IMPORTANT EVIDENCE CASES 2015-2016

Judge Derek P. Pullan
Fourth District Court
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ARTICLE I. GENERAL PROVISIONS

URE 103--Preservation

- ***Helf v. Chevron*, 2015 UT 81 [Case of the Judge Acting On His Own to Exclude Evidence] (Judge Tony Quinn, 3D) [RULE 103—Preservation].** District court ruled sua sponte that the waiver rule did not apply to certain questions posed at deposition. Court held this was error because the waiver rule applies no matter who is acting the question. On appeal, Chevron claimed that the issue was not preserved because Helf failed to object after the court's sua sponte ruling excluding evidence. HELD:
  - Purpose of preservation rule is to give trial court a chance to rule.
  - Ruling admitting evidence.
    - Object or move to strike
    - State specific ground.
  - Ruling excluding evidence.
    - No objection necessary.
    - Make an offer of proof.

- ***Go Invest Wisely, LLC v. Murphy,* 2016 UT App 185 (McVey, J., 4th District) [Denial of Rule 60(b) motion for relief from judgment for lack of jurisdiction and excusable neglect. D served in Ohio jail. Default judgment. GIW filed 430 documents in support of its opposition to the motion, but no supporting affidavit. Defendant Objection to 430 documents: "Hearsay. No supporting affidavit."]**
  - Murphy Objection: "Inadmissible hearsay in the absence of a supporting affidavit."
    - DPP: Is this a specific objection to any particular piece of evidence?
  - Ruling:
    - GIW "provided exhibits establishing facts [supporting personal jurisdiction]."
  - Objection on appeal: "Inadmissible hearsay ***and lack foundation."***
  - Ruling on Appeal:
    - Court erred in not ruling on Murphy's hearsay objections before deciding jurisdictional question.
    - LOTS of discussion about proper authentication (foundation) under Rule 901.
    - *In denying Murphy's request for relief, the district court concluded that Murphy engaged in transactions, supplied documents and caused injury in Utah according to the complaint. [GIW] also provided exhibits establishing these*

facts.` *Based on this language from the district court's order, we can infer that the district court concluded that the Motion Exhibits were admissible evidence. However, the district court provided no findings, no analysis, and gave no reasoning in support of that conclusion, and nothing in the court's order indicates that the court specifically considered and rejected Murphy's hearsay arguments regarding the Motion Exhibits.*"

URE 104—Preliminary Questions of Fact

- ***State v. Lucero*, 2014 UT 15. [Admissibility of Prior Injury to Child—BCS] (Trease 3D). [RULES 104(b) and 403—Shickles].** Defendant is charged with murdering her two-year old child Alex. One week before death, Alex began to experience trouble walking. This first injury was caused by bending his spine backwards. One week later, Alex dies due to a similar injury caused by the same mechanism but with greater force. At first Defendant claimed she was the only one with the child at the time of both injuries. Later, she contended that (1) the first injury was caused by her boyfriend, Martinez on a fishing trip days before symptoms were exhibited; and (2) Martinez was alone with the child when the second injury occurred and she lied to protect him from deportation. State moved to admit the first injury to prove identity (modus operandi). Trial court granted the motion. Defendant appeals.
    - Modus Operandi. There must be a (1) "very high degree of similarity" between the prior acts and the charged offense; and (2) a unique or singular methodology.
        - NOTE: In analyzing similarity court can consider the time lapse between the crimes. Time lapse between crimes—when short—is apparently more indicative of modus operandi. However, this also creates a greater risk of improper purpose (character evidence). See, Cuttler, 2015 UT 95. This must be weighed in the 403 analysis.
        - NOTE: Why does interval of time ever matter when it comes to method of operation? (murder occurs every year on January 1 in the park).
    - Conditional Relevance under Rule 104(b). Prior act is only relevant if Defendant did it. Court makes a threshold determination—could a reasonable jury find the conditional fact by a preponderance of the evidence?
        - Exception: Battered Child Syndrome (BCS) evidence offered to disprove a claim of accidental injury. State can offer this simply to prove intent, and not identity (though it does limit the world of possible offenders—even to two).
        - Question: What if there is only one caretaker—can this evidence in that case ever be divorced from identity?
    - Rule 403—*Shickles* on Life-Support. Presumption in favor of admissibility. Exclude only when probative value is substantially outweighed by the danger of unfair prejudice. [QUOTE PARAGRAPH 32]
    - Scrupulous examination of Rule 404(b) evidence requires you to follow the four part analysis.

- PRIOR BAD ACT ANALYSIS:
    - Could a reasonable jury find by a preponderance of the evidence that the prior bad act occurred and that the Defendant committed it? (Rule 104(b)).
    - Is the prior bad act offered for a genuine non-character purpose? (Rule 404(b)).
    - Is the prior bad act evidence relevant? (Rule 402)
        - Purpose is contested
        - Of consequence
    - Is the probative value substantially outweighed by the danger of unfair prejudice. (Rule 403).

URE 106—Remainder of or related writings or recorded statements

- ***State v. Sanchez,*** **2016 UT App 189 [Case of the brutal beating—"you took my confession out of context" claim] (Lindberg, J., 3rd District).** Defendant was convicted of murder and obstruction of justice. He brutally beat his girlfriend all night long. He confessed to the assault. In the confession he explained that he believed the she was having an affair with his brother, that she admitted the affair, kept saying this and refused to end it, and this hurt his feelings. This "reason" for the assault was excluded over Defendant's objection because it was self-serving and separated from the confession by 21 pages. HELD: Reversed. Fairness required the additional statement to be admitted. Rule 106 creates a hearsay exception. BIG SPLIT ON THIS.
    - Rule 106 permits introduction of otherwise inadmissible statement if the opposing party offers part of the statement if the hearsay statement ought that in fairness to be considered at the same time.
        - Not just a question of timing or order of proof.
    - Purpose of Rule 106 is to prevent a misleading impression by allowing statements to be admitted in context.
    - Factors to Consider:
        - Does the additional statement explain the admitted evidence.
        - Place the admitted evidence in context
        - Avoids misleading the jury
        - Insures fair and impartial understanding of the evidence.
    - Hearsay:
        - Victim statement to D: Not offered for its truth.
        - D statement to police. Hearsay (D's statement not offered *against* D). HELD: Rule 106 allows admission of otherwise inadmissible hearsay if under the fairness standard it ought to be considered.

ARTICLE II. JUDICIAL NOTICE

URE 201—Judicial Notice

- ***State v. Roman*, 2015 UT App 183 [Case of the Defendant Who Stipulated But Did Not Know It] (Judge Eyre, 4D) (Stipulation As Method of Alternative Proof; cf. RULE 201—Judicial Notice).** Defendant's counsel stipulated that Defendant was illegally present in the United States for purposes of determining whether he was a Category II restricted person. Stipulation was presented to the judge—the trier of fact for this question in a bifurcated trial. Defendant was convicted of unlawfully possessing a firearm and appealed. HELD: Affirmed.
    - Stipulations must be presented to the trier of fact—they are a method of alternative proof.

