Dunn, 446 Mich 409, 415 (1994). “MRE 410(4) 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 ‘in the course of 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).

2.9 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.

For purposes of MCL 600.2155, an individual’s “family” includes the person’s spouse, parent, grandparent, stepparent, child, adopted child, grandchild, sibling, half sibling, father-in-law, or mother-in-law. MCL 600.2155(3).

“[S]tatement[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)]” are not precluded from admission by MCL 600.2155(1). MCL 600.2155(2).

2.10 Insurance Coverage

MRE 411 states:

“Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.”

See also MCL 500.3030, which precludes reference, during the course of a trial, to the insurer or the question of carrying insurance 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).35

35For more information on the precedential value of an opinion with negative subsequent history, see our note.
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).

2.11 Polygraph

A. Polygraph Results Generally Inadmissible

Evidence that a polygraph examination was taken or the results of a polygraph examination are not admissible at trial. People v Kahley, 277 Mich App 182, 183 (2007). However, a court may use the results of a polygraph examination “to help determine whether to grant a post-conviction motion for a new trial.” People v Barbara, 400 Mich 352, 412 (1977).

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

“[T]he court should consider: (1) whether [the] 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.” People v Rocha, 110 Mich App 1, 9 (1981).

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 (Kerry), 211 Mich App 233, 234-235 (1995). The Court of Appeals concluded that this was unfairly prejudicial “because it provided supposedly scientific evidence of defendant’s lack of credibility.” Smith (Kerry), supra at 235.

In People v Nash, 244 Mich App 93, 95 (2000), the prosecution’s key witness mentioned taking a polygraph test during direct examination. The Court found that this reference seriously
affected the fairness of the trial and ordered a reversal. *Nash, supra* at 101. The Court stated,

“Where the reference to the polygraph test was brought out by the prosecutor, not as a matter of defense strategy, and where 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’[s] credibility and was later repeated before the jury during deliberations, we believe that prejudice to [the] defendant occurred.” *Id.*

2. **Mention of Polygraph Did Not Require Reversal**

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). 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, supra* at 342-344.

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

B. **Cautionary Instruction**

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).

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36For more information on the precedential value of an opinion with negative subsequent history, see our note.
C. Exceptions: Motions for New Trial 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;
(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, supra* at 117, citing *People v Barbara*, 400 Mich 352, 412-413 (1977).

D. Right to Counsel

A defendant has the right to have counsel present during a polygraph examination if the examination occurs after the Sixth Amendment right to counsel has attached. *People v Leonard*, 125
However, a defendant may waive the right to have counsel present at a polygraph examination. *Wyrick v Fields*, 459 US 42 (1982). See also *McElhaney*, 215 Mich App at 274-277.

**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) states:

“A defendant who allegedly has committed a crime under [MCL 750.520b to 750.520e and 750.520g], shall be given a polygraph examination or lie detector test if the defendant requests it.”

A defendant’s statutory right to a polygraph examination under MCL 776.21(5) does not include the right to have the examination tape-recorded. *People v Manser*, 250 Mich App 21, 32 (2002), overruled on other grounds 482 Mich 540 (2008). Furthermore, information that a defendant did not receive a tape-recorded polygraph is not admissible at trial because it is “not relevant to any material fact but only to a collateral legal matter[.]” *Manser*, 250 Mich App at 32.

The defendant’s statutory right to a polygraph examination applies at any time during the pretrial and trial process until a verdict is rendered. *People v Phillips (Keith)*, 469 Mich 390, 395-396 (2003). The Court stated, “Because the statute does not otherwise provide for a time limit within which to exercise the right, under the clear and unambiguous language of MCL 776.21(5), the right is lost only when the presumption of innocence has been displaced by a finding of guilt, i.e., when an accused is no longer ‘alleged’ to have committed the offense.” *Phillips (Keith)*, 469 Mich at 396. In *Phillips (Keith)*, the defendant asserted his right to a polygraph examination during jury deliberations, and the Supreme Court concluded that his motion was timely because “he was still alleged to have committed the offense.” *Id.* However, failure to grant a defendant’s timely request may not require a new trial where the error was not

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37 Although a defendant’s attorney is not allowed in the examination room, the defendant has the right to stop the examination at any time to consult with the attorney. See *People v McElhaney*, 215 Mich App 269, 274 (1996).

38 If a defendant exercises this right, and the polygraph results indicate that he or she may not have committed the crime, a law enforcement officer (as defined in MCL 776.21(1)(a)) must inform the victim (as defined in MCL 776.21(1)(b)). MCL 776.21(3).

39 For more information on the precedential value of an opinion with negative subsequent history, see our note.
outcome determinative. *Id.* at 396-397. Here, the trial court’s error in failing to order a polygraph examination at the defendant’s request was not outcome determinative, where the victim told police that the defendant committed the crime, the defendant confessed to committing the crime, any favorable polygraph results would not have been admissible, and the defendant’s request was made after the close of proofs, making the test results immaterial to his defense. *Id.* at 397.

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 (People v Marcy)*, 91 Mich App 399, 406-407 (1979).
Chapter 3: Witnesses–Procedure and Testimony

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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.

3.2 Witness Disclosure

A. Civil Case

1. Witness List


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 should 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)–MCR 2.401(I)(1)(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. Dean, supra at 32. In Dean, supra at 32-33, the Court created a nonexhaustive list of factors to consider when determining an appropriate sanction:
“(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 [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.”

“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 Michigan, 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. Pastrick, supra at 246. In Pastrick, the Court of Appeals concluded 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 experts[.]” Id. The Court also noted that a reasonable condition will also normally include a reasonable time frame. Id. at 247 n 1.

B. Criminal Case

1. Discovery Under the Court Rule

Upon request, a party must provide all other parties with the names and addresses of any lay or expert witnesses that may be called at trial. MCR 6.201(A)(1). Alternatively, the party

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1 MCR 6.201 applies only to felony cases. See MCR 6.001(A) and People v Greenfield (On Reconsideration), 271 Mich App 442, 450 n 6 (2006).
may provide the other party with the witness’s name and make the witness available for interview. \textit{Id.} “[T]he witness list may be amended without leave of the court no later than 28 days before trial[.]” \textit{Id.}

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, 7 (2017) (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 any of the sanctions listed in 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. \textit{People v Jackson (Andre)}, 292 Mich App 583, 591-592 (2011).

The defendant was not unfairly prejudiced by the late endorsement of a prosecution witness where the defendant knew the witness was a potential witness in advance of the trial and had subpoenaed the witness himself in case her testimony was needed. People v Allen (Floyd), 310 Mich App 328, 345 (2015), rev’d on other grounds 499 Mich 307 (2016).\footnote{For more information on the precedential value of an opinion with negative subsequent history, see our note.}

2. \textbf{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). If additional res gestae witnesses

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become known, the prosecutor must continue to disclose their names. MCL 767.40a(2). A prosecutor must send the defendant the prosecutor’s 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) (citation omitted), aff’d in part and rev’d in part on other grounds 500 Mich 453 (2017).

“Although the prosecutor did not include [a potential witness] as a known res gestae witness on his witness list, the . . . omission did not prejudice [the] defendant[] . . . or violate his right to present a defense[;] . . . [b]ecause [the] defendant implicated [the potential witness] in the [crime], it [was] apparent that [the] defendant was aware that [the potential witness] could be a res gestae witness.” Steanhouse, 313 Mich App at 15 (citations omitted). “Because [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 [the] 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 (citation omitted).

“[W]hen providing a defendant with the list of witnesses the prosecutor ‘intends to produce’ at trial, a witness may not be ‘endorsed in the alternative’ as an ‘and/or’ witness.” People v Everett, 318 Mich App 511, 522-523 (2017) (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 prosecutor[].”)

“[T]he trial court’s decision to allow removal of [an endorsed witness] from the prosecutor’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[].” Everett, 318 Mich App at 520. “[T]o remove [the witness’s]
name from the witness list, the prosecution was required to comply with MCL 767.40a(4)[,]” and the prosecutor could not avoid the requirements of MCL 767.40a(4) by labeling the witness an “alternative” witness. *Everett*, 318 Mich App at 523-524 (nevertheless 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).

### 3.3 Exclusion of Witness

#### A. Exclusion of Witness

On its own motion or at the request of a party, “the court may order witnesses excluded so that they cannot hear the testimony of other witnesses[.]” MRE 615. A party who is a natural person, a non-natural party’s representative, or an essential person may not be excluded. MRE 615.

A victim of a crime has the right to attend the trial 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 proceedings). The victim may not remain sequestered once he or she testifies. MCL 780.761; MCL 780.789.

#### B. Violation

“[T]rial courts have discretion to order sequestration of witnesses and discretion in instances of violation of such an order to exclude or to allow the testimony of the offending witness.” *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). In *Meconi*, the trial court abused its discretion by excluding the victim’s testimony because she violated the sequestration order when the violation “resulted from an innocent mistake[,]” and the victim “only heard short opening statements, not testimony[,]” *Meconi, supra* at 654-655. However, 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 to exclude the testimony 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).
Committee Tip:

The court may consider the following responses to a violation of a sequestration order:

- Permit the violation to reflect on credibility;
- Preclude the witness’s testimony;
- Strike the witness’s testimony;
- Cite the witness for contempt if the violation was purposeful; or
- Declare a mistrial. 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.

3.4 Competency of Witness\(^5\)

All witnesses are presumed to be competent to testify. People v Watson, 245 Mich App 572, 583 (2001). To be competent, the witness must have “the capacity and sense of obligation to testify truthfully and understandably.” Watson, 245 Mich App at 583. See also MRE 601, which states:

“Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.”

\(^4\) For more information on the precedential value of an opinion with negative subsequent history, see our note.

\(^5\) For information on the competency of a child witness, see Section 3.6(A).
3.5 Criminal Defendant’s Right of Confrontation

A. Generally

A criminal defendant has the right to be confronted by the witnesses against him or her. 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 (Bob) 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).

A criminal defendant’s right to confrontation is guaranteed through the right of cross-examination, the oath taken by witnesses, and the defendant’s ability to observe a witness’s demeanor while testifying. People v Lawson, 124 Mich App 371, 374 (1983), overruled in part on other grounds by People v Buie (Buie III), 491 Mich 294, 313-315 (2012). The protections of the Confrontation Clause extend to pretrial entrapment hearings, Sammons, 191 Mich App at 362, and pretrial suppression hearings. People v Levine (Brian Eric), 231 Mich App 213, 223 (1998), vacated on other grounds 461 Mich 172 (1999). 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). A defendant’s right to confrontation is satisfied when he or she has the opportunity to explore matters such as a witness’s poor eyesight, bias, and bad memory. Id. at 559.

The defendant’s right to confrontation was not adequately protected where “[a]lthough [the] defendant was able to cross-examine the victim at the preliminary examination, [he] was not given the opportunity to cross-examine her at trial relative to the CSC II

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

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

8 For more information on the precedential value of an opinion with negative subsequent history, see our note.
charges, . . . [and t]he jury was not presented with cross-examination testimony that the substance of the claims made by the victim at the time of the preliminary examination was now no longer recalled or remembered by the victim[; the d]efendant was thus deprived of the opportunity to potentially undermine entirely the charges of CSC II by the trial court’s limitation of the victim’s cross-examination at trial.” People v Sardy (On Remand), 318 Mich App 558, 565-566 (2017).

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. This is because “[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.” Iowa v Coy, 487 US 1012, 1019 (1988), quoting Professor Zecariah Chafee, Jr., The Blessings of Liberty, p 35 (1956). In Coy, 487 US at 1020, the defendant’s right of confrontation was violated where a screen was placed between him and the complaining witnesses. And in Sammons, 191 Mich App at 356, 366, 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.

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). A compelling interest is present when the state is protecting victims of sexual assault. Id. at 254. 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). And in Maryland v Craig, 497 US 836, 857 (1990), the United States Supreme Court held 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. “The Court found that an important state interest was involved (protection of a child witness from trauma caused by testifying in the physical presence of the defendant), while also noting that the procedure employed preserved other important elements of the confrontation right, i.e., oath, cross-examination, and observation of the witness’[s] demeanor.” Sammons, 191 Mich App at 363.

See also People v Rose, 289 Mich App 499, 510-517 (2010). In Rose, 289 Mich App at 516-517, 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 otherwise preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process.” Id.

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 right of confrontation under the state and federal constitutions. People v Buie (Buie III), 491 Mich 294, 297-298, 316 (2012), reversing People v Buie (Buie II) (After Remand), 291 Mich App 259 (2011). Noting that “[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel[,]” the Buie III Court held that “where 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.” Buie III, 491 Mich at 306, 313, overruling in part People v Lawson, 124 Mich App 371, 376 (1983). 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. Buie III, 491 Mich at 316-317.

C. Defendant’s Conduct

The Sixth Amendment Confrontation Clause guarantees the right of the defendant to be present at trial. Illinois v Allen (William), 397 US 337, 338 (1970). However, as with the compelling interests present in

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9 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[].”
sexual assault cases, the right to confrontation may succumb to a defendant’s prior conduct. When the conduct of the defendant disrupts the administration of justice, the court has the authority to examine the circumstances of the case and take appropriate action regarding a disruptive defendant. A defendant may be removed from the courtroom to ensure that the trial process is conducted in a dignified manner. *People v Staffney*, 187 Mich App 660, 664 (1990). Ordinarily, the defendant must be warned before he or she is removed from the courtroom. *Id.* at 664. A defendant may be removed without a warning when his or her behavior is aggressive and violent. *Id.* at 665. See also *People v Buie (On Remand) (Buie IV)*, 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).

**D. Unavailable Witnesses**

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). However, *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *United States v Davis*, 577 F3d 660, 667-668 (CA 6, 2009) (the admission of statements made by an unidentified woman to a police officer was not barred by *Crawford* because the statements were not offered to prove the truth of the matter asserted, but rather, were offered as background for the police officer’s investigation).

1. **Constitutional Unavailability**

A witness is constitutionally unavailable for purposes of the Confrontation Clause if he or she is absent and the prosecutor made a good faith effort to obtain the witness’s presence at trial. *Barber v Page*, 390 US 719, 724-725 (1968).

MRE 804(a) provides:

“Unavailability as a witness’ includes situations in which the declarant—

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(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) has a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.”

“[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 ‘has a lack of memory of the subject matter of the declarant’s statement[,]’ MRE 804(a)(3).” People v Sardy (On Remand), 318 Mich App 558, 565 (2017) (third alteration in original). In Sardy (On Remand), the alleged victim of two counts of second-degree criminal sexual conduct (CSC II), a young child, “was available for purposes of the Confrontation Clause[]” where, after taking the stand at trial, she “could not recall matters pertaining to the two acts of CSC II[]” and the trial court admitted her preliminary examination testimony upon a finding that she was unavailable due to lack of memory; because the victim was present at trial, “the trial court erred by not allowing [the] defendant to cross-examine the victim regarding her memory loss and the alleged conduct giving rise to the two CSC II charges.” Id. at 562-563, 565, citing Crawford, 541 US 36; United States v Owens, 484 US 554 (1988).
2. Testimonial and Nontestimonial Statements

“[A] ‘testimonial statement’ is best defined as a statement about a past event or fact that the declarant would reasonably expect to be used later in a criminal prosecution when made.” Confrontation and Crawford, Hon. Mark A. Randon, Michigan Bar Journal, December 2007, p 26. The Crawford Court declined to delineate a comprehensive definition of “testimonial,” but provided the following examples of clearly testimonial and clearly nontestimonial statements:

Clearly testimonial:

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

Clearly nontestimonial:

• casual remarks to acquaintances,
• off-hand, overheard remarks,
• statements in furtherance of a conspiracy,
• statements unwittingly made to informants, and

Following Crawford, the United States Supreme Court clarified the definition of “testimonial statement” in Davis (Adrian) v Washington, 547 US 813 (2006). Davis involved two companion cases: Davis (Adrian) v Washington and Hammon v Indiana. The Court held that whether hearsay evidence constitutes a “testimonial statement” barred from admission against a defendant—where the declarant is unavailable and the defendant has not had an opportunity to cross-examine the declarant—requires a court to conduct an objective examination of the circumstances under which the statement was obtained. Davis (Adrian), 547 US at 826. In Davis (Adrian), 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.” Davis (Adrian), 547 US at 827. But in Hammon, the Court concluded that statements made to the police at a crime scene were
testimonial because they were made during the course of an interrogation. Davis (Adrian), 547 US at 826-832.

The following cases further distinguish between testimonial and nontestimonial statements:

- **Michigan v Bryant, 562 US 344 (2011).**

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.’” Michigan v Bryant, 562 US 344, 348-349, 378 (2011), quoting Davis v Washington, 547 US 813, 822 (2006). In Bryant, 562 US at 374, the United States Supreme 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].” Additionally, the Court 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.

- **People v Fackelman, 489 Mich 515 (2011).**

A non-testifying psychiatrist’s out-of-court medical report that “memorialized [the] 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 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. Fackelman, 489 Mich at 518-519, 532, 564. In Fackelman, 489 Mich at 519-520, 523, the defendant was found guilty but mentally ill of charges stemming from his armed assault of a man that the defendant believed had caused his son’s death. The 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 521-523. 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 “‘[m]ajor 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 [the] 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 533, quoting *Crawford*, 541 US at 52. Moreover, “the prosecutor’s improper introduction and repeated use of [the] diagnosis that [the] defendant was not, in fact, experiencing psychosis fully rendered the [psychiatrist] a witness against [the] defendant.” *Fackelman*, 489 Mich at 530. Because the diagnosis “provided a tiebreaking expert opinion” by “[t]he 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.


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. *Walker (Alvin)*, 273 Mich App at 64. In *Walker (Alvin)*, the defendant beat the victim and threatened to kill her. *Id.* at 59. The victim jumped from a second-story balcony and ran to a neighbor’s house, and 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, and her statements were admitted under the excited utterance exception to the hearsay rule. *Id.* Because the circumstances in *Walker (Alvin)* were substantially similar to the circumstances in *Davis (Adrian)* and *Hammon*, the Court concluded that a similar outcome was warranted. *Walker (Alvin)*, 273 Mich App at 61-65. Like the United States Supreme Court in *Davis (Adrian)*, the
Walker (Alvin) 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 (Alvin), 273 Mich App at 64.

The Walker (Alvin) Court further concluded that “[u]nlike the 911 call, the victim’s written statement recorded by her neighbor, and her statements to the police at the scene, [we]re more akin to the statements in Hammon, which the Davis (Adrian) Court found inadmissible under the Confrontation Clause.” Walker (Alvin), 273 Mich App at 64. The Court explained:

“As in Hammon, where the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, in this case, the police questioning 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. Davis (Adrian), [547 US] at [830]. 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 (Adrian). ‘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.’ Davis (Adrian), [547 US] at [830]. Accordingly, the victim’s written statement and her oral statements to the police are inadmissible.” Walker (Alvin), 273 Mich App at 64-65.

• People v Jordan (Childred), 275 Mich App 659 (2007).

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 under Crawford and Davis (Adrian). In Jordan (Childred), immediately after the early morning assault, the victim ran out of her house
in her nightgown yelling for help. *Jordan (Childred)*, 275 Mich App 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 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.

- **People v Taylor (Geracer), 275 Mich App 177, 181-182 (2007).**

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*. In the alternative, the decedent’s statements were also admissible as dying declarations under the historic hearsay exception to the Confrontation Clause. *Taylor (Geracer)*, 275 Mich App at 182-183.

- **People v Bauder, 269 Mich App 174, 180-187 (2005).**

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.