- ***Mitchell v. ReconTrust Co.,* 2016 UT App. 88 (Lawrence, J., Third District) [Case of trying to take judicial notice of facts in affidavits in another case] [URE 201—Judicial Notice].** Mitchells sought to prevent foreclosure on their real property. Defendant Banks moved for summary judgment. Mitchell wanted to the Court to take judicial notice of declarations that former bank employees made in a separate case admitting to a Banking scheme to induce homeowners into default. Trial court refused. HELD: Affirmed.
    - URE 201. Courts can take judicial notice of adjudicative facts (those subject to adjudication in the case before the court) that are not subject to reasonable dispute because:
        - Generally known
        - Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

ARTICLE IV. RELEVANC AND ITS LIMITS

URE 401-402—Relevance

- ***CDC Restoration v. Tradesmen Contractors*, 2016 UT App. 43 (J. Royal Hansen, 3rd District) [Case of the trade secret stealing contractors bidding at Kennecott] [RULES 402 and 403].** CDC had a contract to repair concrete at Kennecott. It was a preferred provider and had a preferred provider agreement (PPA) with Kennecott. The PPA contained pricing information and equipment rates. Carsey worked for CDC and Allen worked as a sub-K for Kennecott overseeing CDC's work. Both had access to the PPA. Carsey left CDC in January 2006. Allen left in December. The two had become co-owners of Tradesmen, but neither disclosed this to their former employer. A competitive bid opened in January 2006. Carsey did a walkthrough for CDC. Tradesmen had to other reps there for the walkthrough. Carsey and Allen provided information to Tradesmen for its bid. Tradesmen won. CDC sued for misappropriation of trade secrets and won. On appeal, Tradesmen argued that the court erred in admitting the PPA because the PPA contained labor and pricing information that was readily ascertainable and therefore not relevant to the "trade secret" claim and that the PPA was otherwise unfairly prejudicial. HELD: Affirmed.
    - Rule 401—"any tendency" presents a "very low bar that deems even evidence with the slightest probative value relevant and presumptively admissible." The PPA contained pricing information that was a key component of CDC's overall bid.
    - Rule 403—any confusion that the PPA was a trade secret was cured by the jury instruction stating that it was not. NOTE: No requirement that curative instructions be given immediately.

- ***Schreib v. Whitmer*, 2016 UT App. 61 (Faust, J., Third District) [Case of the low-speed rear-end collision on the way the Library and the premature decision to take the wind out of the sales of the defense]. [RULES 401, 402, and 403; Note Expert Testimony Reference].** Schreib sued Whitmer for soft-tissue injuries she incurred when Whitmer struck her vehicle from behind on the way to the Library. Schreib filed two motions in limine: (1) She contended that she was asymptomatic prior to the accident. She moved to exclude evidence of her pre-existing conditions and auto accidents. She argued that this evidence was not relevant because Whitmer had failed to retain an expert tying those conditions contributed in any way to her present condition or injuries; (2) She moved to exclude post-accident photographs of the vehicles showing minimal damage. She contended that the photographs were unfairly prejudicial. Trial court ruled that (1) evidence of pre-existing conditions was relevant, but reserved ruling on admissibility; and (2) photographs were relevant and otherwise admissible under Rule 403. At trial, Schreib introduced evidence of her own preexisting conditions. Jury found the accident was not the cause of Schreib's injuries. HELD: Affirmed.

- Pre-existing Conditions Relevant. Relevance and admissibility are separate questions. Schreib contended she was asymptomatic before the accident. Evidence of her pre-existing conditions had a tendency to make this contention less probable. Trial court reserved ruling on the ultimate admissibility of the evidence.
- Post-Accident Photographs Relevant and Admissible Under Rule 403.
    - In most cases there is a relationship between the severity of an accident and the resultant injury. Photographs showing minimal damage are relevant to the force of impact and to whether the collision caused injury.
    - Photographs were not unfairly prejudicial—fundamental relationship between the force of impact and resultant injury do NOT require expert testimony and are within the general knowledge and common sense of a lay person.

- ***State v. Wager,*** **2016 UT App 97 (Lindberg, J., Third District) [Case of the Defendant who never used drugs in his bathroom . . . Oh wait, here's a photograph]. [RULES 901, 401].** Defendant was charged with possession of meth. At trial, he testified that he would not allow drug use in his house, the he had never smelled any drug use there, and that no one had used meth in his house from the time he moved in to the time police came. Prosecution then offered a photograph depicting the Defendant in his bathroom smoking meth. The photo had been taken by a CI (Wager's ex-girlfriend) and given to police. It was undisputed that the photo depicted the Defendant. The police detective testified that he had been in Defendant's bathroom and that the photo accurately depicted the room. Trial court admitted the photograph. HELD: Affirmed.
    - Photograph was properly authenticated. URE 901 (evidence sufficient to support a finding that the photograph is what the proponent claims it is). Competent witness with personal knowledge of the facts represented in the photo is sufficient. Conclusive proof is not required. Court provides a screening function.
    - Photograph was relevant. URE 401 (time at which it was taken did not matter in light of Defendant's testimony that he *never* allowed drug use in his home).

- ***State v. Plexio,*** **2016 UT App. 118 (Westfall, J., Fifth District) [Case of girlfriend who tried to get her Friend to change her testimony—tell them I did not hit boyfriend]. [Rule 401].** Defendant was charged with assaulting her boyfriend and his other female friend. She was acquitted of these charges after jury trial. Before the case went to trial, Defendant asked the female friend to "tell the police I did not hit boyfriend." For this act, she was charged with witness tampering. At the witness tampering trial, the court declined to admit evidence that she had been acquitted of the assault charges. Trial court ruled that the acquittal was not relevant and required to the jury to speculate about the reasons for her acquittal. HELD: Affirmed.
    - First Blush: The acquittal is relevant because it has some tendency to make the defense more likely—that Defendant asked friend to tell the truth about her not hitting boyfriend.

- More Careful: An acquittal does not equate to a conclusion that Defendant did not hit boyfriend. Jury could have acquitted for other reasons—i.e. Defendant hit boyfriend but not with the requisite mental state.

- ***State v. Jimenez,*** **2016 UT App 138 (Lindberg, J., Third Dist) [Case of the dog-bitten, medication-finding good Samaritan burglar whose blood was actually in the house he could not enter due to a back condition] (RULE 401-402).** Defendant was convicted of burglary of a dwelling. His blood was found in the house. He told police he had never been in the house. But at trial testified that he had gone to help a friend, discovered a stranger who needed medication, went to another friends home for help, that friend's girlfriend went into the victim's home to get money, he was knocked down by the girlfriend's pitbull, started bleeding, that girl reentered the victim's home and retrieved a dishrag, defendant wiped his blood on the rag and it was returned to victim's home. Trial court excluded medical records related to treatment one year before the burglary. Defendant offered them to corroborate his claimed back injuries. HELD: Evidentiary ruling erroneous; harmless error.
  - Medical records had a tendency to make Defendant's entry into the home through an upper window less likely.
  - Medical records were not needlessly cumulative—bolstered Defendant's claim of debilitating injury.
  - Not hearsay because the out of court statements were offered to rebut an implied charge of recent fabrication of the claimed injury.

URE 403—Probative Value and Prejudicial Effect

Generally

- ***Kerby v. Moab Valley,*** **2015 UT App 280 [The Case of the Drugged and Discharged Patient] (Judge Anderson, 7D) (RULE 403).** Patient died after treatment at Moab Valley Health Care, Inc. Patient's daughter and mother sued for medical malpractice. Trial court denied Patient's MSJ on causation. Jury found that Moab Valley breached the standard of care by discharging Patient while she was still under the influence of drugs administered during hospitalization, but that the breach did not cause Patient's death. On appeal, Plaintiff's challenge trial court's decision to admit evidence that patient's son was incarcerated. Son had disclaimed any interest in the case before trial. HELD: Affirmed.
  - Rule 403 analysis—limited probative value of son's incarceration was likely substantially outweighed by danger of unfair prejudice.
  - BUT—Plaintiff failed to prove prejudice (i.e. disallowing the testimony was reasonably likely to lead to a more favorable result).

- ***Schreib v. Whitmer,*** **2016 UT App. 61 (Faust, J., Third District) [Case of the low-speed rear-end collision on the way the Library and the premature decision to take the wind out of the sales of the defense]. [RULES 401, 402, and 403; Note Expert Testimony Reference].** Schreib sued Whitmer for soft-tissue injuries she incurred when Whitmer struck her vehicle from behind on the way to the Library. Schreib filed two motions in limine: (1) She contended that she was asymptomatic prior to the accident. She moved to exclude evidence of her pre-existing conditions and auto accidents. She argued that this evidence was not relevant because Whitmer had failed to retain an expert tying those conditions contributed in any way to her present condition or injuries; (2) She moved to exclude post-accident photographs of the vehicles showing minimal damage. She contended that the photographs were unfairly prejudicial. Trial court ruled that (1) evidence of pre-existing conditions was relevant, but reserved ruling on admissibility; and (2) photographs were relevant and otherwise admissible under Rule 403. At trial, Schreib introduced evidence of her own preexisting conditions. Jury found the accident was not the cause of Schreib's injuries. HELD: Affirmed.
    - Pre-existing Conditions Relevant. Relevance and admissibility are separate questions. Schreib contended she was asymptomatic before the accident. Evidence of her pre-existing conditions had a tendency to make this contention less probable. Trial court reserved ruling on the ultimate admissibility of the evidence.
    - Post-Accident Photographs Relevant and Admissible Under Rule 403.
        - In most cases there is a relationship between the severity of an accident and the resultant injury. Photographs showing minimal damage are relevant to the force of impact and to whether the collision caused injury.
        - Photographs were not unfairly prejudicial—fundamental relationship between the force of impact and resultant injury do NOT require expert testimony and are within the general knowledge and common sense of a lay person.

Shickles On Life Support

- ***State v. Cutler,*** **2015 UT 95 (Case of the Generationally Opportunistic Child Rapist) (Judge Davis, 4D). [RULE 403—Shickles].** Cutler was convicted of raping and sodomizing his seven year old daughter. State moved under Rule 404I to admit evidence that Cutler raped and sodomized his then 8 and 10 year old daughters 30 years earlier in 1985. Cutler opposed the motion. He argued that evidence of acts committed 30 years ago does not establish propensity, and violates Rule 403. Trial court found the acts admissible under Rule 404I but inadmissible under Rule 403. HELD:
    - Trial court erred in ruling that prior acts must "overcome the factors set forth in *Shickles*." Plain language of Rule 403 is the standard.
        - Need and efficacy of alternative proof = NEVER when the issue is unfair prejudice. Only when considering waste of time or cumulative.
        - Overmastering hostility = NEVER
    - Trial court abused its discretion in excluding the evidence under Rule 403.

- Prior acts and charged act were highly similar.
- Fact that prior acts were offered to prove propensity—as opposed to elements of the offense—did not weigh against admission.
- Improper or emotional basis? NO—Propensity IS the purpose under 404I.
    - NOTE: You can limit the details to those that show propensity.
- Time Gap—30 year gap would in many cases suggest a lack of propensity.
    - NO—"The opportunity to abuse children in a familial setting often occurs only generationally."
    - CF. Lucero—passage of time between prior act and crime is relevant to modus operendi.

Gruesome Photographs

- ***State v. Chavez-Reyez*, 2015 UT App 202 [Case Re: Slain Deputy Fox] (Judge Eyre, 4D) (Rule 403—Gruesome Photographs).** Deputy Fox was shot and killed by Defendant's cousin. Defendant was charged with obstruction of justice. State introduced photograph of Deputy Fox as she was found—lying on the road with her head toward her patrol truck. Wounds are not visible. Trial court admitted the photograph. HELD: Sustained.
    - Three part test (relevant, gruesome or not, Rule 403 (standard/reverse) balancing.
    - Note: Defendant conceded on appeal that the photos were not gruesome, but argued the high publicity surrounding the case and heightened emotional impact of the crime.
        - DPP: Focus on the photo. This reasoning would make a campaign photo of Donald Trump gruesome.

- ***State v. Beckering*, 2015 UT App 209 [Case of the Terrible Caretakers] (Judge Bernards-Goodman, 3D) (RULE 403—Gruesome Photos).** Victim—who was developmentally delayed—died as a result of neglect and intentional injuries at the hands of her caregivers. Defendant was charged with aggravated assault of a vulnerable adult. She claimed ignorance of the victim's condition, claiming that she and her husband lived downstairs and victim lived upstairs. State presented photographs of victim's injuries to show they were intentional and so severe as to have been noticeable by anyone. Defense objected to photographs depicting: (1) victim's face with pepper seed in eye; (2) victim's face showing bruising and speckling on skin and lips; (3) victim's legs showing pattern of bruising; and (4) victim's hands showing open skin ulcers. Trial court ruled photographs were relevant, not gruesome, and admissible under Rule 403. HELD: Sustained.
    - Three-Part Test for Gruesome Photographs
        - Is the photograph relevant?
        - Is the photograph gruesome? (not just merely unpleasant to view—it must inspire horror or revulsion, i.e. unnatural contortions, blood, or oozing wounds).
            - Color or black and white
            - Enlargement or close up vs. life-like view

- When taken in relation to the crime
- Other details that may exacerbate effect.

▪ Apply the appropriate balancing test.

- Rule 403 (non-gruesome photos—defense has burden)
- Unusual probative value (gruesome photos—state has burden).

o NOTE: One juror did have a visibly emotional reaction to the photos and refused to observe them.

URE 404—Character Evidence; Crimes or Other Acts

- ***State v. Serbeck*, 2015 UT App 273 [Case of the Mistakenly Gunned Down Child Abuser] (Hruby-Mills 3D)**. **[RULE 404(b) and 403—Absence of Shickles].** Serbeck is charged with unlawful sexual intercourse with a minor. Allegations were made after he was shot by Campos while Serbeck was on neighborhood watch patrol. Victim erroneously believed Defendant was stalking another young girl and had been shot by her enraged father. Victim testified that this was why she came forward with the allegations two years after the sexual relationship. HELD:
  - Rule 404(b)—Not implicated because there was a proper non-character purpose—to explain why the victim had come forward two years after the acts committed against her.
  - Rule 403—Satisfied. (Note absence of Shickles analysis).

- ***State v. Rackham*, 2016 UT App 167** (Hyde, J., 2nd District) (Case of the prolifically touchy cousin). [404(b)--Shickles; Doctrine of Chances--Independence]. Defendant charged with sexual battery of 16 year old cousins KM. Trial court admitted testimony that Defendant had previously sexually abused other cousins MF and KR, and that he later touched the stomach of T.M. HELD: Reversed in part.
  - Prior bad acts were offered for a proper non-character purpose--to show knowledge that unwanted touching would cause affront or alarm.
  - Abuse of MF and KR was relevant to Defendant's knowledge because it occurred before the incidents with KM. T.M incidents were not relevant.
  - Court erred under 403 admitting more extensive abuse of MF and KM. Markedly dissimilar.
  - Court did not err in finding that the prior bad acts were inadmissible under theory of doctrine of chances. Foundational requirement of independence not met. NOTE: All crimes were independently reported but later were the subject of extensive family discussions.