- **Bullcoming v New Mexico, 564 US 647 (2011).**

An unworn 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 aggraivated driving while intoxicated, was created solely for an evidentiary purpose and was therefore testimonial. *Bullcoming v New Mexico*, 564 US at 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 has had an opportunity to 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). 11


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 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, 567 US at 56-58 (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. Where the forensic expert “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

11 MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See Section 4.7 for more information on forensic laboratory reports and certificates.
anything that was done at the . . . [outside] lab[; and did not] . . . vouch for the quality of [its] work[,]” her testimony did not run afoul of the Confrontation Clause. *Id.* at 71.

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. The plurality explained:

“The . . . report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. . . . [T]he profile that [the lab] provided was not inherently inculpatory[; o]n the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. . . . The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.” *Williams*, 567 US at 58-59.12

• *People v Nunley*, 491 Mich 686 (2012).

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[,]” as required by

12 MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See Section 4.7 for more information on forensic laboratory reports and certificates.
MCL 257.212, was not testimonial; 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.” Nunley, 491 Mich at 689-690. Noting that, “under Crawford[, 541 US at 51-52,] and its progeny, courts must consider the circumstances under which the evidence in question came about to determine whether it is testimonial[,]” the Nunley Court concluded that the DOS certificate “[was] not testimonial because the circumstances under which it [was] generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial[; rather,] . . . the circumstances reflect[ed] that the creation of a certificate of mailing, which [was] necessarily generated before the commission of any crime, [was] a function of the legislatively authorized administrative role of the DOS independent from any investigatory or prosecutorial purpose.” Nunley, 491 Mich at 689-690, 706-707. Accordingly, as “a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason[,]” the certificate, assuming that it “qualifie[d] under a hearsay exception within [the] rules of evidence[,]” could “be admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause.” Id. at 690, 699 n 26, 706.


A nontestifying serologist’s notes and laboratory report are testimonial statements under Crawford. In Lonsby, a crime laboratory serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. Lonsby, 268 Mich App at 380-381. The testimony included theories on why the nontestifying serologist conducted certain tests, as well as her notes regarding the tests. Id. at 380-381. In Crawford, “the Court stated that pretrial statements are testimonial if the declarant would reasonably expect 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, quoting Crawford, 541 US at 51-52. The Court of Appeals found 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.” Lonsby, 268 Mich App at 619-620. See People v Lewis,
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490 Mich 921 (2011), vacating in part People v Lewis (On Remand), 287 Mich App 356 (2010), and holding that a statutorily-mandated autopsy report prepared by two nontestifying medical examiners was testimonial and that its admission violated the defendant’s Sixth Amendment right to confrontation, but that “the admission of the report was not outcome determinative[;]” see also People v Dendel (On Second Remand), 289 Mich App 445, 468 (2010) (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.” Specifically, “[t]he medical examiner did not merely delegate to the [l]aboratory 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”).13

Cf. People v Dinardo, 290 Mich App 280, 290 (2010), where, without production of the original Datamaster ticket or a copy of it, 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 [the] defendant’s specific alcohol level, [did not] amount[] to testimonial hearsay within the meaning of Crawford [v Washington, 541 US 36 (2004)].” The Court of Appeals held that “while theDatamaster ticket showed facts relevant to the ultimate issue of [the] defendant’s guilt, the ticket was neither a testimonial statement nor hearsay because it was not the statement of a witness or a declarant.” Dinardo, 290 Mich App 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].” Id.14

13 MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See Section 4.7 for more information on forensic laboratory reports and certificates.
Statements by a victim of sexual abuse to a Sexual Assault Nurse Examiner (SANE) may be testimonial or nontestimonial. *People v Spangler*, 285 Mich App 136, 154 (2009). To make that determination, “the reviewing 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.” *Id.* at 154. See *Spangler*, 285 Mich App at 155-156, for a nonexhaustive list of factual indicia helpful to making an admissibility determination under the Confrontation Clause.

In *People v Garland*, 286 Mich App 1, 11 (2009), the statements made by a sexual abuse victim to a SANE were held to be nontestimonial because “under the totality of the circumstances of the [victim’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 because “the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against [the] defendant.” Specifically, because the victim did not have any outwardly visible signs of physical trauma, the nurse would not have been able to treat the victim without knowing her history. *Id.* at 11. Additionally, the police investigation took place after and apart from the nurse taking the victim’s history and physically examining her. *Id.* at 9.

- *Miller (Sharee) v Stovall*, 608 F3d 913 (CA 6, 2010).

The suicide note of the defendant’s deceased lover, “confessing to [the defendant’s] husband’s murder and accusing [the defendant] of conspiring in the crime,” constituted testimonial evidence. *Miller (Sharee) v Stovall*, 608 F3d 913, 928 (CA 6, 2010) (affirming the district court’s conditional grant of habeas corpus). Along with the suicide note, which stated that the defendant “was involved and helped set . . . up” the murder of the defendant’s husband, the defendant’s deceased lover left evidence implicating himself and the defendant in planning and carrying out the murder of the defendant’s husband. *Id.* at 916-917. The United States Court of Appeals for the Sixth

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14 MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See Section 4.7 for more information on forensic laboratory reports and certificates.
Circuit employed the reasonable-expectation test to determine whether the suicide note was testimonial:

“‘The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime.’” *Miller (Sharee)*, 608 F3d at 924, quoting *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004).

The Sixth Circuit held that “in light of everything else that [the defendant’s deceased lover] did to prepare the case against [the defendant], ‘a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime.’” *Miller (Sharee)*, 608 F3d at 925, quoting *Cromer*, 389 F3d at 675. Specifically, “[b]ecause [the defendant’s deceased lover] took care to assemble, preserve, and arrange delivery to the police of [evidence of the crime], and because the suicide note was placed atop the briefcase [holding evidence of the crime] and contained a direct accusation of [the defendant] . . . it was foreseeable that the authorities would use the note against her.” *Id.* at 925. The Sixth Circuit ruled that the admission of the testimonial suicide note at the defendant’s trial violated her Sixth Amendment right to confrontation. *Id.* at 926.


“*[T]he Sixth Amendment’s Confrontation Clause [did not] prohibit[] prosecutors from introducing . . . [a young child’s] statements” to his teachers in which he “identified [the defendant] as his abuser[;]” because “neither the child nor his teachers had the primary purpose of assisting in [the defendant]’s prosecution, the child’s statements [did] not implicate the Confrontation Clause and therefore were admissible at trial[]” when “the child was not available to be cross-examined.” *Clark (Darius)*, 576 US at ___ (“[d]elin[ning] to adopt a categorical rule excluding [statements to persons other than law enforcement officers] from the Sixth Amendment’s reach[,]” but noting that “such statements are much less likely to be testimonial than statements to law enforcement officers[,]” and further noting that “[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause[.]”).

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15 See *Section 3.6* for discussion of child witnesses.
3. **Forfeiture By Wrongdoing**

*Crawford*, 541 US 36, does not bar the admission of an unavailable witness’s testimonial statements where the defendant “has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” *People v Jones (Kyle)*, 270 Mich App 208, 212-214 (2006). See MRE 804(a) (providing in part that “[a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying[;]” MRE 804(b)(6) (providing that “[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness[;]” is “not excluded by the hearsay rule if the declarant is unavailable as a witness[;]”). However, 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.” *People v Burns (David)*, 494 Mich 104, 115 (2013).

“For the [forfeiture] 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 (David)*, 494 Mich at 113, quoting MRE 804(b)(6). MRE 804(b)(6) “incorporates the specific intent requirement at issue in *Giles v California*, 554 US 353, 367-368 (2008),” which “requir[es] the prosecution to show that [the] defendant acted with, at least in part, the particular purpose to cause [the witness’s] unavailability, rather than mere knowledge that the wrongdoing may cause the witness’s unavailability.” *Burns (David)*, 494 Mich at 114-115, 117, 119 (holding that evidence that “during the alleged [sexual] abuse [the] 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)[;]”). See also *People v Roscoe*, 303 Mich App 633, 640-642 (2014) (“[t]he trial court’s admission of the victim’s . . . statement

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16 “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 (David)*, 494 Mich App at 118 n 42.
[identifying the defendant as his assailant] violated both the rules of evidence and the defendant’s right to confront the witness because the trial court failed to make a factual finding that the defendant had the requisite specific intent to procure the witness’s 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”); People v McDade, 301 Mich App 343, 354-355 (2013) (because the forfeiture-by-wrongdoing doctrine “applies . . . when the defendant, or an intermediary, engaged 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”).

4. Impeachment

An unavailable witness’s former testimonial statement may be admitted to impeach a witness without violating the Confrontation Clause according to Crawford. 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, 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.
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)(3) (hearsay exception for statements against the declarant’s penal interest), not the Confrontation Clause. *People v Taylor (Eric)*, 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)(3) and the Confrontation Clause. See Chapter 5 for more information on hearsay exceptions.

Even though a *Bruton* error is an error of constitutional magnitude, it does not require automatic reversal of a defendant’s conviction; rather, it is subject to harmless error analysis. *People v Pipes*, 475 Mich 267, 276-277 (2006). For example, in *Pipes*, 475 Mich at 269, a joint trial was held for two codefendants charged with first-degree premeditated murder. The trial court admitted into evidence the confessions of the two codefendants that incriminated one another, and a *Bruton* error occurred when both codefendants decided to exercise their right to remain silent. *Id.* at 275-276, 279. However, neither defendant preserved the issue by objecting on *Bruton* grounds, and both defendants were convicted. *Id.* at 273, 277. The Michigan Supreme Court held that the codefendants did not demonstrate plain error affecting their substantial rights, and upheld their convictions. *Id.* at 284.

2. Curing Defects

“Joint trials with a single jury present a special problem.” *People v Bruner*, 501 Mich 220, 227 (2018). “Some evidence may be admissible as to one defendant but violate a codefendant’s confrontation right.” *Id.* at 227. “When that is the case, a court must either exclude the testimony or take measures to eliminate the confrontation problem.” *Id.* at 227. “What measures are sufficient depends on the context and content of the evidence.” *Id.* at 227. “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. See also *Richardson (Gloria) v Marsh*, 481 US 200, 208-209
(1987). 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 (Kevin) v Maryland, 523 US 185, 192 (1998). 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. at 228. “But other times evidence is too compelling for a jury to ignore even with a limiting instruction.” Id. at 228. “[L]imiting instructions are categorically inadequate to protect against evidence that a nontestifying defendant confessed and implicated a codefendant in that confession.” Id. at 228. “In such a case, the confrontation problem persists as if no instruction had been given at all.” Id. at 228.

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. at 223 (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).

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 (Andre), 292 Mich App 583, 595-597 (2011). In Jackson (Andre), 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 subsequent to 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 (Andre), 292 Mich App at 596, citing United States v Nazemian, 948 F2d 522, 527-528 (CA 9, 1991), and People v Gutierrez, 916 P2d 598, 600-601 (Colo App, 1995).

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 reported were properly considered to be [the victim’s] statements.” Jackson (Andre), 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 Two-Way Interactive Video Technology in Certain Proceedings17

A court may use telephonic, voice, video conferencing, or two-way interactive video technology during certain criminal proceedings. See MCR 6.006. However, in Michigan, defendants in felony cases have a constitutional and a statutory

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17 Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, “[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes.” Remote participation as set out in Administrative Order No. 2012-7 is permitted only in the following situations: “1) judicial assignments; 2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district; 3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district; [and] 4) a multiple district plan in which a district court magistrate would have to travel to a different district.” Id. “The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area.” Id. Additionally, “[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B).” Administrative Order No. 2012-7.
right to be “personally present” at trial. MCL 768.3. Thus, use of this technology may implicate a defendant’s right to confrontation.

MCR 6.006(A)-(D) state:

“(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.

(B) Defendant in the Courtroom—Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.

(C) Defendant in the Courtroom—Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use videoconferencing technology to take testimony from a person at another location in the following proceedings:

(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

(2) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be
required to articulate any reason for not consenting.

(D) Mechanics of Use. The use of telephonic, voice, video conferencing, 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.”

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 c]ourt’s discretion,‘” the defendant both 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).18 People v Buie (Buie III), 491 Mich 294, 297-298, 316, 318-319 (2012), reversing People v Buie (Buie II) (After Remand), 291 Mich App 259 (2011). Noting that “[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel[,]” the Buie III Court held that “where 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.” Buie III, 491 Mich at 306, 313, overruling in part People v Lawson, 124 Mich App 371, 376 (1983). 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. Buie III, 491 Mich at 316-317.

Turning to MCR 6.006(C), the Buie III 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

18 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[.]”
abuse its discretion in finding that “good cause” was shown for the use of video technology. *Buie III*, 491 Mich at 318-320. “If 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 III*, 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 III*, 491 Mich at 319 (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.

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.19

3. **Special Protections for Certain Victim-Witnesses**20

MCL 600.2163a affords child victim-witnesses, victim-witnesses with developmental disabilities, and “vulnerable adult” victim-witnesses special protections in prosecutions and proceedings involving certain offenses. MCL 600.2163a(1)(g).21 These special protections include the use of

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

20 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 6.

21 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).
videorecorded statements or closed-circuit television in presenting the victim-witness’s testimony. See MCL 600.2163a(8); MCL 600.2163a(20).\(^{22}\)

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).\(^{23}\)

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

MCL 600.2163a(20) permits the use of closed circuit television to present the testimony of qualifying victim-witnesses. “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 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),\(^{24}\) 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.

\(^{22}\) See also MCL 712A.17b(5); MCL 712A.17b(16).

\(^{23}\) 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).

\(^{24}\) 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, the placement of the defendant as far from the witness stand as is reasonable, and the use of a podium. MCL 712A.17b contains similar provisions.
A defendant can be denied the right to face-to-face confrontation when the court permits a child witness to testify against the defendant outside the defendant’s presence. *Staffney*, 187 Mich App at 665. The right to face-to-face confrontation may be denied to further public policy when the reliability of the testimony is assured. In such an instance, a closed-circuit television is an appropriate mode of communication. *Id.* at 665. In addition, when the witness is mentally and psychologically challenged and the assault was of an extreme nature, closed-circuit television is an appropriate mode of communication. *People v Burton*, 219 Mich App 278, 288-289 (1996).

**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). “The court must also permit a witness who is called upon to testify to have a courtroom support dog25 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 allow a witness to testify accompanied by a support animal.” *People v Johnson (Jordan)*, 315 Mich App 163, 178 (2016), citing MCL 768.29; MRE 611(a).26 A trial court is not required to make findings of good

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25Courtroom 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).
cause or necessity before allowing the use of a support animal. *Johnson (Jordan)*, 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 [the] 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 [the] defendant a face-to-face confrontation with his accuser[.]” *Johnson (Jordan)*, 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 (Dakota)*, 324 Mich App 529, 542 (2018). “[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 (Buie III)*, 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, 313, overruling in part *People v Lawson*, 124 Mich App 371, 376 (1983).

In *Buie III*, 491 Mich at 297-298, 316, 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 defense counsel stated that she would “‘leave [the issue of the admission of the video testimony] to the [trial c]ourt’s discretion[,]’”

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

27 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[.]”
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, reversing *People v Buie (Buie II) (After Remand)*, 291 Mich App 259 (2011). “[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.” *Buie III*, 491 Mich 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 316-317.28

**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 (Buie III)*, 491 Mich 294, 304 (2012). “Confrontation Clause violations are subject to harmless-error analysis.” *Miller (Sharee) v Stovall*, 608 F3d 913, 926 (CA 6, 2010), citing *Delaware v Van Arsdall*, 475 US 673, 682 (1986).


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

A *Bruton*29 error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a

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28 The *Buie III* 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 III*, 491 Mich at 318-320.

defendant’s conviction. *Pipes*, 475 Mich at 276-277. 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 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.

### 3.6 Child Witness

**A. Competency**

Under MRE 601, a child is competent to testify as a witness unless the court finds otherwise, or he or she is precluded from testifying by the rules of evidence. When a child witness testifies, the following jury instruction may be appropriate:

“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. Confrontation**

“*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 (Buie III)*, 491 Mich 294, 304 (2012). Testimonial hearsay is not admissible against a criminal defendant unless the declarant is unavailable to testify at trial and the defendant had the opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 68 (2004).

A defendant may waive his or her right to confrontation. *Buie III*, 491 Mich at 306 (“There is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel.”). “[W]here the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense

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30 Effective August 3, 1998, MCL 600.2163 was repealed, and Michigan courts are no longer required to question a child witness regarding competency.

31 There is only one exception to the Sixth Amendment right to confrontation: forfeiture by wrongdoing. *People v Burns*, 494 Mich 104, 111 (2013). For a discussion of this topic, see Section 3.5(D)(3); see also Section 5.3(D)(5).

32 For a thorough discussion of *Crawford* and its progeny, see Section 3.5. For a discussion of confrontation issues in the context of hearsay exceptions, see Section 5.3(A).
counsel as long as the defendant does not object on the record.” *Id.* at 313.

1. **Testimonial Statements**

   “[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.” *Ohio v Clark (Darius)*, 576 US ___, ___ (2015). 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.” *Id.* at ___. Thus, their admission during trial did not violate the Confrontation Clause. *Id.* at ___. 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.” *Id.* at ___. 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 ___. 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 ___. Finally, the child who made the statements “never hinted that he intended his statements to be used by the police or prosecutors.” *Id.* at ___. The Court further noted that “[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause.” *Id.* at ___.

2. **Closed-Circuit Testimony**

   The use of contemporaneous closed-circuit testimony is constitutional when the court determines that it is necessary to further an important public policy. *Maryland v Craig*, 497 US 836, 845 (1990).

   “The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the

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33 See Section 3.5(G) for additional discussion of the potential implications of a criminal defendant’s right of confrontation with respect to the use of audio and video technology.
defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than ‘mere nervousness or excitement or some reluctance to testify[.]’” *Craig*, 497 US at 855-856 (citation omitted).

MCL 600.2163a(20) (formerly MCL 600.2163a(13)), a statute permitting special arrangements for the testimony during certain types of proceedings of child victims, impaired persons who are victims, and vulnerable adults who are victims, has been found to satisfy the *Craig* requirements. *People v Pesquera*, 244 Mich App 305, 310-312 (2001).34

C. Sexual Act Evidence

Although the common-law “tender years” exception to the hearsay rule did not survive the adoption of the original Michigan Rules of Evidence, it was reinstated with the adoption of MRE 803A. In criminal and delinquency proceedings only,35 a child’s statement regarding sexual acts performed on or with the declarant is admissible, provided 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.

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34 Subsequent to the *Pesquera* decision, MCL 600.2163a(18) was amended. See 2012 PA 170. However, the language analyzed in *Pesquera* was not amended, and thus, the Court’s analysis was not impacted.

35 See also MCR 3.972(C), which applies to child protective proceedings and contains a rule similar to MRE 803A.
as having been caused by fear or other equally effective circumstance; and

“(4) the statement is introduced through the testimony of someone other than the declarant.” MRE 803A(1)–MRE 803A(4).

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) (the statement was admissible under MRE 803(24), a residual hearsay exception).

The proponent of the MRE 803A statement must notify the adverse party of his or her “intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.” MRE 803A.

D. 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). See also Molloy v Molloy (Molloy II), 247 Mich App 348, 351 (2001), vacated in part on other grounds 466 Mich 852 (2002). In camera interviews with children need not be recorded. Molloy v Molloy (Molloy III), 466 Mich 852 (2002).

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 302.37

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

37 See Section 3.6(B) 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.
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) (alteration added). “Such comments 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 (internal citations and quotations omitted).

A. Comment on Witness’s Credibility by Interrogator or Interviewer

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.” Musser, 494 Mich 337, 353 (2013); People v Douglas, 496 Mich 557, 579 (2014). 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 proffer purpose.” Musser, 494 Mich 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 [the] 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 was not admissible evidence[.]”)

B. Comment on Witness’s Credibility by CPS Worker

The trial court abused its discretion on the basis of the principle that a witness may not comment on or vouch for the credibility of another witness when it allowed a CPS worker to testify that “based on her investigation, [the victim’s] allegations had been
“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). [The d]efendant 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–[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, [the] 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.

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38Defense 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 is unpreserved, and therefore, reviewed for plain error affecting substantial rights. Id. at 721-722.

39For more information on the precedential value of an opinion with negative subsequent history, see our note.
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, ___ Mich ___, ___ (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. at ___.

See Section 4.2(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) (citation omitted). 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 (James), 391 Mich 175 (1974) (a criminal matter) 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 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).

3.8 Examination & Cross-Examination

A. Direct Examination

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.” Id.

Leading questions are only permissible on direct examination as “necessary to develop the witness’[s] testimony.” MRE 611(d)(1). See In re Susser Estate, 254 Mich App 232, 239-240 (2002), where 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. “However, a prosecutor has considerable leeway to ask leading questions to child witnesses.” People v Johnson (Jordan), 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 pattern 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).

Only one attorney for a party is permitted to examine a witness, unless otherwise ordered by the court. MCR 2.507(C).

B. Cross-Examination

“A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” MRE 611(c). However, cross-examination may be limited under certain circumstances. MRE 611.

• The trial court may limit cross-examination 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, 270-271 (2015) (holding that the “trial court wisely and properly prevented [the] 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 [the] defendant’s personal cross-examination would cause [the children] significant trauma and emotional stress[.]” (quoting MRE 611(a); additional 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.

• The trial court may 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’[s] testimony on direct examination.” Beadle v Allis, 165 Mich App 516, 522-523 (1987).

Leading questions are permissible during cross-examination. MRE 611(d)(2). However, the court is not always required to allow them. Shuler v Michigan Physicians Mut Liability Co, 260 Mich App 492, 517-518 (2004).

MRE 611(d)(3) permits leading questions “[w]hen 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, supra at 26.

A cross-examining attorney must accept the answer given by a witness regarding any collateral matters. People v Vasher, 449 Mich 494, 504 (1995). However, impeachment may be proper when the collateral matter “‘closely bear[s] on [the] defendant’s guilt or innocence.’” Vasher, supra at 504.

C. 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.” Gallaway, supra at 8. However, “this general rule does not equate to an entitlement to elicit any and all testimony on such topics. Rather, the rules of evidence, which require that ‘questions concerning . . . the admissibility of evidence shall be determined by the court,’ continue to apply regardless of whether the questioning at issue is properly within the scope of examination.” Detroit v Detroit Plaza Ltd Partnership, 273 Mich App 260, 291 (2006).

D. Recross-Examination


E. Nonresponsive Answer

A volunteered and nonresponsive answer to a proper question generally does not warrant granting a motion for a mistrial. People v Haywood, 209 Mich App 217, 228 (1995). However, a police officer has a special obligation not to testify about forbidden matters which may prejudice the defense. People v Holly, 129 Mich App 405, 415-416 (1983). In Holly, the defendant was convicted of armed robbery, and he claimed that he only participated in the robbery because he was afraid of his codefendant. Holly, supra at 416. During the trial, a police officer gave a nonresponsive answer that implicated the defendant in other armed robberies, thereby substantially reducing the credibility of the defense’s theory. Id. The Court concluded that the officer’s testimony was prejudicial, but it did not reverse the defendant’s conviction because the other evidence against him was sufficient to support his conviction. Id.

F. Correction of Witness Testimony

The prosecution has a duty to correct false testimony of witnesses. People v Smith (Feronda), 498 Mich 466, 470 (2015).

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40For more information on the precedential value of an opinion with negative subsequent history, see our note.
“[T]he 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[,]” and the defendant was entitled to a new trial 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 (Feronda), 498 Mich at 470 (citation omitted). “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, 487 (citations omitted).

G. Judicial Questioning and Impartiality

A trial court is vested with broad discretion over the administration of trial proceedings. People v Taylor (Kelvin), 252 Mich App 519, 522 (2002). See also MCL 768.29; MRE 611(a). “The court may interrogate witnesses, whether called by itself or by a party.” MRE 614(b). See the Michigan Judicial Institute’s Civil Proceedings Benchbook, Chapter 6, and Criminal Proceedings Benchbook, Vol. 1, Chapter 12, for additional information on judicial questioning during trial. See the Michigan Judicial Institute’s Judicial Disqualification in Michigan publication for information on judicial bias and impartiality.

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,41 see MRE 611(c);

41 See Section 3.9(C).
• Character or reputation for veracity, \(^\text{42}\) MRE 608(a) (opinion and reputation evidence), and MRE 608(b) (evidence of specific instances of conduct);

• The witness’s prior conviction of a crime, \(^\text{43}\) MRE 609; and

• Prior statements, \(^\text{44}\) MRE 613, MRE 801(d)(1)(A), and MRE 806.

MRE 707 permits impeachment of an expert by use of a learned treatise, provided the treatise is “established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice[.]” If statements from a learned treatise are admitted to impeach an expert witness, they may not be received as exhibits but may be read into evidence. MRE 707.

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) (internal citations omitted).

C. Witness Bias

The interest or bias of a witness has always been deemed relevant. People v Layher, 464 Mich 756, 764 (2001). The Michigan Supreme Court explained witness bias:

“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

\(^{42}\) See Section 3.9(D).

\(^{43}\) 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 2.2(F) for more information on admission of other acts evidence.

\(^{44}\) See Section 3.9(F) and Section 3.9(G).
against a party. Bias may be induced by a witness’[s] like, dislike, or fear of a party, or by the witness’[s] 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’[s] testimony.” Layher, supra at 763, quoting United States v Abel, 469 US 45, 52 (1984).

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 Authority v Drinkwater, Taylor & Merrill, Inc, 267 Mich App 625, 653 (2005). There is no specific rule of evidence that covers this form of impeachment, but MRE 401 (relevancy) and MRE 611 (mode of interrogation) 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.

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 admissible because its admission “supports the inference that [the witness] would color his testimony in favor of [the] defendant.” Id. at 765.

D. Character

Evidence of character is generally inadmissible to prove conduct. MRE 404.45 However, MRE 404(a)(4) 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:

“(a) Opinion and Reputation Evidence of Character.
The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is

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45 See Section 2.2 on character evidence.
admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

“(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’[s] credibility, other than conviction of crime as provided in [MRE] 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’[s] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.”

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 encompass[e][s] [the witness’s] overall ‘integrity.’” *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 102 (2009).

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, during his opening statement, asserted that the complainant had emotional problems which affected her ability to describe the alleged sexual assaults. *Lukity, supra* 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, supra* at 491.

2. **MRE 608(b) Examples**

Although MRE 608(b) prohibits the admission of extrinsic evidence regarding specific instances of a witness’s conduct, the rule clearly permits the cross-examination of the witness regarding matters such as an alleged false affidavit.
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. Guerrero, supra 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 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, supra 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.” Id. at 654-655.

E. Prior Conviction of a Crime

MRE 609 states:

“(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

“(1) the crime contained an element of dishonesty or false statement, or

“(2) the crime contained an element of theft, and

“(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

“(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further
determines that the probative value of the evidence outweighs its prejudicial effect.”

In other words, if the conviction contained an element of dishonesty or false statement, it is automatically admissible. People v Allen, 429 Mich 558, 605 (1988). See also People v Snyder (After Remand), 301 Mich App 99, 105 (2013). If not, the court must determine whether the conviction contained an element of theft. Allen, 429 Mich at 605.

“[I]f the prior conviction ‘contained an element of theft,’ it may be admissible if certain conditions are met. 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 . . . .” Id., quoting MRE 609(a)(2)(B). In determining the probative value of a prior conviction, the court must consider only the age of the conviction or the date on which the witness was released from confinement, whichever is later (i.e. whether the conviction or release occurred within the last ten years, MRE 609(c)) and “the degree to which a conviction of the crime is indicative of veracity.” Allen, 429 Mich at 606; MRE 609(b). “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. “Regarding ‘the degree to which a conviction of the crime is indicative of veracity,’ . . . in general, ‘[t]heft crimes are minimally probative on the issue of credibility,’ or, at most, are ‘moderately probative of veracity . . . .’” Id. (holding that a two-year-old prior conviction did not have significant probative value of credibility46), quoting People v Meshell, 265 Mich App 616, 635 (2005); Allen, 429 Mich at 610-611 (internal citation omitted). Where the defendant is the witness, the court must take an additional step: determine the prejudicial effect of admitting the evidence. Snyder (After Remand), 301 Mich App at 106. In determining the prejudicial effect of admitting the prior conviction, the court must consider only the conviction’s “similarity to the charged offense and the importance of the defendant’s testimony to the decisional process.” Allen, 429 Mich at 606; 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.

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46 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 under the facts of the case).
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.” *Coleman*, *supra* at 7.

1. **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).

2. **Use**

   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). In *Waknin*, the probative value of the defendant’s prior conviction was not substantially outweighed by its unfair prejudice. *Waknin*, *supra* at 335-336. The Michigan Supreme Court stated:

   “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.

   Where the transcript of an unavailable witness’s preliminary examination testimony is properly admitted against the defendant at trial, the trial court must also permit the defendant to introduce evidence of the witness’s prior criminal record for impeachment purposes. See *Vasquez v Jones*, 496 F3d 564, 574 n 6 (CA 6, 2007).

   “[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. *Lindberg, supra* at 234.

The defendant must testify to preserve for review the issue of improper impeachment by a prior conviction. *People v Finley*, 431 Mich 506, 526 (1988). “[T]here can be no error until a defendant testifies and the impeachment evidence of a conviction is actually introduced.” *People v McDonald (Gerald)*, 303 Mich App 424, 431 (2013). “In sum, meaningful appellate review cannot be undertaken unless a defendant actually takes the stand and testifies and the evidence of a prior conviction is admitted.” *Id.* at 431, 439. (“By choosing not to testify [the] [d]efendant 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.”)

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.

F. **Prior Consistent Statements**

   “Generally, a witness’s prior consistent statement is inadmissible as substantive evidence. While such statements are hearsay, they are admissible in certain circumstances. A prior consistent statement is admissible to rehabilitate the witness following impeachment by a prior inconsistent statement or to rebut a charge of recent fabrication. A prior consistent statement is also admissible 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).

   “As a general rule, neither party in a criminal trial is permitted to bolster a witness’[s] 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 against the [witness] of recent fabrication or improper influence or motive.” *MRE 801(d)(1)(B).*

   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 (Valmarcus), 240 Mich App 704, 707 (2000), quoting United States v Bao, 189 F3d 860, 864 (CA 9, 1999). The motive mentioned in elements (2) and (4) must be the same motive. Jones (Valmarcus), supra at 712. 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 Valmarcus Jones (Valmarcus), 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).

“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 2.512(F).

G. Prior Inconsistent Statements

While examining a witness, a party is not required to show or disclose the contents of the witness’s prior statement, unless requested by opposing counsel or the witness. MRE 613(a). “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). 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). See also 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)47 (noting that “prior unsworn statements of a witness are mere hearsay and are generally

47For more information on the precedential value of an opinion with negative subsequent history, see our note.
inadmissible as substantive evidence”), quoting 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. Steanhouse, 313 Mich App at 29. In seeking to admit extrinsic evidence of a prior inconsistent statement, the witness must be “afforded an opportunity to explain or deny the same and the opposite party [must be] afforded an opportunity to interrogate the witness thereon, or [as] the interests of justice otherwise require.” MRE 613(b).

Extrinsic evidence may not be used to impeach a witness on a collateral matter. People v Rosen, 136 Mich App 745, 758 (1984). “[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), citing McCormick, Evidence (2d ed), § 47, p 98.

Generally, evidence of a prior inconsistent statement of the witness may be used to impeach a witness, even if it tends to directly incriminate 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.” Kilbourn, 454 Mich at 683. The Court noted that this analysis is very narrow, and the facts in Kilbourn did not support a finding of inadmissibility based on this rule. Id.

“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 2.512(F).

1. 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). The statement must have been
actually made by the witness, and it must be “in fact inconsistent with the witness’s testimony in court.” *Howard v Kowalski*, 296 Mich App 664, 677 (2012). Any material variance between the testimony and the prior statement is sufficient, as long as a reasonable jury might perceive an inconsistency. *Howard*, *supra* at 677-678. 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. *Barnett*, *supra* at 165. Then, the proponent of the evidence must “allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness.” *Id*.

2. **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*, *supra* at 588, the defendant was charged with murder and aggravated robbery. When the defendant took the stand, he testified that his co-defendant committed the crimes. *Id.* at 589. 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*. The Kansas Supreme Court ultimately held that the informant’s testimony was inadmissible for any reason, including impeachment. *Id*. The United States Supreme Court disagreed and concluded:

“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,’ *Harris [v New York*, 401 US 222, 225 (1971)], 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 [v United States*, 377 US 201, 206 (1964)]48 would add little appreciable deterrence. Officers have significant incentive to ensure that they and their informants comply with the Constitution’s demands, since statements lawfully obtained can

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48 *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.
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.

3. **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*, 478 Mich at 164-167. In such cases, the court should allow the document itself to be admitted, not just the substance of the statements. *Howard*, 296 Mich App at 676-680 (court erred in failing to admit the affidavit, but error was harmless because court allowed the contents of the affidavit to be read to the jury, allowed counsel to discuss the contents in closing argument, and instructed the jury to consider whether the affidavit contradicted the witness’s testimony).

Where a witness’s “police statement implicating [the] defendant in [a crime] was admissible [under MRE 613(b)] only to impeach [the witness’s] trial testimony, the prosecution’s use of the statement as substantive evidence of [the] 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 Steanhhouse*, 313 Mich App 1, 29, 30 (2015), aff’d in part and rev’d in part on other grounds 500 Mich 453 (2017)49 (nevertheless concluding that “in light of the extensive evidence admitted at trial linking [the] defendant to the [crime], . . . these errors did not prejudice [the] defendant[’]s”) (citations omitted).

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] . . .

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49For more information on the precedential value of an opinion with negative subsequent history, see our note.
there was no other testimony from him 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 testimony “had little, if any, probative value[,]” and “[a] review of the complainant’s brother’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.

4. Impeachment of Hearsay Declarants

MRE 806 allows, but does not require, evidence of a hearsay declarant’s inconsistent statement or conduct to be admitted as impeachment evidence. People v Blackston, 481 Mich 451, 460-461 (2008). Evidence that may be admissible under MRE 806 “is still subject to the balancing test under MRE 403[.]” Blackston, 481 Mich at 461. In Blackston, the defendant argued that the trial court erred in refusing to admit at his second trial the statements made by two witnesses who recanted their testimony from the defendant’s first trial. Id. at 457, 460. The Michigan Supreme Court found that the trial court’s decision to exclude evidence of the witnesses’ recantations “was principled and supported by Michigan law.” Id. at 463. Because the impeachment evidence was highly prejudicial to the prosecution and cumulative, and because a significant amount of untainted evidence existed against the defendant, the trial court did not err when it refused to admit the evidence. Id. at 473. However, in Blackston v Rapelje, 780 F3d 340 (CA 6, 2015), the Sixth Circuit affirmed the district court’s grant of a conditional writ for habeas relief to the defendant in Blackston, 481 Mich 451, and held, contrary to the Michigan Supreme Court, that the defendant’s right to confrontation was violated.
by the trial court’s refusal to permit the defendant to present
evidence of the recanting witnesses’ inconsistent statements
for impeachment purposes, and that the constitutional error
was not harmless. Blackston, 780 F3d at 362.50

H. 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 Miranda51 warnings, admission
of evidence of that silence is error. People v McReavy, 436 Mich 197,
201 (1990).

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,” id., and is commonly referred to as
“Doyle error.” See 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-

A defendant’s post-arrest, post-Miranda silence may not be used to
impeach a defendant’s exculpatory testimony, or as direct evidence
of a defendant’s guilt in the prosecution’s case-in-chief. People v
Shaftier, 483 Mich 205, 213-214 (2009). This is because “‘there is no
way to know 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. Cf. People
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.” However, “in some
circumstances a single reference to a defendant’s silence may not

50Although they may be persuasive, lower federal court decisions are not binding on Michigan courts.

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).

3.10 Rule of Completeness

MRE 106 is commonly referred to as the “rule of completeness.” The rule states:

“When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

“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). “[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:

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.

3.11 Refreshing Recollection

A. Writing or Object Used to Refresh Memory

MRE 612 permits a witness to use a writing or an object to refresh his or her memory either while testifying or before testifying. MRE
612(a) and MRE 612(b). If a writing or object is used while testifying at a trial, hearing, or deposition, the adverse party is entitled to have it produced at the proceeding in which the witness is testifying. MRE 612(a) and MRE 612(c). If a writing or object is used before testifying, the adverse party is entitled to have it produced, if practicable and if the court determines it is in the interest of justice, at the proceeding in which the witness is testifying. MRE 612(b).

MRE 612(c) provides guidance on the production and use of a writing or object:

“A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence, for their bearing on credibility only unless otherwise admissible under these rules for another purpose, those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.”52

B. Method of Refreshing Recollection of Witness

Before refreshing a witness’s recollection with a writing, a proper foundation must be laid. 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 witness’s present memory.” Genna v Jackson, 286 Mich App 413, 423 (2009).

52Before 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.
In People v Favors, 121 Mich App 98, 107-108 (1982), 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. Favor, supra 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.” Favor, supra at 109 (internal citations omitted).

C. Introducing a Past Recorded Recollection

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.

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)(5) (deposition testimony when the declarant is unavailable as a witness). 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 “must be made an

53 Recorded recollection is a hearsay exception with its own foundational requirements. See Section 5.3(B)(5).
exhibit pursuant to 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 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). 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 [at trial] 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.” DaFoe, supra at 568.

3.13 Self-Incrimination

“No person . . . shall be compelled in any criminal case to be a witness against himself.” US Const, Am V. 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.” Phillips, supra at 399-400.

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. Bassage, 274 Mich App 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. *United States v Knox*, 396 US 77, 82 (1969). Thus, although he was never informed of his right against self-incrimination, [the] defendant, by providing false testimony, took ‘a course [of action] that the Fifth Amendment gave him no privilege to take.’ Id. ‘If the citizen answers the question, the answer must be truthful.’ *United States v Wong*, 431 US 174, 180 (1977). Accordingly, we hold that the prosecutor had no obligation to advise [the] defendant of his Fifth Amendment right against self-incrimination, because that right was not implicated by [the] defendant’s decision to commit perjury.” *Bassage*, 274 Mich App at 325-326.

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).54

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*, 213 Mich App at 400.

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.

54See Section 1.10(B)(2) for a detailed discussion of this procedure.
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) (internal quotations 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 672-673, quoting Malloy v Hogan, 378 US 1, 11-12 (1964). “A court should bar a claim of privilege under the Fifth Amendment only when the answer cannot possibly be incriminating.” PCS4LESS, LLC, 291 Mich App at 673 (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, 291 Mich App at 679. 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. 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?” (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). PCS4LESS, LLC, 291 Mich App at 681, citing Paramount Pictures Corp v Miskinis, 418 Mich 708, 720 (1984).

C. Criminal Cases

The privilege against self-incrimination is available at sentencing; it is not waived by a defendant’s guilty plea. Mitchell v United States, 526 US 314, 325 (1999).