URE 412—Admissibility of Victim's Sexual Behavior of Predisposition

- ***State v. Bravo,*** **2015 UT App 17 [Case of the "we had rough sex, and did anything you can think of" defense] (Judge Reese, 3D) [RULES 412, 402, and 403].** Defendant was convicted of aggravated burglary, rape, and forcible sodomy. He broke into his ex-wife's home, placed a dog leash over her throat, raped her, threw her on the bed and anally raped her. Defendant moved under Rule 412 to admit prior sexual practices between him and the victim including "just about anything you can think of," "rough sex," sadomasochism, bondage, and anal sex. Parties stipulated that Defendant and victim had continued a sexual relationship after the divorce. Trial court allowed the post-divorce sex evidence to be admitted, but declined to admit the more specific practices because they were not "sufficiently relevant" and because the probative value of this evidence was outweighed by the danger of unfair prejudice. HELD: Affirmed in part.
    - Rule 412 Analysis:
        - Is this a criminal case involving sexual misconduct (charged or uncharge)?
            - No. (Rule 412 does not apply)
            - Yes. (Continue)
        - Does the evidence involve victim's other sexual behavior or sexual predisposition?
            - No. (Rule 412 does not apply)
            - Yes. (Continue)
        - Is there an applicable exception—(these are "situations where probative value may overcome the evidence's prejudicial tendencies").
            - No. (Inadmissible under Rule 412).
            - Yes. (Continue)
                - Other source of semen, injury, or physical evidence.
                - Sexual behavior between victim and the accused to prove consent. (NOTION: "A person is more likely to consent with a past sexual partner.").
                - Evidence exclusion of which would violate constitutional rights of the accused.
        - Is the evidence relevant? (There is no "heightened standard of relevancy." Rule 402 is binary. Evidence is either relevant or it is not. This is a LOW threshold).
            - No. (Inadmissible under Rule 402).
            - Yes. (Continue)
                - Contextualizing the relationship makes consent more probable.
        - Is the evidence admissible under Adjusted Rule 403? (Proponent of the evidence must show that probative value of ***specific instances*** outweighs unfair prejudice. Rule 403 is the mechanism to protect privacy and dignity of victim and to avoid introduction of prejudicial sexual innuendo into the trial).
            - No. (Inadmissible under Rule 403).
            - Yes.
                - Shared sexual history has greater probative value.
                - Similarity of sexual history and charged conduct.

- ***State v. Ashby,*** **105 UT App 169 [Case of the "nude bathing" child abusing baby-sitter] (Judge Laycock, 4D) (RULE 412).** Defendant was convicted of two counts of aggravated sexual abuse of a child. Defenant baby-sat child from age 6 to age 8. She taught him good touch and bad touch. She bathed with him naked during which time the touching occurred. Defendant moved to admit six prior instances in which the child had engage in other sexual behavior with children, five acts of oral stimulation with boys and once he asked a girl to touch his genitals. Defendant's theory was (1) to rebut the sexual innocence inference; (2) to attack child's credibility (child had denied abuse of other children); and (3) to prove child had opportunities to disclose abuse and did not do so. Trial court ruled that the 412 evidence was not relevant, exclusion furthered the purposes of Rule 412, and even if an exception applied was otherwise inadmissible under Rule 403. HELD: Sustained in part.
    - (See Rule 412 Analysis above. *Bravo*).
    - Important Points:
        - Rule 412 is to be construed broadly to effectuate the policy considerations underlying its prohibitions (protect against humiliation, encourage reporting, prevent introduction of prejudicial innuendo into trial).
        - Rule 412 applies to both substantive evidence and impeachment evidence.
    - Holding:
        - Evidence was relevant under Rule 402.
        - Evidence was inadmissible under Rule 403
            - Rebutting sexual innocence inference
                - Age of the child (under 12).
                - Similarity of the other sexual behavior to the charged acts.
            - Impeachment
                - Child was never asked in the CJC interview about acts with children.
                - Other meaningful ways to attack credibility.

- ***State v. Aleh,*** **2015 UT App 195 [The Case of the Lawful Escort and the Bathtub Brawl] (Judge Hruby-Mills, 3D) (RULE 608; 412—NOT).** (Rule 608 Below)

URE—ARTICLE V. PRIVILEGES

URE 505—Government Informer

- ***State v. Garner*, 2016 UT App 186 [Case of the mysterious non-appearing CI's at preliminary hearing] (Walton, J, 5th District).** CI's purchased meth form Defendant and filled out 1102 statements which were admitted at preliminary hearing, but with the names removed. State claimed government informer privilege. Defendant argued that by presenting the 1102 statements, the CI's had "appeared as a witness for the government" extinguishing the privilege. HELD: CI's did not appear as a witness; State could claim the privilege until CI's appeared as a witness at trial.

URE—ARTICLE VI. WITNESSES

URE 602—Personal Knowledge

- ***State v. Fletcher,* 2015 UT App 167 [Case of the Narcotics Officer's "Jogged" Memory] (Judge Willmore, 1D) (RULE 602).** Defendant was convicted of two counts of distribution of marijuana. Charges arose from two controlled buys conducted with a confidential informant. Detective testified at two preliminary hearings and at trial. There were multiple inconsistencies in his former and trial testimony. He explained these discrepancies by saying that he had talked to other officers involved in the investigation and when you do that it "jogs" your memory. Defendant moved to exclude the testimony on the ground that the Detective lacked personal knowledge under Rule 602. Trial court overruled the objection. HELD: Affirmed.
    - Foundation for personal knowledge under Rule 602.
        - Evidence sufficient to support a finding that the witness has personal knowledge of the matter.
            - Nothing more than the "opportunity and capacity to perceive events."
        - May come from the witness's own testimony.
    - NOTE: The conversations with the other officers did not "replace [the Detective's] own recollections" or "fill in the blanks of irretrievably lost memory."

URE 606—Juror's Competency As A Witness

- ***Pena-Rodriguez v. Colorado***. (United States Supreme Court, No. 15-6-06). Defendant convicted of unlawful sexual conduct arising out of an attack on two teenage girls in the bathroom of his workplace. During deliberations, a juror (and former law enforcement officer) made ethnically biased statements. The issue is whether Rule 606(b)'s protection of jury deliberations must yield when a jury openly expressed racial bias during deliberations. Juror's statements were as follows:
    - "I think he did it because he's Mexican and Mexican men take what they want."

- "Mexican men are physically controlling of women because they have a sense of entitlement and think they can do whatever they want with women."
- "Mexican men have a bravado that causes them to believe they can do whatever they want with women."
- "Where I used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."
- "I do not think the alibi witness was credible because . . . he was an illegal."

URE 608—Witness Character for Truthfulness or Untruthfulness

- ***Robinson v. Taylor*, 2015 UT 69 (Case of the Convicted Drug-Peddling Doctor). (Morris-2D). [RULES 608 AND 609].** Medical malpractice action for wrongful death. Dr. Taylor prescribed pain medications to treat Robinson's back pain. Robinson developed a tolerance that required successively larger doses. Last visit = Prescription for 140 mg daily dose of methadone. Robinson died of a methadone overdose. During deposition, Taylor testified that he gave Robinson oral dosing instructions that differed from those on the written prescription. After Robinson died and before trial, Taylor was convicted on federal distribution charges for meeting a guy in a parking lot and giving him a pain-med prescription in exchange for cash. Taylor went to prison. Deposition was read a trial. Robinson sought to introduce evidence of Taylor's felony conviction to impeach his deposition testimony. Trial court admitted evidence of the conviction under Rule 608(b) (specific instance of conduct relevant to character for truthfulness); 609(a)(1) (felony conviction); and 609(a)(2) (crimen falsi). Verdict for Robinson: $3,000,000.00 and $300,000 in punitive damages. HELD: Reversed.
  - Rule 608(b)—permits impeachment only by specific acts that did not result in criminal conviction.
    - NOTE: Rules 608(b) and 609 are exceptions to the general bar against character evidence. They apply when specific instances of conduct bear upon character for truthfulness.
  - Rule 609(a)(2)—Automatic Admission of Crimes Involving Dishonesty or False Statement.
    - Applies only when elements of crime required proving a dishonest act or a false statement.
    - NOTE: We do not look behind the conviction to the facts! Elements determine admissibility, not the manner in which the offense was committed.
  - Rule 609(a)(1).—Felony Conviction.
    - Should have been excluded under Rule 403
      - Conviction had minimal probative value—oral dosing instructions was not a consequential fact. (Robinsons argued that Taylor was negligent either way—oral dosing instructions or not).
      - Conviction was unfairly prejudicial

        - NOTE: "Conviction evidence carries with it . . . unique and inherent danger of unfair prejudice."
        - Emotional response, close similarity, unwillingness to say no to demanding patients.
    - Dissent (Lee)
        - Focus of the analysis should be the impact of the conviction on the Doctor's credibility (probative value), not a particular issue in the case.
            - NOTE: This means we start looking at the manner in which the crime was committed—false pretenses.
        - Credibility of the doctor was an important issue (oral dosing instructions).
- DPP NOTE: Here a description of where and how the crime was committed was read to the jury. Usually—at least in criminal cases—this impeachment is more limited: "Isn't it true that your convicted of aggravated assault, a third degree felony in 1995?"