“‘Use’ immunity protects a witness . . . from the prosecutorial use of compelled testimony.” People v Jones (Bennie), 236 Mich App 396, 399 n 1 (1999). “A witness granted ‘use’ immunity may still be prosecuted for a crime in which he was involved and to which his immunized testimony relates.” Id. at 399 n 1. 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

This sub-subsection discusses a witness or suspect invoking the privilege against self-incrimination before (or when no) Miranda warnings have been given. See Section Section 3.14 for information on a defendant invoking the privilege after being informed of his or her Miranda rights.

“To properly assert [the Fifth Amendment] privilege [against self-incrimination], a witness must have a ‘reasonable basis . . . to fear incrimination from questions.” People v Steanhouse, 313 Mich App 1, 19 (2015), aff’d in part and rev’d in part on other grounds 500 Mich 453 (2017),55 quoting People v Dyer, 425 Mich 572, 578 (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.’” Steanhouse, 313 Mich App at 19, 20, quoting Dyer, 425 Mich at 579 (citation omitted). A witness had a reasonable basis to fear incrimination from questioning where the defendant’s

55For more information on the precedential value of an opinion with negative subsequent history, see our note.
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[]” Steanhous, 313 Mich App at 20.

The Supreme Court discussed the trial court’s role in determining whether a witness’s assertion of the self-incrimination privilege should be permitted:

“This privilege is held by the witness. However, the witness is not the sole judge of whether the testimony is or may be incriminating. The constitutional privilege against self-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. However, 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 Dyer, 425 Mich 572, 578-579 (1986) (internal citations omitted).

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), citing People v McNary, 43 Mich App 134, 140 (1972). 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 (internal 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 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.”56 *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[, but . . . 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**

This sub-subsection discusses the admissibility of statements before (or when no) *Miranda* warnings have been given. See Section Section 3.14 for information on a defendant’s confession after being informed of his or her *Miranda* rights.

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)(3), if the declarant is unavailable as defined in MRE 804(a). A defendant may be unavailable to testify by exercising his or her constitutional right to remain silent.

MRE 410 precludes the admission of statements made during plea discussions or in connection with a plea that was withdrawn.57 However, a defendant’s voluntary testimony at a prior proceeding, including a guilty plea proceeding involving an unrelated crime, is generally admissible. *People v Plato*, 114 Mich App 126, 134-135 (1981).

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56 “[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[, *Griffin (Eddie) v California*, 380 US 609, 613-615 (1965), and] . . . [s]econd, . . . a witness’ failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary[, *Miranda*, 384 US at 467-468, 468 n 37].” *Salinas v Texas*, 570 US 178, 184 (2013) (plurality opinion).

57 “MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority[; i]t only requires that the defendant’s statement be made ‘in the course of plea discussions’ with the prosecuting attorney.” *People v Smart*, 497 Mich 950, 950 (2015) (overruling the “statement to the contrary in *People v Hannold*, 217 Mich App 382, 391 (1996)[”]).
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 (Steven), 450 Mich 249, 256 (1995) (witness’s claim that he did not remember making prior inconsistent statement was sufficient foundation for 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) (holding that where a witness’s “police statement implicating defendant in [a crime] was admissible [under MRE 613(b)] 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”) (citations omitted).

D. Child Protective Proceedings

“[A] parent’s constitutional right against compelled self-incrimination bars a court in child protection 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 even when criminal proceedings have not been instituted or even planned.” Id. at 332. Compulsion existed even where “respondent initially waived his Fifth Amendment right, testified at trial, and was then later compelled to retract his claim of innocence and incriminate himself.” Id. at 335.

3.14 Confessions

A. Corpus Delicti Rule

According to Michigan common law, a defendant’s confession is inadmissible unless the corpus delicti of the offense is established. People v Modelski, 164 Mich App 337, 341 (1987). “Corpus” means

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

body, and “delict” means wrong or injury; therefore, the corpus delicti of a homicide, for example, is established (and a defendant’s confession may be admitted) when the prosecution demonstrates that the victim is dead and that the death resulted from criminal agency. *Id.* at 341.

“The purpose of the corpus delicti rule is to prevent the use of a defendant’s confession to convict him of a crime that did not occur.” *People v Ish*, 252 Mich App 115, 116 (2002). “[A] defendant’s confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of a specific injury (for example, death in cases of homicide), and (2) some criminal agency as the source of the injury.” *People v Konrad*, 449 Mich 263, 269-270 (1995). “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.’” *Ish*, 252 Mich App at 117, quoting *People v Cotton*, 191 Mich App 377, 389 (1991). 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 (“[p]rosecutor established corpus delicti of 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 [the] defendant had a motive to kill her, his deteriorating marriage and his claim of infidelity, and by showing that [the] defendant’s actions suggest[ed] that he had murdered [the victim]”).

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; “[t]he corpus delicti of accessory after the fact is the same as the corpus delicti of the underlying crime itself.” *People v King* (Genevieve), 271 Mich App 235, 237 (2006). See also *People v Williams* (John L Jr), 422 Mich 381, 388-392 (1985), for a discussion of the history and development of the corpus delicti rule.
B. *Miranda* Requirements

1. Required Warnings

*Miranda* warnings are required when a defendant is subject to custodial interrogation. See *People v Elliott (Samuel) (Elliott (Samuel) II)*, 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).

**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 the interview,’ satisfies *Miranda.*” *Florida v Powell*, 559 US 50, 53 (2010). 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.

“[A] warning preceding a custodial interrogation is deficient 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.” *Mathews*, 324 Mich App at 438.

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, MCL 763.8(2) requires “[a] law enforcement official interrogating an individual in custodial detention regarding the individual’s involvement in the commission of a major felony” to capture the entire interrogation, including notification of a defendant’s Miranda rights, in a time-stamped, audiovisual recording. 60 A defendant who is interrogated while in a “place of detention” as defined by MCL 763.7 for purposes of MCL 763.8(2) is not automatically subject to “custodial interrogation” for purposes of Miranda. People v Barritt (Barritt I), 318 Mich App 662, 672 (2017), vacated in part on other grounds 501 Mich 872 (2017) (Barritt II). 61 The trial court erred by determining that the defendant was subject to custodial interrogation based entirely on the fact that the interview occurred in a “place of detention” as defined by MCL 763.7; “[t]he fact that a police station is a ‘place of detention’ is a fact that should be considered among the totality of the circumstances, but [MCL 763.7] also makes clear that a person can be questioned in a police station without necessarily being in custody.” Barritt, 318 Mich App at 673. See also People v Barritt (Barritt III), 325 Mich App 556, 569 n 4 (2018), which rejected the portion of the trial court’s analysis that implied “that questioning a suspect in a police station, by itself, can provide a legal basis for a finding that a person is ‘in custody,’” because it “runs afoul of [Oregon v Mathiason, 429 US 492 (1977).]” 62

“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, “[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

60 However, if the defendant’s “statement is otherwise admissible[,]” a law enforcement officer may “testify[] in court as to the circumstances and content of the . . . statement” even if the recording requirements of MCL 763.8 are not fulfilled. MCL 763.9. In such a situation, “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 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. See Section 3.14(D) for discussion of major felony recordings.

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

62 See Section 3.14(E) for additional discussion of the Barritt III case.
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 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.

“[F]ailure to comply with [MCL 763.8 and MCL 763.9] does not create a civil cause of action against a department or individual.” MCL 763.10.

C. Invoking Miranda Rights

1. Invoking the Right to Silence

The defendant must clearly invoke the Miranda rights. See People v Williams (Reginald), 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

“[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver[63] 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. . . . [A]n 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). See also People v Harrington, 258 Mich App 703, 706 (2003) (when a defendant invokes his or her Sixth Amendment right to counsel, any subsequent waiver of this right in a police-initiated custodial interview is ineffective; once invoked, a defendant’s Sixth Amendment right to counsel may be waived only when the defendant initiates contact with the police officer and makes a valid waiver of his or her once-invoked right to counsel).

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63 See Section 3.14(D) for more information on valid waivers of Miranda rights.
3. **Violation of Right to Counsel**


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).

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); *Brewer v Williams (Robert)*, 430 US 387, 409-410 (1977). See Section 3.14(F)(6) for more information on valid waiver of *Miranda* rights, including the right to counsel.

4. **Violation of Privilege Against Self-Incrimination**


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*, 384 US at 444; *Arroyo*, 138 Mich App at 249-250. In *Miranda*, 384 US at 444-445, the United States Supreme 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. *Connelly*, 479 US at 168; *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).

2. **Voluntary, Knowing, and Intelligent Waiver – Generally**

A suspect may waive his or her *Miranda* rights. *Moran*, 475 US at 421. However, statements made by a defendant during custodial interrogation are not admissible against the defendant unless he or she makes a *voluntary, knowing, and intelligent waiver* of his or her Fifth Amendment rights. *People v Howard (Connell)*, 226 Mich App 528, 538 (1997). There is a distinction between determining whether a defendant’s waiver of his or 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

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65 “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). However, if the defendant’s “statement is otherwise admissible[,]” a law enforcement officer may “testify[] in court as to the circumstances and content of the . . . statement” even if the recording requirements of MCL 763.8 are not fulfilled. MCL 763.9. In such a situation, “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 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. See Section 3.14(F)(3) for discussion of major felony recordings.

“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 (Nathaniel), 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 waiver.” Tanner (George), 496 Mich at 203, 249, 256, citing Moran, 475 US 412, and overruling Bender (Jamieson Todd), 452 Mich 594. 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 (George), 496 Mich at 211, 256 (quoting Moran, 475 US at 422-423, and 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[]”).

3. Factors For Determining a Voluntary Waiver

The Michigan Court of Appeals set out four factors to consider in determining whether a defendant’s statement was given voluntarily.67

“(1) the duration and conditions of detention,


67 “The legal analysis [applicable to determining whether a confession was voluntary] is essentially the same with respect to examining the ‘voluntary’ prong of a Miranda waiver.” People v Ryan (Sean), 295 Mich App 388, 397 (2012). For a confession to be voluntary, it “‘must have been . . . the product of a free and deliberate choice rather than intimidation, coercion or deception[,]’” id. at 397, quoting Daoud, 462 Mich at 635.
(2) the attitude of the police towards the accused,

(3) the physical and mental state of the accused, and

(4) the diverse pressures which sap or sustain the accused’s power of resistance or self-control.”

Arroyo, 138 Mich App at 256.

In People v Cipriano, 431 Mich 315, 334 (1988), the Michigan Supreme Court elaborated on the four factors first discussed in Arroyo, 138 Mich App at 256. According to the Cipriano Court, the following factors are relevant to determining whether a defendant’s statement was voluntary:68

(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;

(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.

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68 Known as the “Cipriano factors.”
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 mental retardation); *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”), and *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”).

Police promises or threats can make a statement involuntary. “[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 officer’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.*

However, “[t]he fact that police lie to a suspect about the evidence against him does not automatically render an otherwise voluntary statement involuntary.” *People v Perkins (Floyd)*, 314 Mich App 140, 155 (2016), citing *People v Hicks (James)*, 185 Mich App 107, 113 (1990). “Instead, misrepresentation by the police is just one factor to be considered; the focus remains the totality of the circumstances.” *Perkins (Floyd)*, 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” ).
“[T]he mere fact that [the] 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 ‘unusually susceptible . . . to a particular form of persuasion’ [within the meaning of Innis, 446 US at 302]). White (Kadeem) II, 493 Mich at 203.

4. 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 (Willie), 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, 384 US at 475.

“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 demonstrated that the defendant waived his right to remain silent by knowingly and voluntarily making a statement to the police, where (1) “there was 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 was a ‘course of conduct indicating waiver’ of the right to remain silent”; and (3) there was no evidence that his statement was coerced. Id. at 385-387, quoting Butler (Willie), 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.” McReavy, 436 Mich at 222. A defendant who speaks following Miranda warnings must

5. **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).

6. **Cases Involving Valid Waiver**

A defendant who is intoxicated and claims to be suicidal may make a valid waiver of his or her *Miranda* rights as long as the totality of circumstances supports a finding that the waiver was knowingly, intelligently, and voluntarily given. *Tierney*, 266 Mich App at 709-710. In *Tierney*, the defendant’s college education and familiarity with the criminal justice system, coupled with the evidence that the defendant conducted himself in a coherent and rational manner during police questioning, supported the trial court’s conclusion that the defendant’s confession was voluntary and properly admitted at trial. *Id.* at 709-710.

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 (Mary Ann)*, 480 Mich 1047 (2008); *People v McBride (Mary)*, 273 Mich App 238, 240-244 (2006).

Notwithstanding the fact that the subsequent interrogation of a suspect who 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 (Isaiah)*, 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 acknowledgement of his right to counsel and a signed waiver of that right. *Id.*
A defendant made a voluntary, knowing, and intelligent waiver of his or her right against self-incrimination, even when the defendant 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* 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).

### E. Custodial Interrogation

“[N]either *Miranda*’s right to be given a series of warnings nor *Edwards*’ right to have counsel present apply absent custodial interrogation.”70 *People v Elliott (Samuel) (Elliott (Samuel) II)*, 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[,] in other words, according to *Edwards*, [451 US at 485-486,] 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 (Samuel) II*, 494 Mich at 303-305, 322 (reversing *People v Elliott (Samuel) (Elliott (Samuel) I)*, 295 Mich App 623 (2012), and holding that “[b]ecause . . . 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*”).

Custodial interrogation is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way.” *Miranda*, 384 US at 444. Whether a suspect is in custody or deprived of his or her freedom of action in any significant manner

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70 See Section 3.14(C) for more information on invoking *Miranda* rights.
requires a two-pronged analysis. *Thompson (Carl) v Keohane*, 516 US 99, 112 (1995). First, the reviewing court must look at the circumstances surrounding the interrogation. *Id.* at 112. 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.*

“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).

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).

The age of a child subjected to police questioning “properly informs the *Miranda* custody analysis.” *JDB v North Carolina*, 564 US 261, 264 (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.

“[O]rdinarily a motorist detained for a routine traffic stop or investigative stop is not in custody within the meaning of *Miranda [v Arizona]*, 384 US 436 (1966)].” *People v Steele (James)*, 292 Mich App 308, 319 (2011).
There is no “categorical rule . . . that the questioning of a prisoner is always custodial [within the meaning of *Miranda*, 384 US 436,] 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.” *Fields*, 565 US 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 (Samuel) (Elliott (Samuel) II)*, 494 Mich 292, 305-306 (2013). “Pursuant to *Fields*, [565 US at 509,] the 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 (Samuel) II*, 494 Mich at 308, quoting *Fields*, 565 US at 509.

Individuals not acting on the government’s behalf may not be required to give *Miranda* warnings before eliciting a statement. See *People v Anderson (Robert)*, 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), and *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).

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 v Arizona*, 384 US 436 (1966). *Shatzer*, 559 US at 112-114. According to the Court, “[w]ithout
minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in Miranda.” Shatzer, 559 US at 113.

Custodial Interrogation Existed:

- *Edwards v Arizona*, 451 US 477, 487 (1981) (custodial interrogation existed where he 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 Barritt (Barritt III)*, 325 Mich App 556, 574, 575-576, 582-583, 584 (2018) (custodial interrogation existed where 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, . . . [h]is 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 drive to the very same police station, . . . [d]efendant did not get to arrange the time of the interview, the place of the interview or when the interview would conclude, . . . [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”; 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”; “[i]n viewing the totality of the circumstances . . . [a] physical restraint on defendant’s freedom of movements [occurred]”; “[a] reasonable person in defendant’s position would have felt that he was not at liberty to terminate the interrogation and leave, and the environment presented the same coercive pressures as the type of station house questioning in *Miranda*, and] . . . [t]herefore, defendant was ‘in custody,’ and his Fifth Amendment rights were violated when he was not advised of his *Miranda* rights”).

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71The facts in *Barritt III* 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.
• 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[,] . . . [the] respondent was not in custody within the meaning of *Miranda*”).

• *People v Elliott (Samuel) (Elliott (Samuel) II)*, 494 Mich 297-299, 308-313 (2013) (defendant was not subjected to custodial interrogation when his first interrogation (about a robbery) was discontinued when he requested an attorney, but subsequently met with a different parole officer at the jail who served him with an amended notice of parole violation and during the meeting, confessed to his involvement in the robbery; “[the] defendant 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), [the] defendant was not physically restrained, . . . he was escorted to the library by a deputy, not by the parole officer[,] . . . [the] defendant was not free to leave the jail library by himself under any circumstances[,] . . . [and], much like the prisoner in *Fields*, [565 US 499] a ‘reasonable person’ in [the] 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] . . . [the] defendant . . . did not even once indicate that he did not want to talk to the parole officer”).

• *People v White (Kadeem) (White (Kadeem) II)*, 493 Mich 187, 191-192, 195, 198-200, 202, 204-206 (2013), affirming *People v White (Kadeem) (White (Kadeem) I)*, 294 Mich App 622 (2011) (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

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72 *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[ ]”).
“‘hope[d] that the gun [was] in a place where nobody [could] get a hold [sic] of it and nobody else [could] get hurt by it[.]’” did not constitute either “‘express questioning’” or its “‘functional equivalent[.]’” under Innis, 446 US at 299-303, and the trial court therefore erred in suppressing the defendant’s subsequent incriminating statements; “[t]he 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 [the] defendant”; “[f]urthermore, immediately before the officer made the statement at issue, he said, ‘I’m not asking you questions, I’m just telling you[,]’ [a]lthough 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 [the] defendant to answer with an incriminating response or that [the] defendant would have proffered an incriminating response”; the officer’s comment about the location of the gun was a “direct statement[,]” but because there was “nothing in the record to suggest that the officer was aware that [the] 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”) White (Kadeem) II, 493 Mich at 202, 204-206, quoting Innis, 446 US at 302-303.

• 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 “[the] 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[, 565 US 499, 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 (Cynthia), 301 Mich App 566, 580 (2013) (“[the] 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 [the] defendant and her children to sit in his police cruiser for their own safety;” because “[the] defendant was not handcuffed and was informed that she was not under arrest[,] . . . under the totality of the circumstances, a reasonable person in [the] defendant’s position would have believed she was free to leave”).

• People v Steele (James), 292 Mich App 308, 319 (2011) (“[g]iven the circumstances that justified the Terry [(John) v Ohio, 392 US 1 (1968)] stop, [the police officer] was permitted to temporarily detain [the] 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 narcotics without subjecting [the] defendant to custodial interrogation”).

• People v Vaughn (Joseph), 291 Mich App 183, 186-190 (2010), rev’d in part on other grounds 491 Mich 642 (2012)73 (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)

1. Common Challenges to Confessions

   Illegal Arrest/Unlawful Detention. A confession obtained following an illegal arrest or unlawful detention is inadmissible. 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 (James), 160 Mich App 20, 25 (1987). See also People v Dowdy, 211 Mich App 562, 569 (1991), 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).

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 (Timothy)*, 149 Mich App 568, 577 (1986). See Section Section 3.14(F)(3) for more information on voluntariness.

**Unreasonable Prearraignment Delay.** A confession obtained during an unreasonable prearraignment delay may be inadmissible. *Mallory*, 421 Mich at 243; *People v White (James)*, 392 Mich 404, 424 (1974). Although the “48 hour” rule established in *Riverside v McLaughlin*, 500 US 44 (1991), 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). See Section Section 3.14(F)(3) for more information on voluntariness.

2. **Walker Hearings**

A defendant may move to suppress his or her statement, either because it was involuntary, or because it was otherwise obtained in violation of his or her constitutional rights. Hearings on the admissibility of confessions must be conducted outside the presence of the jury. MRE 104(c). If the accused testifies, he or she does not become subject to cross-examination on other issues in the case. MRE 104(d). The hearing is typically called a Walker hearing. *People v Walker (Lee)*, 374 Mich 331, 338 (1965). With the exception of the rules of evidence regarding privilege, the rules of evidence do not apply to Walker hearings. MRE 104(a); *People v Richardson (Derrie)*, 204 Mich App 71, 80 (1994).

MRE 104(c) requires that hearings be conducted outside the presence of the jury on other preliminary matters when the interests of justice require it or when a defendant is a witness and requests that the hearing be conducted outside the presence of the jury.

G. Scope/Applicability of Exclusionary Rule

Confessions obtained in violation of a defendant’s Fifth Amendment privilege against compulsory self-incrimination are not admissible. *Miranda*, 384 US at 474-477; *People v Hill (ML)*, 429 Mich 382, 394-395 (1987). *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). 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 (Jeffrey)*, 84 Mich App 447, 457 (1978).

1. Testimonial vs. Physical Evidence

The *Miranda* rule bars only testimonial, not physical evidence.74 *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.

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 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 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”).

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74 “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(F)(3) for discussion of major felony recordings.
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. *People v Frazier (Corey)*, 478 Mich 231 (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. The *Frazier (Corey)* 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.

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). See also *People v Clary*, 494 Mich 260, 271-272 (2013) (citing *Doyle v Ohio*, 426 US 610, 618-619 (1976), and 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, supra* at 374-375.

“[A] defendant’s nonverbal conduct [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 silence’ at his first trial. *Jenkins* [ v Anderson, 447 US 231, 235 (1980)], citing *Raffel v United States*, [271 US 494 (1926)].” *People

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75 See Section 3.13(E)(8) for discussion of asserting *Miranda* rights.
v Clary, 494 Mich 260, 266, 271-272 (2013) (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]).”76

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 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 the danger of unfair prejudice[,]’)’” Clary, 494 Mich at 271 n 8 (alteration added).

H. Standards of Review

“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.

76 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 v Ohio, 426 US 610, 618-619 (1976). Clary, 494 Mich at 263.
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.

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.

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 the *Miranda* right to remain silent. *People v Boyd*, 470 Mich 363, 365 (2004).

A trial court’s determination that the entire context of a given pretrial statement is admissible to explain the statement is reviewed for an abuse of discretion. *Moody v Pulte Homes, Inc*, 423 Mich 150, 162 (1985).

“Application of the exclusionary rule to a constitutional violation is a question of law that is reviewed de novo.” *Frazier (Corey)*, 478 Mich at 240.

### 3.15 Lay Testimony

#### A. Admissibility

MRE 701 limits lay opinion testimony to certain circumstances. According to MRE 701:

> “If the witness is not testifying as an expert, the witness’[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’[s] testimony or the determination of a fact in issue.”

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 701 where the witness “testified that she had significant experience in reviewing medical documentation for [the defendant insurance company], she had approved payment of approximately 100 auto 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). “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, “[t]he admissibility of [the witness’s] claims log entry, wherein she expressed an 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

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) (internal citations omitted):

> “Lay witness testimony in the form of an opinion is permitted where it is rationally based on the witness’s perception and helpful to a clear understanding of the witness’s 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).

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 (Eddie)*, 326 Mich App 185, 197 (2018). Defendant challenged the testimony arguing it “improperly enhanced the victim’s credibility by indicating that, even though there was no

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77The witness was an insurance adjuster employed by the defendant. *Andreson v Progressive Marathon In Co*, 322 Mich App 76, 87 (2017).
evidence of trauma, the victim’s body language implied that the sexual assaults occurred.” Id. at 197. 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 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. Caban, supra at 422. MRE 1101(b)(8) also authorizes hearsay to be admitted at a preliminary examination when the hearsay involves proof of ownership, use authority, possession, and entry of property.
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4.1 Expert Testimony\(^1\)

A. Admissibility

1. Rule

MRE 702 explains the conditions under which expert testimony may be admitted at trial:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

“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 creation of new certifications any time a novel or rare issue were before a trial court.” People v Brown (Eddie), 326 Mich App 185, 196-197 (2018) (a certified nurse who had not yet received her sexual assault nurse examiner certification was still considered competent as a medical professional).

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\(^1\) Also see the following sections: Section 4.2, Syndrome Evidence—Expert Testimony; Section 4.3, Medical Malpractice—Expert Testimony; and Section 4.6, Police Officer as Witness.

\(^2\) See Section 4.3 for discussion of medical malpractice expert testimony.
2. **Trial Court’s Gatekeeper Role**

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.

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“[T]he court’s gatekeeper role is the same under *Davis-Frye* 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 in “an action for the death of a person or for injury to a person or property[,]” 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[, 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[”].

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3 *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 595 (1993), requires the court to focus its inquiry “solely on principles and methodology, not the conclusions that they generate.”

4 The *Davis-Frye* test was derived from *People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 App DC 46 (1923).
“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).

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, quoting Surles v Greyhound Lines, Inc, 474 F3d 288, 295 (CA 6, 2007) (citation 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 asserting the necessity of 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 (quotation marks and citation omitted). “[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. at 25.

3. Practice

“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.’ MRE 702.” People v Brown (Eddie), 326 Mich App 185, 196 (2018). 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. *Id.* at 196. “[The nurse’s] testimony regarding the lack of injury . . . 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 Michigan Court of Appeals noted, “[I]t 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).* 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. *Edry,* 486 Mich at 640. The Michigan Supreme Court concluded that “in this case the lack of supporting literature, combined with the lack of any other form of support for [the expert’s] opinion, renders his opinion unreliable and inadmissible under MRE 702.” *Edry,* 486 Mich at 641.

“[T]he 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 [the expert’s] 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, [the] plaintiff failed to provide any other support for [the expert]’s opinion, and [the] defendants submitted contradictory peer-reviewed literature.” *Elher v Misra,* 499 Mich 11, 14 (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”) (citations omitted).

In People v Dobek, 274 Mich App 58, 92 (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 “tell you with any degree of certainty that a person is or is not a sex offender.” Dobek, 274 Mich App at 95. The Court of Appeals compared the danger of admitting evidence of sex offender profiling to that of admitting the results of a 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.

Referring to Dobek, 274 Mich App 58, 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, supra, was to testify that the defendant did not demonstrate the typical characteristics of a sex offender).

“[B]ecause the claim of a false confession is beyond the common knowledge of an ordinary person, expert testimony about this phenomenon is admissible under MRE 702 when it meets the other requirements of MRE 702.” People v Kowalski (Jerome), 492 Mich 106, 129 (2012) (plurality opinion). 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.” Kowalski (Jerome), 492 Mich at 129 (internal quotation marks, edits, and citations omitted). In Kowalski (Jerome), 492 Mich at 111-112, 132, two experts proposed to offer testimony based on research and literature about the phenomenon of false confessions. 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
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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. *Id.* 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. *Id.* at 138.

Expert testimony concerning Y-STR DNA analysis, which “involve[s] testing DNA only on the Y-chromosome,” is “properly admitted under MRE 702.” *People v Wood (Alan)*, 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 illustrating 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 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 evaluating complex mixtures,” is properly admitted under MRE 702. *People v Muhammad (Elamin)*, 326 Mich App 40, 47 (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

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5For more information on the precedential value of an opinion with negative subsequent history, see our note.

6See Section 4.10(C)(3) for additional information on the admissibility of STRmix probabilistic genotype testing.
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 (holding that the mechanic was qualified as an expert where he had a college certification in automotive technology, a state certification in brakes, 15 years of 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”).

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 2.512(G).

C. Testifying Via Video Communication Equipment

After a court determines “that expert testimony will assist the trier of fact and that a witness is qualified to give the expert opinion[,] and if all the parties consent, the court may allow a qualified expert

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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.
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). See also MCR 2.407(B)(1) (allowing “the use of videoconferencing technology by any participant in any court-scheduled civil proceeding.”) 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 “initiat[ing] the use of video communication equipment must pay the cost for its use unless the court directs otherwise.” 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).

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).

E. Funding the Expert Witness

1. Amount to Pay Expert Witness

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. People v Williams (Donald), ___ Mich App ___, ___ (2019) (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”).

2. 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.”

“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 (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 [the] plaintiff’s request[]”). See also *Nostrand v Chez Ami, Inc*, 207 Mich App 334, 342 (1994), where the trial court abused its discretion when it completely refused to award expert witness fees to the defendant after determining that the witness was in fact an expert.

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 insurer] in connection with the expert’s time [are] necessary for the expert to develop his [of her] opinion regarding the cause of the damages[]”).

**F. Discovery**

1. **Civil Cases**

Experts who are expected to testify at trial must be identified and “facts known and opinions held by experts . . . acquired or developed in anticipation of litigation or for trial” are subject to discovery only as provided in MCR 2.302(B)(4)(a)(i)—MCR 2.302(B)(4)(a)(iii). Pursuant to MCR 2.302(B)(4), the “[d]iscovery of facts known and opinions held by experts, otherwise discoverable under [MCR 2.302(B)(1)] and acquired or developed in anticipation of litigation or for trial,” may only be obtained by:

- Interrogatories that “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).

• “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 another means.” MCR 2.302(B)(4)(b)(i)–MCR 2.302(B)(4)(b)(ii).

Discovery is not permitted of any expert witness’s written communications to a party’s attorney unless there is a showing of substantial need or undue hardship. MCR 2.302(B)(3)(a).

Unless manifest injustice would result, the court shall 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.” See MCR 2.302(B)(4)(c)(ii). “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.

2. **Criminal Cases**

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 (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. 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. Rose, supra at 526.

G. **Factual Basis for Opinion**

MRE 703 states:

“The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence[8] This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.”
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), quoting 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703). 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. Fackelman, supra 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. Id. at 536. 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.

“In the particular case” is a phrase in MRE 703 that limits the type of evidence that must be admitted as the basis for an expert’s opinion “to 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. Yost, supra 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, but that 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 those data in evidence before [the expert] could utilize them in rendering an opinion.” Id. at 390.

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8 This is a significant change from the prior rule, which gave the court discretion to allow an expert opinion to be based on facts not in evidence.
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.” Wilson, supra at 601.

Repeated references to expert witnesses as “hired guns” may require a new trial. See Wilson, 411 Mich at 605 (statement implying an expert witness was a “professional witness” did not require new trial); 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); Wolak v Walczak, 125 Mich App 271, 275 (1983) (court’s allowance of a single statement characterizing expert witness as a “professional witness” who resides out of state, did not require new trial).

“To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits.” 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 incapacity to execute a will or deed, simple versus gross negligence, the criminal responsibility of an accused, or [the accused’s] guilt or innocence.” Drossard, supra at 79-80. Therefore, it is error to permit a witness to give the witness’s own opinion or interpretation of the facts because doing so would “invade[] 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, supra at 123.

J. Report

Upon request, 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 underlying basis of that opinion[].” MCR 6.201(A)(3) (applicable only to felony cases). 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

Under MRE 706, the court is authorized to appoint an expert witness to assist the court; the rule does not apply to a request for an appointed expert to consult with and assist a litigant. In re Yarbrough, 314 Mich App 111, 121, 121 n 7 (2016) (stating that “MRE 706 is identical to FRE 706[,] . . . [and] ‘litigant assistance’ is not the purpose of Rule 706[]”). The court may seek nominations by the parties and appoint an agreed-upon expert, or appoint an expert of the court’s own selection. MRE 706(a). The court cannot appoint an expert unless the expert consents to the appointment. Id. An appointed expert must be informed of his or her duties, either in writing or at a conference where all parties are able to participate. Id. The appointed witness must disclose any findings to all parties. Id. In addition, the witness may be required to participate in a deposition or to testify at trial. Id. If testifying, the witness will be subject to cross-examination by any party, even the party calling the witness. Id.

2. Court-Appointed Expert Indigent Defendants in Criminal Cases

When considering whether to appoint an expert witness for an indigent defendant, trial courts must apply the due process analysis set forth in Ake v Oklahoma, 470 US 68 (1985). People v Kennedy (Johnny), 502 Mich 206, 228 (2018). Ake is the controlling law in this area, and analysis under MCL 775.15 (as

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9See Section 4.7 for information on the admissibility of a forensic laboratory report and certificate.
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 costs of attending trial.” Kennedy (Johnny), 502 Mich at 222. The Kennedy opinion overrules People v Jacobsen (Sheri Lynn), 448 Mich 639 (1995) and People v Tanner (Hattie Mae), 469 Mich 437 (2003), to the extent those cases did not apply Ake and held (or suggest) that MCL 775.15 governs a request by an indigent defendant for the appointment of an expert at government expense. Kennedy (Johnny), 502 Mich at 225.

A trial court must consider three relevant factors when determining whether to appoint an expert witness for an indigent defendant: (1) “the private interest that will be affected by the action of the State”; (2) “the governmental interest that will be affected if the safeguard is to be provided”; and (3) “the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.” Ake, 470 US at 77; see also Kennedy (Johnny), 502 Mich at 215. In addition, the Kennedy (Johnny) Court adopted the reasonable probability standard set forth in Moore v Kemp, 809 F2d 702 (CA 11, 1987), “as the appropriate standard for courts to apply in determining whether an indigent criminal defendant is entitled to the appointment of an expert at government expense under Ake’s due process analysis.” Kennedy (Johnny), 502 Mich at 228. Moore provides:

“[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, . . . 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. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution’s proof – by preparing counsel to cross-examine the prosecution’s experts or by providing rebuttal testimony – he must inform the court of the nature of the prosecution’s case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the
evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in Ake. In each instance, the defendant’s showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant’s motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. [While] defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide, . . . defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense’s case.” Moore, 809 F2d at 712.

Accordingly, “‘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.’” Kennedy (Johnny), 502 Mich at 228.

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, 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[,] [his or her] interests, and the burden on the state of providing expert funding.” In re Yarbrough, 314 Mich App at 134, 137 (“highlight[ing] that the Eldridge due process framework is inherently fact-specific”). In In re 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[ ] the 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 experts’ testimony.” Id. 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 lack[ed] 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).10

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 at 121. In Carson Fischer Potts, 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 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 defendant may move to strike a plaintiff’s expert if the defendant believes that the “expert is not qualified because he does not specialize in what the defendant believes to be the relevant specialty[.]” Woodard v Custer, 476 Mich 545, 574 (2006). “A party must move to strike an expert within a reasonable time after learning the expert’s identity and basic qualifications. The failure to timely do so results in forfeiture of the issue.” Cox v Flint Bd of Hosp

10For a detailed discussion of expert testimony in child protective proceedings, see the Michigan Judicial Institute’s Child Protective Proceedings Benchbook, Chapter 11.
M. 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 (Fifth Amendment did not prohibit government from introducing evidence from the defendant’s court-ordered mental evaluation to rebut expert testimony that supported a defense of voluntary intoxication).

N. Jury Instructions

Civil. No instruction recommended. See M Civ JI 4.10.


4.2 Syndrome Evidence—Expert Testimony

A. Battered Woman Syndrome

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).

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,

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

12 For more information on the precedential value of an opinion with negative subsequent history, see our note.
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. Christel, supra 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. 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. at 352.

Despite these limitations, “(1) an expert may testify in the prosecutor’s case-in-chief [(rather than only in rebuttal)] regarding 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.

A defendant must raise certain issues before expert testimony is admissible to show that the victim’s behavior was consistent with sexually abused victims generally:

“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*, [450 Mich 349 (1995),] 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, [the] 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 (Jeffrey)*, 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.

In *People v Thorpe*, ___ Mich ___, ___ (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 apply[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 ___. 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 ___. “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 ___.

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*, ___ Mich at ___. 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.* at ___. “An examining physician’s opinion is objectionable when it is solely based ‘on what the victim . . . told’ the physician.” *Thorpe*, ___ Mich at ___, quoting *People v Smith (Joseph)*, 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*, ___ Mich at ___ (quotation marks and citation omitted; alteration in the original).

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. *Ackerman*, *supra* at 441. The Court stated that this behavior “supported an inference that [the] 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.” *Id.* 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. 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. at 521. 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. at 523.

“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.” Id. 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 (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”).
4.3 Medical Malpractice—Expert Testimony

A. Requirements

MRE 702 requires an expert witness to be qualified in order to testify. MCL 600.2169(1) and (2) set forth the qualifications necessary for an expert witness to testify regarding the standard of care in medical malpractice cases. 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).


“Admission of expert testimony . . . does not depend on being exactly as knowledgeable as a defendant in a medical malpractice action.” Albro v Drayer, 303 Mich App 758, 763 (2014). There is “no rule, statute, or binding authority requiring identical experience and expertise between a party and an expert[]” Id. In Albro, 303 Mich App at 761-62, the “defendant’s experts satisf[ied] MCL 600.2169(1), which . . . essentially requires the experts to share the defendant’s certifications, practice, and specialties.” The plaintiff argued that the defendant’s experts were “unqualified to render an opinion as to [the] defendant’s compliance with the standard of care because they ha[d] little, no, or no recent personal experience actually performing the specific surgical procedure [the] defendant performed.” Albro, 303 Mich App at 761-62. Although “none of [the] defendant’s experts were as familiar with the [specific] procedure as was [the] defendant[,] . . . all of them were familiar with the [specific] procedure.” Id. at 763-64. Accordingly, “[t]he trial court did not abuse its discretion by finding that [the] defendant’s experts were, at a minimum, sufficiently knowledgeable, trained, or educated to form an expert opinion under MRE 702 . . . [and] none of the

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13 This section includes information on expert testimony that is specific to medical malpractice cases. See Section 4.1 for general information on expert testimony.

14 For more information on the precedential value of an opinion with negative subsequent history, see our note.
considerations under MCL 600.2169(2) demand[ed] that the experts be excluded.” Albro, 303 Mich App at 763.

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.” Elker 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. Where “[d]ifferent doctors have different viewpoints on [a] subject[,] . . . [g]atekeeping courts are not empowered ‘to determine which of several competing scientific theories has the best provenance.’” Id. at 308, quoting Ruiz-Troche v Pepsi Cola of Puerto Rico Bottling Co, 161 F3d 77, 85 (CA 1, 1998).

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. ‘[T]he 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.” Decker, 287 Mich App at 686 (internal 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 [the expert’s] lengthy testimony was that the procedures at issue [in Decker were] so commonplace that the same standard of care applied locally and nationally. . . . Thus, [the] 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 [proposed] 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).
The Michigan Court of Appeals interpreted this to mean 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.” *Kiefer*, 283 Mich App at 559.

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.*

A board certified family practitioner who had been engaged in the general practice of medicine as a family practitioner during the year prior to the date of the alleged malpractice was qualified under *MCL 600.2169(1)(c)* to testify against a defendant doctor who was a general practitioner. *Robins v Garg (On Remand)*, 276 Mich App 351, 360-361 (2007). The *Robins* Court noted that a different outcome would result if the defendant was a board certified family practitioner and the plaintiff’s expert witness was a general practitioner. *Robins*, 276 Mich App at 360 n 3. In such a case, the plaintiff’s witness would not be qualified to testify against the defendant doctor because *Woodard v Custer*, 476 Mich 545, 560-561 (2006), and *MCL 600.2169(1)(a)* require the plaintiff’s expert witness to be board certified in the same specialty as the defendant doctor if the alleged malpractice occurred during the defendant’s practice in that specialty. *Robins*, 276 Mich App at 360 n 3. See also *Woodard*, 476 Mich at 560-561.

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.

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 (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.

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 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).

2. Specialists

“[A] ‘specialty’ is a particular branch of medicine or surgery in which one can potentially become board certified.” Woodard v Custer, 476 Mich 545, 561 (2006). 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.”