- ***State v. Aleh,*** **2015 UT App 195 [The Case of the Lawful Escort and the Bathtub Brawl] (Judge Hruby-Mills, 3D) (RULE 608; 412--NOT).** Defendant was charged with robbery and theft (2Fs), unlawful detention, and sexual solicitation (MB's). He went to a motel and hired an escort. One hour for $150.00. He had only $100. She agreed to stay for half the time. He asked for sex. She said she does not do that. He demanded his money back and she told him there are no refunds. Defendant assaulted her in the bathroom as she tried to call her bouncer. She discharges a weapon. He recovers it and runs out of the motel room. At trial, escort testified that she never engaged in prostitution but provided lawful escort services and that she quit working as an escort within 2 months of this event. Defense counsel sought to impeach her with evidence that: (1) while working as an escort she had two encounters with undercover officers (one in 2005 and one four weeks after this event); and (2) she continued to work as an escort four weeks after this event. [NOTE: Trial court made a record of what her answers to these questions would be—better than an offer of proof]. Trial court excluded the testimony under Rule 412. Defendant appealed. HELD: Affirmed.
    - Rule 608—On cross, you can impeach with specific instances of conduct probative of truthfulness or untruthfulness.
        - NOT impeachment material (she was never arrested in her encounters with police).
        - Her encounter with police four weeks later was benign in comparison the event with Defendant.
    - Rule 412 (NEVER REACHED—But how would it work out?)
        - This is a criminal proceeding involving alleged sexual misconduct (sexual solicitation—does not have to be charged).

        - Evidence of her meeting an undercover cop with lubricant and handcuffs in her bag is evidence that "implies sexual behavior" and therefore constitutes "other sexual behavior" or "sexual predisposition" (dress, speech, lifestyle).
        - Exceptions:
            - Someone other than Defendant was source of injury, semen, evidence (No).
            - Other acts with the Defendant offered by the defendant to prove consent or the prosecutor. (No).
            - Evidence the exclusion of which would violate the Defendant's constitutional rights. (Maybe—Confrontation).

- ***State v. Shepherd*, 2015 UT App 208 [Case of Tragic Boat Crash With Swimmer] (Judge Jones, 2D) (RULE 702; Fifth Amendment—Silence, Rule 608).** Defendant was charged with reckless endangerment and obstruction of justice. A swimmer was struck by a boat in Pineview Reservoir. Defendant was in the boat and drove it away immediately after the collision. Victim's femoral artery was severed and over the next 20 minutes she bled to death. A man on shore several hundred feet away heard screams on the water and saw the Defendant's boat speed away. State called a boating expert (20,000 hours on the water) to testify about how sound travels over water and his experiences when hitting items in the water with a boat. Two state witnesses testified that they did not believe the Defendant when he said he heard no screams. Defendant was convicted.
    - Witnesses cannot comment on Defendant's ***assertion*** of the right to remain silent. (Here Defendant never asserted the right).
    - URE 702 Analysis
        - Scientific, technical or other specialized knowledge would assist the jury to understand the evidence or determine a fact in issue.
        - The witness is qualified by knowledge, skill, experience, training, or education.
        - Threshold showing that principles and methods underlying the testimony are
            - Reliable
            - Based on sufficient facts and data
            - Reliably applied
    - The Experiential Witness = NO METHODOLOGY REQUIRED
        - Does not rely on anything like a scientific method
        - Witness must explain:
            - The nature of his experience
            - How his experience leads to his opinions
            - Why his experience is a sufficient basis for the opinion
            - How his opinion is reliably applied to the facts
    - Rule 608(b)—Specific Instances of Conduct to Attack or Support Character for Truthfulness.

- Character for truthfulness = Opinion or Reputation
- Extrinsic evidence of specific instances of conduct to attack or support character for truthfulness are not admissible.
- THEREFORE: A witness cannot testify that another witness was lying on a particular occasion.

URE 609—Impeachment By Evidence of a Criminal Conviction

- ***Robinson v. Taylor*, 2015 UT 69 (Case of the Convicted Drug-Peddling Doctor). (Morris-2D). [RULES 608 AND 609].** (See URE 608—Above).

URE 613—Witness's Prior Statement

- ***In the Interest of LC,* 2016 UT App 10 (Judge Bartholomew, 4th District Juvenile) [Case of the Marijuana Grove Smoking Gang] [RULE 613—Extrinsic Evidence of Prior Inconsistent Statement].** Defendant and four others left school during an assembly to smoke marijuana in a grove of trees near the canal road. School resource officer followed and apprehended them. Two of the juveniles were interviewed by the principal. State called the principal at trial who reported the hearsay statements of the boys. State later called the boys but did not ask them about their inconsistent statements to the principal. HELD: Error, but not obvious.
  - URE 613: Prior inconsistent statements are not hearsay—but they must be inconsistent with the declarant's in court testimony. Here, the Principal testified first. Therefore his testimony reporting the statements of the boys was not inconsistent with the boys' in court testimony.
  - URE 613. Extrinsic evidence of a prior inconsistent statement is admissible if the declarant is given an opportunity to explain of deny the statement, and the adverse party can examine thereon. State never confronted the boys with their inconsistent statements to the Principal.

- ***State v. Kirby,* 2016 UT App 193** (Bernard's-Goodman, J., Third District) (Case of the three-day aggravated assault and kidnapping in a SLC hotel room--"Is it kidnapping if I am bad at it and give you opportunities to get away?"). Defendant charged with aggravated assault and aggravated kidnapping. Couple on a drug binge in a hotel in SLC. Over a period of three days he beats her mercilessly with hands, sock filled with hard objects. He threatens her not to leave. Threatens to rape her children if she reports. HELD: Affirmed.
  - Defendant challenges the sufficiency of the evidence. [For hard calls like these, appellate judges make the big money].
  - Defense attempted to call a witness on the last day of trial--needed time to find him. He was the ex-boyfriend of the victim and would testify that she told him "I made it all up."

- Prior Inconsistent Statement. URE 613. No. Victim was not given an opportunity to explain of deny it.
- Therefore, it is hearsay with no applicable exception.

URE 615—Excluding Witnesses

- ***State v. Gibson*, 2016 UT App 15. (Judge Ben Hadfield, 2d) [Case of the Opportunistic Non-Baby-Sitter Baby Sitter]. [RULE 615—Exclusionary Rule].** Defendant was convicted of two counts of aggravated sexual abuse of a child. Trial court allowed a witness to testify who had attended the preliminary hearing. Defendant appealed alleging that Rule 615 had been violated. HELD: Affirmed.
  - Rule 615: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony."
  - Purpose of the Rule: "To prevent witnesses from changing their testimony based on other evidence adduced at trial." Quoting *Billsie*, 2006 UT 13.
  - Trial court has broad discretion to:
    - Decide whether a party will be prejudiced by permitting a witness to testify in violation of Rule 615.
    - Control and manage the proceedings.
    - Preserve the integrity of the trail process.
  - To prevail on appeal, Defendant must show that the witness actually changed her story in a material way because of what she heard from other witnesses at trial.
  - NOTE: Court assumes without deciding that Rule 615 was violated.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