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. *Jilek*, 490 Mich 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.
A plaintiff’s expert witness’s credentials need not match the defendant’s expert witness’s credentials in every respect. 

*Woodard*, 476 Mich at 559-560. According to the *Woodard* Court:

“[T]he plaintiff’s expert [is only required] to match one of the defendant physician’s specialties. Because the plaintiff’s expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff’s expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff’s expert must also be board certified in that specialty.” *Woodard*, 476 Mich at 560.

Where a defendant doctor was practicing outside of her board certification and the defendant doctor could have obtained a board certification in that particular area, the defendant doctor was practicing as a “specialist” when the alleged malpractice occurred. *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622, 630 (2007). This means that the plaintiff’s expert must be a specialist, as well. *Id.* at 630.

The level of certification required of a plaintiff’s expert witness in the relevant area of medicine depends on the level of certification achieved by the defendant. See *Reeves*, 274 Mich App at 629. For example, if a defendant is board certified in the specialty he or she was practicing at the time of the alleged malpractice, the expert witness must also be board certified in the same specialty. If a defendant is merely a specialist who is not board certified, at a minimum, the expert witness must be a specialist. *Id.* at 629. Even where an expert witness is board certified, as is the case in *Reeves*, the witness must also satisfy the requirements of a specialist as defined in MCL 600.2169(1)(b). *Reeves*, 274 Mich App at 629-630. In *Reeves*, the record did not reflect any information pertaining to the expert’s status as a specialist under MCL 600.2169(1)(b), so the Court of Appeals remanded the case to the trial court to determine the issue. *Reeves*, 274 Mich App at 630.

In *Estate of Norczyk v Danek*, ___ Mich App ___, ___ (2018), defendant, a board-certified cardiologist and interventional cardiologist, moved for summary disposition asserting that plaintiff’s affidavit of merit did not satisfy the requirements of MCL 600.2912d and MCL 600.2169. Specifically, defendant
asserted plaintiff’s affidavit of merit from a board-certified cardiologist was defective because plaintiff’s expert was not also a specialist in interventional cardiology. Estate of Norczyk, ___ Mich App at ___. “This certificate distinguishes the two physicians, [but] that distinction is relevant only if, at the time of the alleged malpractice, [defendant] was practicing interventional cardiology, making that the one most relevant specialty.” Id. at ___. See also Woodard v Custer, 476 Mich 545, 567-568 (2006). The Court of Appeals upheld the trial court’s decision to deny defendant’s motion for summary disposition, “conclud[ing] that the one most relevant specialty here is cardiology, not interventional cardiology, because the allegations of medical malpractice do not pertain to negligence in the performance of invasive procedures, but instead concern failures by [defendant] to act relative to [plaintiff’s] care and treatment, falling outside of and not encompassed by the performance of invasive procedures.” Estate of Norczyk, ___ Mich App at ___ (“we agree with the trial court’s determination that [the] affidavit of merit submitted on behalf of plaintiff satisfied the requirements of MCL 600.2912d and MCL 600.2169, where the one most relevant specialty was cardiology, not interventional cardiology”).

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, ___ Mich App ___, ___ (2019). “[T]he requirements of [MCL 600.2169(1)(a)] were satisfied because the two doctors [were] both board-certified OB-GYNs,” and MCL 600.2169(b)(1) “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, ___ Mich App at ___.

“[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), aff’g in part 308 Mich App 155 (2014) (citations omitted). “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).

A board certified family practitioner who had been engaged in the general practice of medicine as a family practitioner during the year prior to the date of the alleged malpractice was qualified under MCL 600.2169(1)(c) to testify against a defendant doctor who was a general practitioner. Robins, 276 Mich App at 360-361. The Robins Court noted that a different outcome would result if the defendant was a board certified family practitioner and the plaintiff’s expert witness was a general practitioner. Id. at 360 n 3. In such a case, the plaintiff’s witness would not be qualified to testify against the defendant doctor because Woodard and MCL 600.2169(1)(a) require that when a defendant doctor is board certified in a specialty, the plaintiff’s expert witness must be board certified in the same specialty if the alleged malpractice occurred during the defendant’s practice in that specialty. Woodard, 476 Mich at 560-561; Robins, 276 Mich App at 360 n 3.

“[F]or purposes of a matching specialty analysis as required by MCL 600.2169(1)(a) . . . there is no difference between a defendant physician who is board certified in a specialty but is practicing outside of that specialty at the time of the alleged malpractice and a physician, like [a third-year surgical resident], ‘who can potentially become board certified’ and is practicing in a specialty but is not board-certified in that specialty.” Gonzalez v St John Hosp & Med Ctr, 275 Mich App 290, 303 (2007). In Gonzalez, because the defendant was practicing as a third-year surgical resident when the alleged malpractice occurred and the plaintiff’s expert was a board-certified general surgeon who provided the plaintiff with an affidavit of merit, summary disposition was improper without further examination of the expert’s qualifications and a determination of the defendant’s status as a specialist. Id. at 307.

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 nursing, 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 thus properly excluded.” *Cox v Hartman*, 322 Mich App 292, 305 (2017) (concluding that “[t]he health profession of nursing 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”). The proposed expert “testimony was not admissible to establish the standard of care applicable to [the defendant registered nurse], [the] plaintiff presented no other expert witnesses concerning the standard of care applicable to [the defendant registered nurse], and [the] plaintiff thus failed to establish a genuine issue of material fact regarding the applicable standard of care and the breach of that standard.” *Id.* at 306.

C. Exceptions to Requirement of Expert Testimony

There are two exceptions to the requirement that an expert testify in a medical malpractice action:

- where the alleged negligence is a “matter of common knowledge and observation”;
- where the elements of res ipsa loquitur are satisfied, negligence may be inferred. *Thomas v McPherson Comm Health Ctr*, 155 Mich App 700, 705 (1986).

D. Hospitals


A hospital incident report or peer review record may be inadmissible under the peer review privilege set forth by MCL 333.20175(8) and MCL 333.21515. See also *Gallagher*, 171 Mich App at 769-770.15 MCL 333.20175(8) 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 patient care.”16 This includes objective facts gathered

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15At 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(8). See 1993 PA 79 (amending the statute to set forth the peer review privilege in § 20175(8)).
contemporaneously with an event contained in an otherwise privileged incident report.” *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 263 (2015), overruling *Harrison v Munson Healthcare, Inc*, 304 Mich App 1 (2014), to the extent that it held “that objective facts gathered contemporaneously with an event do not fall within the peer review privilege.” However, “the scope of the [peer review] privilege is not without limit.” *Krusac*, 497 Mich at 261. “[T]he privilege only applies to records, data, and knowledge that are collected for or by the committee under [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, quoting MCL 333.21515(d). “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 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.

### E. 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.19 *Domako v Rowe*, 438 Mich 347, 362 (1991). 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

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16. 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).


18. See MCL 333.21515.

19. 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*, supra at 446, quoting 45 CFR 164.512(e)(1)(ii)(B).
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. *Davis, supra* at 293.

### 4.4 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.

#### B. Permissible Testimony

This subsection discusses only permissible testimony; for a discussion on limitations on gang-related expert testimony, see Section 4.4(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.” *Bynum*, 496 Mich at 626. “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.*, quoting *Gutierrez v State*, 423 Md 476, 496 (2011).

“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.’” *Bynum*, 496 Mich at 626, quoting *Gutierrez*, 423 Md at 496.

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. *Bynum*, 496 Mich at 630. 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)\(^{20}\) “limits the extent to which a witness may opine about a defendant’s gang membership.” *Bynum*, 496 Mich at 627. “[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.*

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.” *Id.* 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

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\(^{20}\) MRE 404(a) provides “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .” unless one of the enumerated exceptions apply. See Sections 2.2 for more information on MRE 404(a).
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 there waiting for someone to give them the chance. ‘Make us . . . give me a reason to shoot . . . to fight you, to show how tough we are, the Boardman Boys, on our turf.’” Bynum, 496 Mich at 631. 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.

4.5 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,[21] 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.

4.6 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.

1. Examples


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[21] 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.
“[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.”


A police officer certified as a forensic video technician was permitted to give opinion testimony under MRE 701 regarding the identity of individuals in still photos and surveillance footage, because it 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.


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.

• *Miller v Hensley*, 244 Mich App 528, 531 (2001).

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.


The court accepted opinion testimony from police officers that a car had been dented by bullets.


Two police officers were permitted to give opinion testimony that the defendant was visibly intoxicated.

• *People v Smith (Jonathon)*, 152 Mich App 756, 764 (1986).

A police officer was permitted to give opinion testimony that the defendant was trying to conceal himself.
2. **Jury Instruction**

Police officers frequently appear as fact witnesses, which presents no special problems. However, 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 [the] 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.” *Haywood*, supra at 225.

2. **Delayed Disclosure**

The Court of Appeals concluded that a detective possessed the requisite knowledge, training, experience, and education to be considered an expert capable of testifying about “delayed disclosure” in sex abuse victims. *People v Dobek*, 274 Mich App 58, 79 (2007).

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.” *Murray*, supra at 53, 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**


5. **Firearms**

A police expert in firearms identification has been allowed to testify that bullets came from the defendant’s gun. People v McPherson (Robert), 84 Mich App 81, 83 (1978) (dicta).

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**

Because of the police officer’s training and experience, he was qualified as an expert to testify about the defendant’s estimated speed at the time of the accident. People v Ebejer, 66 Mich App 333, 340-343 (1976).


7. **Self-Defense**

A testifying detective’s “expertise did not extend to offering a profile on 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 [the] 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 behavior 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 maintain the requisite knowledge, skill, experience, training, and education to be qualified as an expert in such an area[.]” Id. at 505 (further concluding that the error was not outcome determinative).

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.”22 “A major felony recording shall include the law enforcement official’s notification to the individual of the individual’s *Miranda*[23] 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 763.9.24

### 4.7 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, proof of service of the report and certificate (if

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22MCL 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).


24“[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.
applicable) on the opposing party’s attorney (or party, if not represented by an attorney), must be filed with the court. 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. MCR 6.202(C)(1). 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. MCR 6.202(C)(1). “Except as provided in [MCR 6.202(C)(2)], a forensic laboratory 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 receipt of 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 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. MCR 6.202(C)(2). 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 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.
MCR 6.202(D).

4.8 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

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.25 People v Jambor (On Remand), 273 Mich

Jury Instruction. M Crim JI 4.15 should only be given where the sole
evidence of identity comes from fingerprints.

“Before a defendant may be convicted on the basis of
fingerprint evidence, the people must prove that the prints
correspond to those of the accused and were found in the
place where the crime was committed under such
circumstance that they could only have been impressed at the
time when the crime was committed.” Commentary to M
Crim JI 4.15.

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25 See Section 4.3(B)(6) on the business record hearsay exception, and Section 4.3(B)(7) on the public record hearsay
exception.
4.9 DNA (Deoxyribonucleic Acid) Identification Profiling System Act (DNA Profiling Act)\(^{26}\)

A. Definitions

- 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).

- Department means the Michigan Department of State Police. MCL 28.172(b).

- DNA identification profile or 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 “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).

- 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). See also MCL 750.520m(9)(c).

- Investigating law enforcement agency “means the law enforcement agency responsible for the investigation of the offense for which the individual is convicted.” MCL 28.172(f). Investigating law enforcement agency “includes the county sheriff but does not include a probation officer employed by the department of corrections [(DOC)].” Id. See also MCL 750.520m(9)(b).

- Sample “means a portion of an individual’s blood, saliva, or tissue collected from the individual.” MCL 28.172(g). See also MCL 750.520m(9)(d).

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\(^{26}\) MCL 28.171 et seq.
B. 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 [DOC] 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 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 [MCL 28.173(a)].

(d) The DNA identification or genetic marker profiling of samples described in [MCL 28.173(a)].

(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 for issues in addition to the issues outlined in MCL 28.173, above.
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 from 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 this section, 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 CODIS procedures27 “[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. Who Must Provide a Sample

MCL 750.520m(1)(a)-(b) in 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).

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27 The Michigan’s DNA Identification Profiling System Act, MCL 28.171 et seq., is part of the national Combined DNA Index System (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 http://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet.
• 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 750.520m(1)(b)(i);
  
  • MCL 750.167(1)(f) (disorderly person—indecent/obscene conduct in public), MCL 750.520m(1)(b)(i);
  
  • MCL 750.167(1)(i) (disorderly person—loitering in house of ill fame or prostitution), MCL 750.520m(1)(b)(i);
  
  • MCL 750.335a(1) (indecent exposure), MCL 750.520m(1)(b)(ii);
  
  • MCL 750.451(1) or MCL 750.450(2) (first and second prostitution violations), MCL 750.520m(1)(b)(iii);
  
  • MCL 750.454 (leasing a house for purposes of prostitution), MCL 750.520m(1)(b)(iv).

F. Individual's Refusal to Provide Sample

If an individual who is required by law to provide a sample for DNA profiling refuses or resists providing a sample, he or she must be advised that his or her 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).

“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).28

G. Cooperative Agencies and Individuals

“The department of state police shall work with the federal bureau of investigation and other appropriate persons to develop the

28 See also Section 4.9(L).
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.

H. 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.

I. Impermissible Use of DNA Information

DNA profiles resulting from samples collected under the DNA Profiling Act must only be used for one or more of the following purposes:

• law enforcement identification;
• assisting with the recovery or identification of human remains or missing persons;
• academic, research, statistical analysis, or protocol development purposes if personal identifiers are removed. MCL 28.175a(1)(a)-(c).

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:

“(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.” MCL 28.175(1).
(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.” MCL 28.175(2).

(3) An individual shall not, without proper authority, obtain a DNA identification profile from the DNA identification profiling system.” MCL 28.175(3).

(4) An individual shall not, without proper authority, test a DNA sample obtained under [the DNA Profiling Act].” MCL 28.175(4).

(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).

J. 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 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).

K. 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).

L. 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)].” MCL 28.176(3). See also MCL 28.173a(2) (containing 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).

29 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).
M. Disposal of DNA Sample or Profile

1. Individual's Charge(s) Is 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 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).

**N. 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)]\(^{30}\), the laboratory shall dispose of the sample in compliance with . . . MCL 333.13811.\(^{31}\)

(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).

**0. 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.”

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\(^{30}\)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.

\(^{31}\)Provisions of the Public Health Code governing the storage, decontamination, and disposal of medical waste.
4.10 DNA (Deoxyribonucleic Acid) Testing and Admissibility

“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, ___ Mich App ___, ___ (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 (George), 195 Mich App 267, 270 (1992).

B. Mitochondrial DNA (mtDNA)

Mitochondrial DNA testing is admissible without a Davis-Frye 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

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32 A detailed discussion of the scientific methods involved in DNA testing is beyond the scope of this benchbook. For a comprehensive discussion of DNA testing, see www.dummies.com/education/science/forensics-fingerprinting-criminals-using-dna/.
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 99 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 which 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,’ 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 [sic] 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 admissibility, and is a question to be determined by the jury. Holtzer, 255 Mich App at 490.

A Davis-Frye hearing is not necessary to show the general acceptance of both RFLP (restriction fragment length polymorphisms) and PCR (polymerase chain reaction) DNA testing methods within the scientific community. People v Coy (Coy II), 258 Mich App 1, 9-12 (2003).
1. **Restriction Fragment Length Polymorphisms (RFLP) Method**

   - *People v Adams (George)*, 195 Mich App 267 (1992), modified and remanded on other grounds 441 Mich 916 (1993)\(^{33}\) (proportionality of sentence)

   DNA identification testing does not require a *Davis-Frye* hearing for its admissibility because “DNA identification testing is generally accepted in the scientific community as reliable.” *Adams (George)*, 195 Mich App at 277 (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 (George)*, 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).

2. **Polymerase Chain Reaction (PCR) Method**


   DNA identification evidence using the PCR method was properly admitted at trial because the method met the *Davis-Frye* standard for admission. *Lee (Albert)*, 212 Mich App at 281-282. As with *Adams (George)*, 195 Mich App at 277, before the DNA identification evidence is admitted, the prosecution must show that the laboratory conducting the DNA test employed generally accepted procedures. *Lee (Albert)*, 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**


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\(^{33}\)For more information on the precedential value of an opinion with negative subsequent history, see our note.
“STRmix probabilistic genotype testing” is “a more recent form of DNA testing and a relatively new method of evaluating complex mixtures.” Id. at 47. “[T]he trial court did not abuse its discretion in concluding that . . . evidence [regarding STRmix probabilistic genotype testing performed on the shoe of a robbery suspect] was admissible under MRE 702.”34 Muhammad (Elamin), 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. at 57. “Based on this record, the trial court did not abuse its discretion in concluding that the DNA evidence was admissible under MRE 702.” Muhammad (Elamin), 326 Mich App at 57.

D. Statistical Interpretation Evidence of DNA Results

Statistical analysis of DNA results is necessary to connect a specific individual to a crime—“[t]he results of DNA identification testing would be a matter of speculation without the statistical analysis[.]” Adams (George), 195 Mich App at 279. 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[.]”).

“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 (Gregory), 211 Mich App 604, 608 (1995) (admission of DNA statistical interpretation evidence does not require a Davis-Frye hearing). See also Leonard, 224 Mich App at 591 (“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 [the] 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.

DNA results were properly admitted where a forensic scientist testified that DNA profiles on a tank top, leggings, and door matched the victim’s profile and excluded the defendant as a donor and that the DNA profile on a pillowcase matched the defendant’s DNA and excluded the victim as a donor. *People v Urban*, 321 Mich App 198, 204 (2017). “The witness was not asked at trial to provide any empirical data to define the statistical parameters of a DNA ‘match.’” *Id.* “However, her report was admitted into evidence, and it contained the testing methodology used, as well as her conclusions and interpretations of the data. Following each conclusion, and for each item indicating a match with the DNA of either [the] defendant or [the victim], the report contained language stating that ‘in the absence of identical twins or close relatives, it can be concluded to a reasonable degree of scientific certainty that the DNA profile of the major donor to item [number and description of item tested] and from [number and description corresponding to either [the] defendant or [the victim]] is from the same individual.’” *Id.* (some alterations in original). The Court held that this report constituted “‘some analytic or interpretive evidence concerning the likelihood or significance of a DNA profile match.’” *Id.* at 204-205, quoting *Coy I*, 243 Mich App at 301-302. The report “indicate[d] that [the witness] analyzed and interpreted the samples that were suitable for analysis and concluded ‘to a reasonable degree of scientific certainty’ that they matched samples taken from [the] defendant and the victim.” *Urban*, 321 Mich App at 204-205 (finding no plain error in the admission of the evidence).

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 (Johnny)*, 502 Mich 206, 228 (2018). See Section 4.1(K)(2) for more information on appointing an expert for an indigent defendant.
4.11 Postconviction Request for DNA Testing

A defendant does not have a constitutional due process right to postconviction access to the State’s evidence for DNA testing. Dist Attorney’s Office for the Third Judicial Dist et al v Osborne, 557 US 52, 55-56, 73-74 (2009).

A defendant serving a prison sentence for a felony, \(35\) if convicted of that felony at trial and 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).

Note: For defendants meeting the requirements of MCL 770.16, 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:

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\(35\) A felony is defined as an offense expressly designated as a felony, or one where the offender is subject to imprisonment for more than one year. MCL 761.1(f).
“[It] 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). According to the Hernandez-Orta Court, 480 Mich at 1101:

“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)]36. 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.”

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.

36Hernandez-Orta references MCL 770.16(3)[a]; however, the statute has since been amended and the relevant section is MCL 770.16(4)[a].
A. Requirements for Ordering 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).

Under MCL 770.16(4), a defendant must:

• "[p]resent[] 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.” MCL 770.16(4)(a).