URE 701—Opinion Testimony By Lay Witnesses

URE 702—Testimony By Experts

- ***State v. Shepherd*, 2015 UT App 208 [Case of Tragic Boat Crash With Swimmer] (Judge Jones, 2D) (RULE 702; Fifth Amendment—Silence, Rule 608).** Defendant was charged with reckless endangerment and obstruction of justice. A swimmer was struck by a boat in Pineview Reservoir. Defendant was in the boat and drove it away immediately after the collision. Victim's femoral artery was severed and over the next 20 minutes she bled to death. A man on shore several hundred feet away heard screams on the water and saw the Defendant's boat speed away. State called a boating expert (20,000 hours on the water) to testify about how sound travels over water and his experiences when hitting items in the water with a boat. Two state witnesses testified that they did not believe the Defendant when he said he heard no screams. Defendant was convicted.
    - Witnesses cannot comment on Defendant's ***assertion*** of the right to remain silent. (Here Defendant never asserted the right).
    - URE 702 Analysis
        - Scientific, technical or other specialized knowledge would assist the jury to understand the evidence or determine a fact in issue.
        - The witness is qualified by knowledge, skill, experience, training, or education.
        - Threshold showing that principles and methods underlying the testimony are
            - Reliable
            - Based on sufficient facts and data
            - Reliably applied
    - The Experiential Witness = NO METHODOLOGY REQUIRED
        - Does not rely on anything like a scientific method
        - Witness must explain:
            - The nature of his experience
            - How his experience leads to his opinions
            - Why his experience is a sufficient basis for the opinion
            - How his opinion is reliably applied to the facts
    - Rule 608(b)—Specific Instances of Conduct to Attack or Support Character for Truthfulness.
        - Character for truthfulness = Opinion or Reputation
        - Extrinsic evidence of specific instances of conduct to attack or support character for truthfulness are not admissible.

- THEREFORE: A witness cannot testify that another witness was lying on a particular occasion.

- ***State v. Clopten*, 2015 UT 82 [Case of the Talkative Self-Incriminating Inmate and Eye Witness ID Expert] (Skanchy 3D). [RULES 804(b)(3)(A) (statement against interest); 702].** Clopten was convicted of murder of Fuailemaa. Clopten's theory was that his cousin, White, committed the murder. Clopten sought to introduce hearsay statements of White that Clopten was not the murderer. White feared Polynesian inmates would harm his cousin, Clopten. He told them that Clopten was not the shooter. When asked if White was the shooter, White responded "It wasn't Clopten" and "I can't talk about that." Trial court excluded the testimony as hearsay. The State called an expert witness on eye-witness identification. He testified that the studies done on eyewitness identification have little real world application because they don't involve real crimes. HELD: Sustained.
  - Statements Against Interest—Offered in Criminal Case and Which Expose the Declarant to Criminal Liability. Rule 804(b)(3)(A).
    - Statement a reasonable person in the declarant's position would have made ONLY if he believed it to be true; and
      - Surrounding circumstances
      - Need not be an outright confession
      - Motives for the statement
    - Statement was supported by corroborating circumstances that clearly indicate trustworthiness.
  - Residual Hearsay Exception. Rule 807(a)—Equivalent circumstantial guarantees of trustworthiness.
    - Circumstances under which statement was made
    - Content of the statement itself
    - NOTE—Other corroborating evidence does not factor into analysis.
  - Rule 702(b)—Expert testimony must be based on principles and methods that are:
    - Reliable;
      - Focus on principles and methods, not "minority" conclusions.
    - Based on sufficient facts or data; and
    - Reliably applied.

  - Progeny of *Clopten*
    - ***State v. Heywood***, 2015 UT App 191 (eye witness expert and *Long* instruction not required where mother of victim observed the Defendant masturbating at his front door, made eye contact with him, and identified him to police immediately thereafter; circumstances implicating reliability not presented).
    - ***State v. Lujan***, 2015 UT App 199 (trial court erred in admitting unreliable eye-witness identification. Victim of robbery observed robber kneeling at the open

door of victim's car, longish hair. Police apprehended Defendant who was bald with no facial hair. Show-up (positive). Line-up (uncertain). Prelim. (positive). Court applied *Ramirez* factors but invites Utah Supreme Court to revisit this).

- ***Majors v. Owens*, 2015 UT App 306 . [Personal Injury action against Kennecott Copper Driver] (Maughn, J., 3D). [RULE 702].** Majors were injured in a car accident with Owens, who drove for Kennecott. They called three treating physicians to testify about treatment and "causation as it relates to their treatment." Defendants move in limine to exclude the causation testimony because it was not "based on any reliable facts or methodology." (URE 702(b)). Defendants argue that the physicians accepted the Majors account of events and assumed that the injuries they treated were caused by the accident. Plaintiffs argue that a reliable methodology was used—(1) take a history of the event, (2) take a medical history, (3) do a physical exam; (4) review imaging; and (5) provide treatment. Trial court granted the motion, holding that: (1) expert must do more than establish a chronological relationship between the accident and injury; and (2) the physicians merely assumed causation based on the temporal connection between the accident and the Plaintiff's self-reported injuries, with NO underlying analysis. HELD: Reversed.
    - Expert testimony is required to establish a causal link between negligence and personal injury. Treating physicians can provide this testimony.
    - Role of the Judge—(DPP 104(a) determination)
        - Gatekeeper to screen out unreliable expert testimony.
        - Minimal threshold of reliability—Basic foundational showing.
        - Do not weigh credibility—jury decides accuracy, reliability, and weight.
        - Contrary and inconsistent opinions can BOTH meet the threshold.
        - Protections: Vigorous cross, contrary evidence, burden of proof.
    - The rise of *Eskelson*—No Methodology Required (Cf. Shepherd, 2015 UT App 208).
        - Experience as a physician
        - Exposed to nearly identical situation.
    - Compare *Beard v. K-Mart*—physician noted chronological relationship between accident and onset of symptoms, but could not say to a reasonable degree of certainty that the accident was the cause of the injury.
    - DPP: *Eskelson* Creep—This is NOT an experiential expert ("bean in the ear" case).
        - Underlying principles and methods were reliable.
            - Take a history of the event/medical history (From Plaintiff)
            - Physical examination
            - Review imaging studies.
        - Based on sufficient facts and data
            - History (from Plaintiff)—(physicians in the field rely on this 703).
            - Examination
            - Imaging studies

        - Reliably Applied
            - Did not consider other potential causes (OK).
            - Injuries were consistent with those sustained in an auto accident.

- ***State v. Lujan*, 2015 UT App 199 [Case of the] (Judge Skanchy, 3D) ["I remember the hair." Case of the Car-Jacking Spanish Man with long, straight, black and white hair, black beanie and black jacket. . . . or did I mean the Hispanic Man with closely-shaved head, goatee, and no jacket] (Eye Witness ID).** Car-jacking at knife point. Native American victim described the perpetrator as Spanish, wearing a black leather jacket and beanie, with black and white, longish hair poking out of the beanie to ear length. Police were called. K-9 got the scent and went to elementary school to one area. Officers split from there and found defendant in another area sleeping. Defendant is Hispanic, has closely shaved hair, and a goatee. He was wearing a black beanie. Police said he had a black jacket but this does not appear in the booking photo or in defendant's jail property list, and no jacket was produced at trial. Show-up ID in headlights of police cars, only person, in handcuffs. Failed ID in photo lineup. In-court ID—"only defendant seated at counsel table and the only reasonable choice." Trial court denied motion to exclude the identifications. HELD: Reversed.
    - Constitutionally reliable eye-witness identification evidence:
        - Opportunity to view the actor during the event
            - Length of time witness viewed the actor
            - Distance between them
            - View of face
            - Lighting or lack of it
            - Distracting noises or activity
        - Degree of attention to the actor
        - Capacity to observe the actor during the event
            - Personal Capacity: Stress or fright, personal motivations, biases, prejudices,
            - Physical Capacity: Uncorrected visual defects, fatigue, injury, drugs/alcohol.
        - Was the identification spontaneous and did it remain consistent thereafter or was it the product of suggestion.
            - Length of time between event and identification
            - Mental capacity and state of mind at time of identification
            - Witness exposure to information from other sources
            - Instances of misidentification
            - Instances of descriptions inconsistent with defendant
            - Circumstances of presentation of defendant
        - The nature of the event and the likelihood the witness would perceive, remember, and relate it correctly.