• [e]stablish[] all the following by clear and convincing evidence:

  • [a] sample of identified biological material described in [MCL 770.16(1)] is available for DNA testing.” MCL 770.16(4)(b)(i).

  • [t]he 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.” MCL 770.16(4)(b)(ii) (bullets added).

  • [t]he identity of the defendant as the perpetrator of the crime was at issue during his or her trial.” MCL 770.16(4)(b)(iii).

When granting or denying 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). “[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 [the] defendant’s identity as the perpetrator.” Poole, 311 Mich App at 414-415. “DNA testing is justified [where] . . . there exists prima facie proof that the blood samples, which will be
subjected to DNA testing, are material to [the] defendant’s identity as the perpetrator, where the DNA testing could point to another specific individual as the perpetrator.” 

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).37

2. Results Show Defendant Not Source

“If the results of the DNA testing indicate 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

37 Before November 8, 2011, the effective date of an amendment to MCL 770.16(7), a defendant’s DNA profile was provided to the Department of State Police only if the results of the DNA testing indicated that the defendant was the source of the identified biological material. See 2011 PA 212.
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 (On Remand), 311 Mich App 296, 305 (2015), citing MCL 770.16(4)(b)(ii).38

“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[.] Notwithstanding [MCL 770.3],39 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

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38 MCL 770.16(4)(b)(ii) provides that “[t]he court shall order DNA testing if the defendant . . . establishes all of the following by clear and convincing evidence . . . [t]he 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.”

39 MCL 770.3 governs an aggrieved party’s right to appeal in different types of cases.
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).

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).

4.12 Tracking/Cadaver Dog Evidence

A. Tracking Dog Evidence

1. Foundation

The prosecutor must lay a foundation in order for the court to 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 (internal citations omitted).

2. Use

Tracking dog evidence, standing alone, will not support a conviction, but is sufficient to justify the issuance of a search warrant. People v Coleman, 100 Mich App 587, 591-593 (1980).

\[40\]For more information on dog sniff evidence as it relates to drug searches, see the Michigan Judicial Institute’s Controlled Substances Benchbook, Chapter 8.
3. **Jury Instruction**

When tracking dog evidence is used, the court must give M Crim JI 4.14. M Crim JI 4.14 is derived from *People v Perryman*, 89 Mich App 516, 524 (1979).

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.* at 54. “[C]adaver dog evidence is sufficiently reliable under *Daubert* and *Gilbert* 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.” *Id.* at 54.
Chapter 5: Hearsay

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5.1 Hearsay - Generally

Hearsay is “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). A hearsay statement is “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” MRE 801(a). An assertion is something capable of being true or false. See People v Jones (Alphonzo) (On Rehearing After Remand), 228 Mich App 191, 204-205 (1998), modified in part and remanded 458 Mich 862 (1998) (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 (Alphonzo), 228 Mich App at 225-226.

Hearsay is not admissible except as provided by the rules of evidence. 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).

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); or (3) it falls under an exception contained in MRE 803, MRE 803A, or MRE 804?

1For more information on the precedential value of an opinion with negative subsequent history, see our note.
2 See Section 5.2 for a discussion of MRE 801(d).
3 See Section 5.3(B) on MRE 803 hearsay exceptions.
4 See Section 5.3(B) on the MRE 803A hearsay exception.
5.2 Nonhearsay

Some out-of-court statements are considered nonhearsay. MRE 801(d). Nonhearsay statements include prior statements of a testifying witness and admissions by party-opponents. MRE 801(d)(1)–MRE 801(d)(2). All of 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).

“[MRE] 801(d) does not apply to statements that are not considered hearsay, such as direct testimony by witnesses.” United States v Benson, 591 F3d 491, 502 (CA 6, 2010) (the Court came to this conclusion under FRE 801(d)(2)(E), which is, in relevant part, identical to MRE 801(d)(2)(E)).

A. Prior Statement of Testifying Witness

A prior statement of a testifying witness is not precluded from being hearsay solely because the declarant and the witness are the same person. See MRE 801(c). 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 admissible solely for the purpose of impeaching the witness (although admission of the statement in the case at bar was error due to other issues that arose as a result of the statement’s admission). However, 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 if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or

(B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

5 See Section 5.3(B) on MRE 804 hearsay exceptions.
(C) one of identification of a person made after perceiving the person[].”

1. **Prior Inconsistent Statements**

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.’” People v Chavies, 234 Mich App 274, 282 (1999), overruled in part on other grounds People v Williams (Cleveland), 475 Mich 245, 254 (2006), quoting United States v Dennis, 625 F2d 782, 795 (CA 8, 1980). See also People v Green (Gabriel), 313 Mich App 526, 531-532 (2015) (defining ‘inconsistent’ and citing Chavies, 234 Mich App at 282). 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).

“The Court of Appeals erred in its analysis of MRE 801(d)(1)(A) by considering whether the witnesses were unavailable, rather than whether their prior statements were inconsistent.” Benson, 500 Mich at 964.

2. **Prior Consistent Statements**

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 (Valmarcus), 240 Mich App 704, 707 (2000), quoting United States v Bao, 189 F3d 860, 864 (CA 9, 1999). The motive mentioned in elements (2) and (4) must be the same motive. Jones (Valmarcus), supra at 712. Consistent statements made

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6 See Section 3.9(G) on impeaching a witness using prior inconsistent statements.

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

8 See Section 3.9(F) on impeaching a witness using prior consistent statements.

### 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*, supra at 377. In addition, MRE 801(d)(1)(C) does not preclude out-of-court statements from a third party; the declarant is irrelevant. *Malone*, supra at 377-378. In *Malone*, a witness previously identified the defendant as the victim’s shooter. *Id.* at 371-372. On the stand, the witness denied making the identification. *Id.* 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*, supra at 390.

**B. Admission by Party-Opponent**

Statements that constitute admissions by party-opponents include:

“(A) the party’s own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or

“(B) a statement of which the party has manifested an adoption or belief in its truth, or

“(C) a statement by a person authorized by the party to make a statement concerning the subject, or

“(D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or
employment, made during the existence of the relationship, or

“(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.” MRE 801(d)(2).

The Michigan Supreme Court explained the rationale for admitting a party-opponent statement:

“[T]he admissibility of a party-opponent 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**

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, the defendant was charged with committing a larceny in a building. Greenwood, supra at 471. During the trial, a detective testified 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 [the] 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.

The Sixth Circuit explained the inquiry a court needs to make in deciding whether to admit an adoptive admission under FRE 801(d)(2)(B), which is identical to MRE 801(d)(2)(B):

“When a statement is offered as an adoptive admission, the primary inquiry is whether the statement was such that, under the circumstances, an innocent defendant would normally be induced
to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.” *Neuman v Rivers*, 125 F3d 315, 320 (CA 6, 1997).


2. **Statements by Authorized Persons**

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 [the] defendant to make a statement concerning the subject.” *People v Von Everett*, 156 Mich App 615, 624-625 (1986).

In medical malpractice cases, an affidavit of merit constitutes a party admission under MRE 801(d)(2)(C). “An independent expert who is not withdrawn before trial is essentially authorized by the plaintiff to make statements regarding the subjects listed in MCL 600.2912d(1)(a)–MCL 600.2912d(1)(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*, 432 Mich at 775. 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, supra* 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) without making a showing of unavailability. *Shields, supra* at 764. The Court stated that “the deposition

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9 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, supra* at 786.
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.” *Shields, supra* 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

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. *Martin*, 271 Mich App at 317. In-court coconspirator testimony may be used to satisfy this requirement. *Benson*, 591 F3d at 501-502. In satisfying the second requirement, a “conspiracy continues ‘until the common enterprise has been fully completed, abandoned, or terminated.’” *Martin, supra* at 317, 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, supra* 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 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 benefitted 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, supra* at 316-319.

### 5.3 Hearsay Exceptions\(^ {10} \)

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). “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

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\(^{10}\) The residual exceptions (MRE 803(24) and MRE 804(b)(7)) are discussed together in Section 5.3(E).
(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 right of confrontation does not apply during a preliminary examination. *People v Olney*, ___ Mich App ___, ___ (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).

Testimonial hearsay is not admissible against a criminal defendant unless the declarant is unavailable to testify at trial and the defendant had the opportunity to cross-examine the declarant.11 *Crawford*, 541 US at 68.

Additionally, “the rules of evidence do not trump the Confrontation Clause.” *Fackelman*, 489 Mich 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.*

“[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). In *Dinardo*, the Court of Appeals approved the admissibility of an officer’s DI-177 report “[b]ecause the breath-test results, printed on the [machine’s report], were self-explanatory data produced entirely by a machine and not the out-of-court statements of a witness . . . .” *Dinardo*, 290 Mich App at 291.

While the United States Supreme Court has not provided “a comprehensive definition of [the term] ‘testimonial,’” it includes “at a minimum prior testimony at a preliminary hearing, before a grand jury, or at a former trial” and “police interrogations.” *Crawford*, 541 US at 68. Statements made to persons other than law enforcement officers “are much less likely to be testimonial than statements to law enforcement officers.” *Ohio v Clark (Darius)*, 576 US ___, ___ (2015) (declining to adopt a categorical rule excluding statements to individuals who are not law enforcement officers from the Sixth Amendment’s reach but holding that the child-victim’s statements to his teacher identifying his abuser were not made with the primary purpose of creating evidence for prosecution, and accordingly, were not testimonial).12

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11 For a thorough discussion of *Crawford* and its progeny, see Section 3.5.
Crawford does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. People v McPherson (Lanier), 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 (Lanier), 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 (Randall) (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. at 154. (quotations, alterations, and citation omitted).

“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). 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,

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12 For a thorough discussion of what constitutes a testimonial statement, see Section 3.5.
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.” *Williams*, 567 US 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.

Only one exception to the Sixth Amendment right to confrontation exists: forfeiture by wrongdoing. *People v Burns*, 494 Mich 104, 111 (2013). *Crawford* does not bar the admission of an unavailable witness’s testimonial statements where the defendant “‘has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.’” *People v Jones (Kyle)*, 270 Mich App 208, 212-214 (2006), quoting MRE 804(b)(6). However, 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. *Giles v California*, 554 US 353 (2008). The doctrine of forfeiture by wrongdoing applies only when the witness’s unavailability to testify at trial results from wrongful conduct designed by the defendant for the purpose of preventing the witness’s testimony. *Id.* See also *People v McDade*, 301 Mich App 343, 354-355 (2013) (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).13

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

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13 For more information on MRE 804(b)(6), the rule of evidence that codifies the common-law doctrine of forfeiture by wrongdoing, see Section 5.3(D)(5).
declarant, he or she has no additional constitutional right to confront the interpreter. *People v Jackson (Andre)*, 292 Mich App 583, 595-596 (2011). In *Jackson (Andre)*, supra at 587, a hospitalized shooting victim was questioned by a police officer. Id. at 593-594. 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”). 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 subsequent to 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 (Andre)*, 292 Mich App at 596, citing *United States v Nazemian*, 948 F2d 522, 527-528 (CA 9, 1991), and *People v Gutierrez*, 916 P2d 598, 600-601 (Colo App, 1995).

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 reported were properly considered to be [the victim’s] statements.” *Jackson (Andre)*, 292 Mich App at 597. Because he “had a full opportunity to cross-examine” the victim, the defendant’s Confrontation Clause rights were satisfied. Id.

**B. Rule 803 Exceptions**

Generally, MRE 803 does not require a declarant to be unavailable before the evidence will be admitted. However, under *Crawford*, 541 US 36, any testimonial hearsay that is offered can only be admitted upon a showing that the declarant is unavailable and was previously subject to cross-examination.

1. **Present Sense Impression**

“The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

“(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event

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14 See Section 5.3(A) on *Crawford v Washington*, 541 US 36 (2004).
or condition, or immediately thereafter.” 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 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) (“statements [contained in the victim’s police statement] were 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 ‘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. 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.
2. **Excited Utterance**

“The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

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“(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” 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. \(\text{People v Smith (Larry), 456 Mich 543, 550 (1998).}\)

The Smith (Larry) 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 (Larry), 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. \(\text{Id.}\) Some plausible reasons include shock, unconsciousness, or pain. \(\text{Id. at 551-552.}\) In Smith (Larry), the victim was sexually assaulted and made a statement about the assault ten hours after it occurred. \(\text{Id. at 548-549.}\) 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.” \(\text{Id. at 552-553.}\)

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, \(\text{MRE 1101(b)(1) and MRE 104(a)}\) 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.” \(\text{People v Barrett, 480 Mich 125, 139 (2008).}\)
The trial court did not abuse its discretion by admitting several statements made by the complainant as excited utterances. *People v Green (Gabriel)*, 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 under the specter of [the] defendant investigating [the] complainant . . . for child abuse and neglect[,]” and testimony established that the complainant was “very upset and crying during both conversations.” *Id.* at 536-537. The first set of statements “were made within a few minutes of [the] defendant leaving the apartment so there was no time to contrive and misrepresent his actions[, and the second statements were made] within hours of [the] 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 [the] defendant’s actions, which was the startling event.” *Id.* at 537.

3. **Then Existing Mental, Emotional, or Physical Condition**

“The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

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“(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.” *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).15 In *Smelley* (a homicide
case), the Court of Appeals 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, supra at 325.

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 In re Utrera, the respondent appealed the trial court’s order terminating her parental rights and argued that hearsay testimony was improperly admitted. Utrera, supra at 14. The Michigan Court of Appeals affirmed the trial court’s decision to admit statements the declarant (a child) 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.

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. Duke, supra at 571. 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

“The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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“(4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment. Statements made for purposes of

\[^{15}\text{For more information on the precedential value of an opinion with negative subsequent history, see our note.}\]
medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.” 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 (Jordan), 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; rather, she was specifically referred to [the pediatrician] by the police in conjunction with the police investigation into the allegations of abuse by [the] 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. LaLone, 432 Mich 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.”
Evidence Benchbook Section 5.3

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. Id. at 324-325. 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. See also the Michigan Judicial Institute’s Sexual Assault Benchbook, Chapter 7, for a detailed discussion of the Meeboer factors and other relevant caselaw.

5. Recorded Recollection

“The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

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“(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’[s] memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” MRE 803(5).

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 Daatamaster machine. Dinardo, supra 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.\footnote{\textsuperscript{16} “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.} Id. at 283-284. 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, supra at 293. Therefore, the officer was permitted to read the contents of the report into evidence at trial. Id. at 294.

According to People v Missias, 106 Mich App 549, 554 (1981):

“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.’”

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 2.512(F).

6. Records of Regularly Conducted Activity

“The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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“(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term ‘business’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.” 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, FRE 803(6) and MRE 803(6) provide 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), quoting MRE 803(6).

If a party makes a timely objection, the court must determine whether the proffered evidence lacks trustworthiness. Solomon, 435 Mich at 126. If trustworthiness is lacking, the evidence cannot be admitted under MRE 803(6). See Solomon, supra at 126. “Trustworthiness . . . 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.

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, supra at 483-484. “[T]he fingerprint cards were prepared during the normal course of investigating a crime scene.” Id. at 483.

7. Absence of Record

“The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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(7) Absence of Entry in Records Kept in Accordance With the Provisions of [MRE 803(6) (Records of Regularly Conducted Activity)]. Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of [MRE 803(6)], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate 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 nonoccurrence or nonexistence of the matter[].’” People v Marshall, 497 Mich 1023, 1023 (2015), quoting MRE 803(7).

8. Public Records

“The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

“(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.”17 MRE 803(8).

“[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

17 “[S]cientific studies and research for the reduction of death, injury, and property losses” authorized by the office of highway safety planning “shall not be available for use in a court action[].” MCL 257.624(1), (2).
official duty to observe and report.” Solomon, 435 Mich at 131. 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, supra at 131-132.

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). “[A] laboratory report prepared by a nontestifying analyst ‘is, without question, hearsay.’” People v Payne, 285 Mich App 181, 196 (2009), quoting McDaniel, supra at 412. In McDaniel (a drug case), a police laboratory report was inadmissible under MRE 803(8) because “[i]t was destined to establish the identity of the substance—an element of the crime for which [the] defendant was charged[.]” McDaniel, supra at 413.

C. Rule 803A Exception: Child’s Statement18 About Sexual Act

Although the common-law “tender years” exception to the hearsay rule did not survive the adoption of the original Michigan Rules of Evidence, it was reinstated with the adoption of MRE 803A. In criminal and delinquency proceedings only,19 a child’s statement regarding certain sexual acts involving the child is admissible, provided 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;

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18 See Section 3.6 on child witnesses.
19 See also MCR 3.972(C), which applies to child protective proceedings and contains a rule similar to MRE 803A.
“(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; and

“(4) the statement is introduced through the testimony of someone other than the declarant.”

MRE 803A.

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 nonsponsive and require extra scrutiny). Gursky, supra 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 626.

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, supra 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, supra 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, supra* at 615-616.

“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 (Jeffery) (Douglas II)*, 496 Mich 557, 575 (2014), aff’g in part and rev’g in part 296 Mich App 186 (2012) (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 II*, 496 Mich at 576 (also holding that the evidence was inadmissible under the residual hearsay exception, MRE 803(24), and ultimately 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) (the statement was admissible under MRE 803(24)).

The proponent of the MRE 803A statement must notify the adverse party of his or her “intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.” MRE 803A.

**D. Rule 804 Exceptions**

Hearsay exceptions that apply only when the declarant is unavailable are set forth in MRE 804(b). A witness is “unavailable” when:

- the court exempts the declarant from testifying about his or her statement on the ground of privilege; or
- the declarant refuses to testify about his or her statement despite being ordered to do so; or
- the declarant cannot remember the subject matter of his or her statement; or
• the declarant cannot be present or testify due to death or current physical or mental illness or infirmity; or

• the party offering the statement has not been able to procure the declarant’s attendance at the hearing. MRE 804(a)(1)-(5).

“A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness 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, ___ Mich ___, ___ (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”) (emphasis added).

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 (Alan), 307 Mich App 485, 517-518 (2014), vacated in part on other grounds 498 Mich 914 (2015)20 (citations omitted), 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, [] lived in Virginia, and [] was unable to fly or travel to Michigan to testify.” The trial court abused its discretion by finding a witness unavailable where it “recognized that [the witness] refused to testify due to the prosecutor’s threat [of prosecution for perjury if the witness’s trial testimony deviated from his preliminary examination testimony and lifetime imprisonment on conviction], yet failed to connect its finding with the rule’s command that ‘procurement’ of a witness’s absence nullifies the witness’s unavailability.” Lopez, 316 Mich App at 724. “The trial court did not abuse its discretion in 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). Although this situation “is not expressly addressed under MRE 804(a), . . . it is of the same character as other

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20For more information on the precedential value of an opinion with negative subsequent history, see our note.
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 trial court’s decision to declare [the witnesses] unavailable was within the range of reasonable and principled outcomes.” Id.

“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 [his or] her youth, is unable to do so because [he or] she lacks the mental ability to overcome [his or] 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.

1. Former Testimony

“The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

“(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” MRE 804(b)(1).

The admission of prior testimonial statements violates a defendant’s constitutional right to confrontation unless the
prior statements were subject to cross-examination by the defendant, and the person who made the statements is unavailable to testify. *Crawford*, 541 US at 68.21

For former testimony to be admissible under MRE 804(b)(1), two requirements must be met: (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). See also MRE 804(b)(1). 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 the 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. *Garay*, 320 Mich App at 37-38.