            - Ordinary event
            - Race of the witness and the actor the same.
    - NOTE: Pearce, J. (dissenting) (facts in this case are indistinguishable from those in *Ramirez* where the testimony was admissible).

- ***State v. Gallegos*, 2016 UT App 172 (Judge Elizabeth Hruby-Mills, 3rd D) (Case of the club brawl stabbing by bald Hispanic member named "Smokey 18th Street" in the parking lot—bouncer assaulted and patron died. References by cop to "gang unit" and "gang crimes).**
    - Federal Due Process Analysis (14th Amendment)—Suggestive Circumstances
        - Was the identification the product of unnecessarily suggestive law enforcement procedures? (No. Ends Inquiry. Yes—move on to question 2).
        - Under the totality of the circumstances, was the identification reliable anyway?
            - Opportunity to view at the time of the crime
            - Degree of attention
            - Accuracy of prior description
            - Level of certainty
            - Length of time between crime and identification
    - Utah Constitution (Article I, Sec. 7).—Prosecution has burden to show admissibility (constitutional reliability). Evidence is to be carefully scrutinized for constitutional defects. Focus: Is the identification constitutionally reliable under the totality of the circumstances? (Answer can be no even if law enforcement procedures are appropriate).
        - Suggestive police conduct is not a threshold requirement in Utah.
        - Factors:
            - Opportunity to view the actor during the event
            - Degree of attention
            - Capacity to observe (including physical and mental acuity)
            - Spontaneous identification which remained consistent or product of suggestion.
            - Nature of event being observed and likelihood that witness would remember.
                - Ordinary event?
                - Race of the actor same as observer or different?
    - HELD: Manager's identification was reliable, and harmless beyond a reasonable doubt in any event.
    - HELD: Passing references to gang enforcement tied cop to gang responsibilities but not Defendant. "18th Street" could be a place and not necessarily an association.

- ***Landry v. State*, 2016 UT App 164 (Hansen, J., 4th District). [Case of the accelerant-sniffing canine (Oscar) with a nose more sensitive than the scientific equipment we use.]** Defendant convicted of aggravated arson for setting fire to his apartment. Oscar alerted on the

Defendant's sock and shoe at his motel room. Samples were sent to the state crime lab and no accelerants were detected. City fire marshal testified that canine was more sensitive than scientific equipment. Canine handler testified that just because no accelerant was detected in the lab does not mean it was not there. Defense counsel failed to object to this substantive testimony of the presence of accelerants which would clearly have been inadmissible under *State v. Schultz,* 2002 UT App. 366. Trial counsel called no expert witness. Relied on a spilled alcohol and cigarette theory—which both post-conviction experts agreed was unlikely. HELD: Trial counsel provided ineffective assistance and this was prejudicial.

- "It is objectively unreasonable for counsel to forego a valid objection to the admissibility of incriminating evidence, when that evidence provides not benefit to the defendant.
- Testimony about canine alerts on accelerants are admissible only if:
  - Corroborated by laboratory analysis; OR
  - The proponent satisfies the test for admissibility under Rule 702 (not generally accepted).
    - Alert is inherently reliable.
    - Techniques used were properly applied to the facts of the case by qualified experts.
    - Evidence of the alert is more probative than prejudicial.

URE 703—Bases of An Expert's Opinion Testimony

- **Belnap v. Graham, 2016 UT App 14 (Judge Scott Hadley, 2nd D). (Case of the Non-Charting BUT Actual Visiting Doctor). [RULE 803—Hearsay Exceptions; 703].** (See 803 Below).

URE 704—Opinion on Ultimate Issue

- ***Colosimo v. Gateway Community Church*, 2016 UT App 195** (Lawrence, J., Third District). Case of the over-ambitious expert electrician. Plaintiff was electrocuted when he trespassed at the church property. Defendant moved for summary judgment on the issue of duty. Trial court admitted testimony of pastor regarding sign maintenance prior to the date the pastor joined the congregation. Trial court excluded testimony of plaintiff's expert electrician asserting that Defendants would have known about the hazardous condition of the sign. HELD: Affirmed.
  - URE 602. Personal knowledge. Pastor did not have it, but the affidavit was irrelevant to the court's decision.
  - URE 702. Ultimate issue or legal conclusion.
    - Expert can rely on his own interpretation of disputed facts.
    - Expert testimony can embrace the ultimate issue.
    - Legal conclusions are inadmissible (NO BRIGHT LINE)
      - Blurs distinction between judge, jury and witness.
      - Tells the jury what result to reach.

- Ties opinion to requirements of Utah law

- Expert can testify to A,B, and C = Let jury draw the conclusion.

ARTICLE VIII. HEARSAY

URE 803—Exceptions: Regardless of Unavailability

- *****Belnap v. Graham, 2016 UT App 14 (Judge Scott Hadley, 2nd D). (Case of the Non-Charting BUT Actual Visiting Doctor). [RULE 803—Hearsay Exceptions; 703].** Husband and children of Belnap sued Dr. Graham and the hospital for wrongful death. Belnap was discharged from the hospital after heart surgery, but had a very low platelet count. She returned to the hospital the next day where she died. Plaintiff's theory was the Graham was negligent for (1) failing to chart; and (2) failing to visit Belnap in person before discharging her. Plaintiff's expert witness (Mr. Brown) relied on two things to prove Dr. Graham's failure to visit: (1) the statements of Belnap to her husband and children made after noon on the day of discharge: "No doctor saw me before I left the hospital." (Graham testified that he DID see Belnap at 7:00 a.m. in person before discharge, and that Brown's opinion was grounded on the inadmissible hearsay statements of Belnap); (2) the absence of a chart note memorializing the 7:00 a.m. visit. Trial court agreed with Graham. HELD: Affirmed.

    - Present Sense Impression? NO. URE 803(1) (statement describing an event or condition made while or immediately after the declarant perceived it).
        - Belnap made the statement 5 hours after the purported event—(Dr. Graham's non-appearance at 7:00 a.m.).
        - Statement must be contemporaneous with the event.

    - Then Existing Mental, Emotional, Physical Condition? NO. URE 801(3).
        - Not really a statement of Belnap's then existing state of mind
        - BUT even if it was ("I did not see a doctor before I left")—it is offered to rebut Graham's claim that he did see Belnap at 7:00 a.m. Therefore it is a statement of Belnap's memory or belief about not seeing a doctor 5 hours earlier, offered to prove the fact remembered or believed.

    - Statement for Purpose of Medical Diagnosis? NO. URE 803(4).
        - Trial court: Ruled that the statement was not made to a doctor and did not describe past or present symptoms or sensations or their general cause.
        - Appellate Court:
            - Statements don't have to be made to a doctor.
            - Statement was arguable one describing recent medical history.
            - BUT—There is nothing that would suggest it was made for the purpose of diagnosis or treatment.

    - Absence of a Record? NO. URE 803(7).

- Theory of 803(7) = Unlikelihood of deviation from actual regular practices for record-keeping.
- Foundation of 803(7)
  - "Record" (which requires proof of 803(6) factors).
  - Admitted to prove that a matter did not occur or exist.
  - A record was regularly kept for a matter of that kind.
  - Possible sources of information or other circumstances do not exhibit a lack of trustworthiness.
- Here: Plaintiff relied on the testimony of Brown about what records "should" have been kept by the hospital, not evidence what records the hospital actually did keep.

- BUT CAN'T EXPERTS RELY ON HEARSAY TESTIMONY. URE 703
  - Yes, but only if "experts in the field would reasonably rely on those kind of facts or data in forming their opinion."
  - Statements of Belnap:
    - Not that kind of statement.
    - Cannot use Rule 703 as a conduit to introduce every hearsay statement made. You cannot introduce hearsay "under the guise of expert testimony."