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21 See Section 5.3(A) on admissibility under *Crawford*, supra.
MRE 804(b)(1) is not violated by a trial court “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 (Alan), 307 Mich App 485, 516 (2014), vacated in part on other grounds 498 Mich 914 (2015). 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. Dying Declaration

“The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

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“(2) Statement Under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.” MRE 804(b)(2).

MRE 804(b)(2) 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

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22The Court found that the reading of the preliminary examination testimony at trial did not violate the Confrontation Clause for the same reasons. Wood (Alan), 307 Mich App at 516, vacated in part on other grounds 498 Mich 914 (2015).

23For more information on the precedential value of an opinion with negative subsequent history, see our note.
who inflicted his fatal injuries. *Stamper, supra* 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.

### 3. Statement Against Proprietary Interest

“The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

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“(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” *MRE 804(b)(3).*

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. *Sackett, supra* 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 this statement was admissible under *MRE 804(b)(3)* 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, supra* 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:

“By enacting MRE 804(b)(3), 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, supra* at 267 (emphasis added).

4. **Statement Against Penal Interest**

“The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

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“(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” MRE 804(b)(3).

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, the Confrontation Clause is implicated. *Crawford*, 541 US 36. However, the admissibility of a *nontestimonial* statement is governed solely by MRE 804(b)(3) because it does not implicate the Confrontation Clause. *People v Taylor (Eric)*, 482 Mich 368,

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24 For a thorough discussion on what constitutes a testimonial statement under *Crawford*, see Section 3.5(D).
Evidence Benchbook  

374 (2008). See, e.g., United States v Johnson (Earl), 581 F3d 320, 326 (CA 6, 2009), where a nontestifying codefendant’s tape-recorded statements were properly admitted under FRE 804(b)(3) (MRE 804(b)(3) uses the same language as the federal rule of evidence) because the statements were not testimonial but were statements against penal interest for purposes of FRE 804(b)(3).

Under MRE 804(b)(3), “‘if a declarant is unavailable, as defined in MRE 804(a), [the declarant’s] out-of-court statement against interest may avoid the hearsay rule if certain thresholds are met.’” People v Steanhouse, 313 Mich App 1, 22 (2015), aff’d in part and rev’d in part on other grounds 500 Mich 453 (2017),

25quoting People v Barrera, 451 Mich 261, 267 (1996) (added footnote omitted). “Whether to admit or exclude a statement against a witness’s penal interest offered under MRE 804(b)(3) 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.’” Steanhouse, 313 Mich App at 23, quoting Barrera, 451 Mich at 268.

“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.

Trial courts must consider the relationship between MRE 804(b)(3) and a defendant’s constitutional due process right to present exculpatory evidence when exercising discretion to admit evidence under MRE 804(b)(3). Steanhouse, 313 Mich App at 23, citing Barrera, 451 Mich at 269.

A statement that one intends to commit a crime is inadmissible under MRE 804(b)(3). People v Brownridge, 225 Mich App 291, 303-304 (1997), rev’d in part on other grounds 459 Mich 456 (1999). 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.

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25For more information on the precedential value of an opinion with negative subsequent history, see our note.

26For more information on the precedential value of an opinion with negative subsequent history, see our note.
“‘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. at 304, quoting Merritt v Chonowski, 58 Ill App 3d 192 (1978).

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 [the] defendant planned and executed the [crime.]” Id. at 23 (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 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. at 24 (quotation marks and citation omitted).

Standard of Review. The trial court’s decision whether to admit or exclude evidence is reviewed for an abuse of discretion. Steanhouse, 313 Mich App at 16. “However, whether a statement was against a declarant’s penal interest is a question of law” reviewed de novo. Id. at 22.

a. 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)(3).” People v Poole, 444 Mich 151, 161 (1993),

27 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(3). People v Brownridge (On Remand), 237 Mich App 210, 216-217 (1999).
overruled on other grounds by Taylor (Eric), 482 Mich 368.

In Taylor (Eric), 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 (Eric), 482 Mich at 379-380. Relying on the Court of Appeals holding, the Michigan Supreme 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’”—and constituted a narrative of events as required by Poole, 444 Mich 151 and MRE 804(b)(3). Taylor (Eric), 482 Mich at 380.

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 [crime].” People v Steanhouse, 313 Mich App 1, 24 (2015), aff’d in part and rev’d in part on other grounds 500 Mich 453 (2017).\(^28\)\(^29\) 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.

b. Exculpatory Statements

“A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not

\(^28\)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. People v Steanhouse, 313 Mich App 1, 24 (2015).

\(^29\)For more information on the precedential value of an opinion with negative subsequent history, see our note.
admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” MRE 804(b)(3). 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)(3) 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 likely other factors can be interjected to weigh against admission of the statement.” People v Barrera, 451 Mich 261, 279-280 (1996) (internal 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
30 rights before giving the statement. Id. at 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.

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:

“[T]he 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, supra at 165.31

The Barrera Court further indicated that an additional inquiry must be made when a statement is made to the authorities while the declarant is in custody. Barrera, 451 Mich at 276. The Court stated:

“With respect to custodial statements, we find useful the three-factor inquiry developed by the United States Court of Appeals for the Seventh Circuit. United States v Garcia, 986 F2d at 1140 [(1993)]. Under that test, the court should first 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.’ Id. (citation omitted). The second factor is ‘whether the confessor made a voluntary statement after being advised of his Miranda rights.’ United States v Nagib, 56 F3d 798, 805 (CA 7, 1995), citing Garcia, 986 F2d at 1140. The third is ‘whether there is any evidence that the statement was

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31 People v Taylor (Eric), 482 Mich 368 (2008), overruled Poole, supra, to the extent that Poole applied these factors to its confrontation analysis because Crawford v Washington, 541 US 36 (2004), 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.
made in order to curry favor with authorities.’  
_Id._” _Barrera, supra_ at 275.

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.

The court has discretion whether to admit an exculpatory statement under MRE 804(b)(3). _Barrera_, 451 Mich at 269. “In exercising its discretion, the trial court must conscientiously consider the relationship between MRE 804(b)(3) and a defendant’s constitutional due process right to present exculpatory evidence.” _Barrera, supra_ at 269.

c. **Cautionary Instruction**

Where the statement against interest involves accomplice testimony, the trial court has discretion whether to give a cautionary instruction on accomplice testimony. _People v Young_, 472 Mich 130, 135 (2005). The court may give the instruction no matter who 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. _Heikkinen, supra_ 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, supra_ 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_

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32 See M Crim JI 5.6.
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. Reed, supra 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

“The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

“Statement by Declarant Made Unavailable by Opponent. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” 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). “[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, quoting MRE 804(b)(6) (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 n 35. In Burns, 494 Mich at 115, it was “alleged that during the alleged [sexual] abuse [the] defendant instructed [the child-victim] ‘not to tell’ anyone and warned her that if she told, she would ‘get in trouble.’” Those threats, “made contemporaneously with the abuse but before any report or investigation, require a finding that [the] defendant ‘intended to . . . procure the unavailability of [the child-victim] as a witness.’” Id., quoting MRE 804(b)(6) (last alteration added). 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 [the] 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 [the] 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 specific factual finding that [the] defendant had the requisite specific intent” that his wrongdoing would render the witness unavailable to testify. “Although there was evidence from which to infer that [the] defendant killed the victim because [the defendant] was caught trying to steal . . ., this does not support an inference that [the] defendant specifically intended to kill the victim to prevent him from testifying at trial,
particularly where there were no pending charges against [the] 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 stated that he was going to call the police.” *Id.* “[W]ithout specific findings by the trial court regarding intent, [the] 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 a jury could conclude, beyond a reasonable doubt, that [the] defendant killed the victim[,]” the error was not outcome determinative, and reversal of the defendant’s convictions was not warranted. *Id.* at 642-43.

E. Residual Exceptions

The Michigan Supreme Court explained the purpose behind the residual hearsay exceptions (MRE 804(b)(7) and MRE 803(24)):

“The residual exceptions are designed to be used as safety valves in the hearsay rules. They will allow evidence to be admitted that is not ‘specifically covered’ by any of the categorical hearsay exceptions under circumstances dictated by the rules. Differing interpretations of the words ‘specifically covered’ have sparked the current debate over the admissibility of evidence that is factually similar to a categorical hearsay exception, but not admissible under it.” *People v Katt*, 468 Mich 272, 281 (2003).33

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.” *Katt*, 468 Mich at 282-286. Under the *near miss* theory, “[e]vidence is ‘specifically covered’ if there is a categorical hearsay exception dealing with the same subject matter or type of evidence.” *Id.* at 282. In rejecting the *near miss* theory, the Court concluded that “a hearsay statement is ‘specifically covered’ by another exception for purposes of MRE 803(24) only when it is admissible under that exception.” *Katt*, 468 Mich at 286. The Court emphasized that

33 The *Katt* Court analyzed the evidence under MRE 803(24). However, MRE 803(24) contains language identical to MRE 804(b)(7). The only difference is that MRE 804(b)(7) requires the declarant to be unavailable. See *People v Welch*, 226 Mich App 461, 464 n 2 (1997).
“residual hearsay must reach the same quantum of reliability as
categorical hearsay” before it can be admitted under the residual
exception. *Id.* at 290.

Evidence offered under **MRE 803(24)** must meet four requirements. *Katt*, 468 Mich at 290. “[A] hearsay statement must:

“(1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions,

“(2) be relevant to a material fact,

“(3) be the most probative evidence of that fact reasonably available, and

“(4) serve the interests of justice by its admission.” *Katt*, 468 Mich at 290.

In determining equivalent trustworthiness, the court must look at
the totality of the circumstances. *Katt*, 468 Mich 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 292,
citing *Idaho v Wright*, 497 US 805 (1990). 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 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 grounds
500 Mich 453 (2017),34 quoting *People v Geno*, 261 Mich
App 624, 634 (2004) (quotation marks and citation
omitted).

In *Katt*, a child victim made statements to a social worker that she
was sexually abused by the defendant. *Katt*, 468 Mich at 273. These
statements were not admissible under **MRE 803A**, but were

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34For more information on the precedential value of an opinion with negative subsequent history, see our
note.
properly admitted under MRE 803(24). Katt, 468 Mich at 273-274. The Court concluded:

“The spontaneity of the interview, lack of motive to lie, and [the social worker’s] interviewing methods combine[d] to give the statement circumstantial guarantees of trustworthiness equivalent to the categorical exceptions. The unavailability of [the victim’s] first statement, the timing of the interview, and [the social worker’s] careful conduct in eliciting information make this statement the most probative evidence of defendant’s abusive acts. Having found that [the victim’s] statement met the first three requirements of MRE 803(24), the [trial] court [properly] concluded that admission would not endanger the interests of justice and ruled the statement admissible.” Katt, 468 Mich at 296.

But see People v Douglas (Jeffery) (Douglas II), 496 Mich 557, 578 (2014), aff’g in part and rev’g in part 296 Mich App 186 (2012), where the Court rejected that the prosecution’s argument that testimony from a forensic interviewer and a video of the interview itself were admissible under MRE 803(24). The statements contained in both the testimony and the video did not meet the admissibility criteria of MRE 803(24) because the statements were not the most probative evidence reasonably available in light of the fact that the statements made to the interviewer were not the first corroborative statements made by the victim; rather, the victim’s statements to her mother made prior to the forensic interview constituted the “best evidence.” Douglas II, 496 Mich at 577. Moreover, the testimony about the victim’s statements during the interview did not demonstrate circumstantial guarantees of trustworthiness because the statements were not the first corroborative statements, they were delayed, and were not spontaneous, but rather, were given in response to questions posed in order to investigate the victim’s prior disclosure of sexual abuse. Id. at 578-579.

The totality of the circumstances did not demonstrate that the declarant’s statement was trustworthy because the statement was not spontaneous and was 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. Steanhouse, 313 Mich App at 26 (noting that the trial court did not abuse its discretion when it
precluded admission of the statement under MRE 804(b)(7) despite the fact that the declarant had personal knowledge about the matter on which he spoke and the statement was voluntary).

F. Statements Narrating, Describing, or Explaining the Infliction or Threat of Physical Injury

MCL 768.27c establishes an exception to the hearsay rule for statements purporting to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. This exception applies only to cases involving domestic violence. 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 this section 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.” People v Meissner, 294 Mich App 438, 446 (2011). 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 victim’s] statements met [MCL 768.27a](1)(a) because the statements described text messages that threatened physical injury, and met [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 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.*

For purposes of **MCL 768.27c**, the phrase “‘[d]omestic violence’ or ‘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.

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35 “Family or household member” is defined in **MCL 768.27c(5)(c).**
(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 768.27c(5)(b).

MCL 768.27c(3) requires the prosecuting attorney to disclose evidence admissible 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, ___ Mich App ___, ___ (2019) (concluding that when ruling on defendant’s motion to quash bind-over, the “circuit court erred as a matter of law in holding there is an ‘unavailability’ requirement under MLC 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, ___ Mich App at ___.

G. Statutory Exceptions for Hearsay at the Preliminary Examination

“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.

(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[; a]ccordingly, 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 [the] 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) (internal 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 W R Co, 350 Mich 479, 485 (1957). The Dalton Court went on to state that “[t]he mere fact of [nonperceiving], standing alone, ordinarily has no probative value whatever as to the occurrence, or nonoccurrence, of the event.” Dalton, supra 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'[s] 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 or Entry

“The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

***

“(7) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) [(records of regularly conducted activity)], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

***

“(10) To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902 [(self-authentication)], or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.” 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 nonoccurrence or nonexistence of the matter[.]’” *Marshall*, 497 Mich at 1023, quoting MRE 803(7). 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.

• *Larned v Vanderlinde*, 165 Mich 464 (1911) (a slip and fall case).

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*, 165 Mich at 468.


“[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*, 90 Mich App at 584 (internal citation omitted). In *Beasley*, six witnesses testified that they did not hear a train whistle or any other warning device. *Id*. 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

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6.1 Receipt, Custody, and Return of Exhibits

The receipt and return or disposal of exhibits is governed by MCR 2.518. MCR 2.518(A) provides that, “[e]xcept 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.” “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 MCR 2.518(A). “As defined in MCR 1.109, exhibits received and accepted into evidence under this rule 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.” MCR 2.518(B). 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 object is in substantially the same condition as when it was seized. 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. Prast, supra at 490.

1See http://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf. ADM File No. 2002-37, effective May 1, 2019, instituted a name change from Trial Court Case File Management Standards to Trial Court Records Management Standards. The document setting forth these standards has not been amended to reflect the name change.
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 n 76 (2001), citing *People v Jennings*, 118 Mich App 318, 322 (1982). “[T]he prosecution [must] show that the article is what it is purported to be and show that it is connected with the crime or the accused.” *People v Prast (On Rehearing)*, 114 Mich App 469, 490 (1982).

A break in the chain of custody of the object affects the weight of the evidence, not its 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 (Elamin)*, 326 Mich App 40, 59 (2018); *Jennings*, 118 Mich App at 324.

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) (internal 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). “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). In *Lopez* (an automobile accident case), 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. *Lopez, supra* at 620, 625, 634-635.

The Court of Appeals noted the difference between re-creation evidence and demonstrative evidence and when each type of evidence is appropriate. *Lopez*, 224 Mich App at 628 n 13. The Court stated:

“[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, supra at 628 n 13 (1997), citing Green v Gen Motors Corp, 104 Mich App 447, 449-450 (1981) (internal citations omitted).

6.4 Best Evidence Rule

A. Requirement of Original

“To prove the content of a writing, recording, or photograph,[3] the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” MRE 1002.

“‘Writings’ and ‘recordings’ consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.” MRE 1001(1).

“An ‘original’ of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ‘original’ of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’” MRE 1001(3).

B. Photographs

For purposes of the best evidence rule and its exceptions, “[p]hotographs’ include still photographs, X-ray films, video tapes, and motion pictures.” MRE 1001(2).

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2 Because MRE 1002 is commonly referred to as the “Best Evidence Rule” in most Michigan courts, this benchbook will also refer to the court rule as such. However, the common name is misleading and frequently misunderstood. “[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). Additionally, 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).

3 See Section 6.4(B) on photographs.
As with all evidence, the trial court has discretion to admit or exclude photographs. *People v Mills*, 450 Mich 61, 76 (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’[s] testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice.” *Mills*, 450 Mich at 76 (internal 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 63, 66. The Michigan Supreme 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.

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 (Joel)*, 320 Mich App 484, 487-489 (2017), vacated in part on other grounds ___ Mich ___ (2019).4 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 depicted the seriousness of her injuries.” *Davis (Joel)*, 320 Mich App at 488-489. Further, “[e]ven if the neck brace was ‘precautionary’ only as argued by [the] defendant, this precaution was required by [the] defendant’s actions,” and “was part and parcel of the medical treatment [the victim] received for injuries sustained after [the] defendant repeatedly punched her in the face.” *Id.* at 489.

“[S]exually explicit photographs used as evidence of a sexual assault of a minor cannot be unfairly prejudicial per se.” *People v Brown*
Section 6.4 Evidence Benchbook

(Eddie), 326 Mich App 185, 194 (2018). “[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. at 194. 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. at 194.

“[T]he trial court did not abuse its discretion by admitting [gruesome] 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, 514-542 (2018). “The nature and extent of [the victim’s] injuries revealed the powerful nature of the short-barreled shotgun and was 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.

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] testify 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) (internal citations omitted). In Robinson (a murder case), 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, supra 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.

### C. Exceptions

MRE 1003–MRE 1007 provide exceptions to the best evidence rule. However, because no published case law exists on MRE 1005 (public records) and MRE 1007 (testimony or written admission of a party), the rules themselves are quoted for reference purposes.⁵

#### 1. Admissibility of Duplicates

MRE 1003 permits the admission of duplicates, unless (1) there are genuine questions of the original’s authenticity or, (2) admitting a duplicate would be unfair. “A ‘duplicate’ is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduces the original.” MRE 1001(4).

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 [the] defendant was ordered to pay child support, a fact that [the] defendant [did] not contest.” *People v Monaco*, 262 Mich App 596, 609 (2004), rev’d in part on other grounds 474 Mich 48 (2006).⁶

#### 2. Admissibility of Other Evidence of Contents

MRE 1004 does not require the original. “[O]ther evidence of the contents of a writing, recording, or photograph is admissible if:"

- the originals are lost or destroyed, “unless the proponent lost or destroyed them in bad faith”; or
- the originals are not obtainable by any judicial process or procedure; or

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⁵ See Section 6.4(C)(3) and Section 6.4(C)(5).

⁶ For more information on the precedential value of an opinion with negative subsequent history, see our note.
the originals are in the possession of the party against whom they are being offered, and after receiving notice of the proponent’s intent to use the originals as a subject of proof, the possessing party does not produce them at the hearing; or

• “[t]he 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 [the] defendant’s computer.” Girard, supra 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(4). Girard, supra at 20.

3. Public Records

MRE 1005 states:

“The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 9027 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.”

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7 MRE 902 concerns self-authentication.
4. Charts, Diagrams, and Summaries

MRE 1006 permits the admission of charts, summaries, and calculations to summarize “[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court[.]” “The court may order that [the originals or duplicates] be produced in court.” Id. To be admissible, four requirements must be satisfied:

- The evidence must summarize a voluminous amount of material, which cannot conveniently be examined in court;
- The underlying materials must be admissible;
- “[T]he originals or duplicates of the underlying materials must be made available for examination or copying by the other parties, at a reasonable time and place”; and

5. Testimony or Written Admissions of Party

MRE 1007 states:

“Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission without accounting for the nonproduction of the original.”

6.5 Loss of Evidence

“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 (Cynthia), 301 Mich App 566, 580 (2013). The “[d]efendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith.” Id. at 581. In Jones (Cynthia), 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 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.*
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