- Absence of a record (harder call).—Brown did apply his medical expertise to evaluate the absence of the document. BUT—there still wasn't foundation demonstrating the unlikelihood of deviation from a regular record-keeping practice.

URE 804—Exceptions: Unavailability Required

804(b)(1)—Former Testimony

- ***State v. McNeill*, 2016 UT 3 [Case of the Deceased Preliminary Hearing Witness—Kennecott Car Pool, Pound on the Dashboard, "I'll Cut Your Fingers Off," "Big Daddy Is Going to Let You Live" Co-Worker Assault] (Kouris, J. 3D). [RULES 804((b)(1) Former Testimony; 1002 Best Evidence; 901(b)(1) Foundation for Telephone Call].** Defendant was charged with assaulting a co-worker. Defendant did not commit the actual assault—his son Quentin did—but Defendant was linked to the assault by phone calls between he and his son immediately before and after the assault. State did not present the phone records themselves, but sought to introduce a detective's preliminary hearing testimony about the records. The detective had died prior to trial. [NOTE: Objection. Hearsay. Kouris: "I don't think so." And defense counsel sheepishly acquiescing]. HELD: Sustained.
  - The testimony of the detective is hearsay—(out of court statement offered for truth), but the former testimony exceptions applies. [NO ONE ARGUES THIS]

- The detective's testimony is offered to prove the content of a writing which violates the Best Evidence Rule. [NO ONE ARGUES THIS]
- The State was likely to lay foundation for the records through testimony of a Cricket employee (a person with knowledge that the records are what they say they are).

- ***West Valley City v. Kent*, 2016 UT App 8. [Case of the Recanting First Girlfriend] (Boyden 3D). [RULE 804(b)(1) (former testimony exception)].** Victim goes over to the "other woman's" house to tell her boyfriend to come home. An argument ensues between Victim and Defendant (boyfriend). Defendant kicks her in the face. Victim testifies at preliminary hearing—(1) she was not the aggressor; (2) she did not approach Defendant during the argument; and (3) she was sitting in a chair when Defendant kicked her. Defendant's counsel cross examines her about whether she had a screwdriver in her hand at the time of the assault, and whether her face was near the ground at the time she was kicked. She denied both assertions. Court refused to allow questions about prior instances when Victim threatened Defendant. Court allowed questioning about criminal convictions involving false statement , but otherwise limited this line of inquiry too. Victim fails to appear at trial. She writes two letters asking that charges be dropped because she had made "false accusations." City moves to admit preliminary hearing testimony. Trial court found Victim unavailable, but found Defendant lacked opportunity and similar motive to develop the testimony at preliminary hearing, especially in light of the recantation statements. HELD: Reversed.
  - Former Testimony Exception to Hearsay Rule. 804(b)(1).
    - Witness is unavailable.
    - Testimony was given at trial, hearing, or deposition.
    - Offered against a party who had "an opportunity and similar motive to develop [the testimony] by direct, cross, or redirect examination."
      - *Brooks.* Motive and interest are the same in preliminary hearing and at trial—establishing the innocence of the Defendant."
  - Confrontation Clause Analysis:
    - Unavailability
    - Prior opportunity for cross-examination.
  - Confrontation Clause Analysis—Intervening Events (unknown at time of first hearing).
    - What topics are implicated by the intervening events?
    - Was defendant afforded an opportunity to explore those topics at preliminary hearing?
      - NOTE: The issue is the actual testimony developed at preliminary hearing, not the testimony that could have been developed at trial.
      - NOTE: Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way the defense may wish.

- ***State v. Goins*, 2016 UT App 57 (J. Ann Boyden, 3rd District) [Case of the vigilante man seeking to recover his cellphone from two homeless guys—bites off his ear] [RULES 804(b)(1)—Prior Testimony Exception]**. Defendant and his girlfriend confronted with a knife homeless man 1 (HM1) and accused the man of stealing Defendant's cellphone. HM1 denied it and walked away. Defendant then went to pioneer park and confronted homeless man 2 (HM2) stabbing him under the arm and biting off his earlobe. HM1 and HM2 testify at preliminary hearing. HM2 had disappeared by the time of trial, notwithstanding the State's efforts to maintain contact with him through his pastor, and checking at jail. Trial court found HM2 unavailable and admitted his preliminary hearing testimony. HELD: Affirmed.
    - HM1 was unavailable.
        - To prove unavailability, proponent must make "reasonable efforts to procure the witness's testimony at trial." Every reasonable effort must be made to produce the witness.
        - BUT "good faith search does not mean that every lead, no matter how nebulous must be tracked to the ends of the earth." Patently futile efforts to serve a person whose whereabouts are completely unknown are NOT required.
    - Defendant had the ***opportunity*** for cross-examination at the preliminary hearing AND ***the same motive*** to develop the testimony.
        - DPP NOTE: ***California v. Green***, 399 U.S. 149 (1970) (Brennan, J., dissenting) (motives to develop testimony at preliminary hearing are markedly different from motives at trial: preliminary hearing establishes probable cause, not guilt beyond a reasonable doubt; defense counsel may be reluctant to disclose his trial strategy by examination at preliminary hearing; defense counsel is too busy to turn every preliminary hearing into a trial).

- ***State v. Pham,* 2016 UT App. 105 (Bernards-Goodman, J., Third District) [Case of the witness shot in the abdomen/scrotum not having the decency to show up for trial]. [Confrontation Clause].** Defendant was convicted of discharge of a firearm causing serious bodily injury. Victim appeared at preliminary hearing, but not at trial. Preliminary hearing transcript read at trial. Defendant appealed. HELD: Affirmed.
    - Opportunity for cross examination at preliminary may or may not satisfy Defendant's Sixth Amendment right to confrontation.
    - Factors relevant to consider:
        - Motive and interest of Defendant.
        - Court-imposed limitations

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

URE 901—Authenticating or Identifying Evidence

- ***State v. Wager,*** **2016 UT App 97 (Lindberg, J., Third District) [Case of the Defendant who never used drugs in his bathroom . . . Oh wait, here's a photograph]. [RULES 901, 401].** Defendant was charged with possession of meth. At trial, he testified that he would not allow drug use in his house, the he had never smelled any drug use there, and that no one had used meth in his house from the time he moved in to the time police came. Prosecution then offered a photograph depicting the Defendant in his bathroom smoking meth. The photo had been taken by a CI (Wager's ex-girlfriend) and given to police. It was undisputed that the photo depicted the Defendant. The police detective testified that he had been in Defendant's bathroom and that the photo accurately depicted the room. Trial court admitted the photograph. HELD: Affirmed.
    - Photograph was properly authenticated. URE 901 (evidence sufficient to support a finding that the photograph is what the proponent claims it is). Competent witness with personal knowledge of the facts represented in the photo is sufficient. Conclusive proof is not required. Court provides a screening function.
    - Photograph was relevant. URE 401 (time at which it was taken did not matter in light of Defendant's testimony that he *never* allowed drug use in his home).

- ***State v. McNeill*****, 2016 UT 3 [Case of the Deceased Preliminary Hearing Witness—Kennecott Car Pool, Pound on the Dashboard, "I'll Cut Your Fingers Off," "Big Daddy Is Going to Let You Live" Co-Worker Assault] (Kouris, J. 3D). [RULES 804((b)(1) Former Testimony; 1002 Best Evidence; 901(b)(1) Foundation for Telephone Call].** (See Above).

- ***State v. Griffin,*** **2016 UT 33 [Case of the 32 year old Perry Gas Station murder solved by DNA blood evidence and mtDNA hair evidence] [RULES 901; 701-703].** Defendant charged with murder in connection with death of gas station attendant. Police collected a blood stained one dollar bill from customers dismissed from the station on the night of the murder after pumping gas. Police collected hair from the crime scene by use of a vacuum. Defendant challenged the chain of custody of the nuclear DNA blood evidence and the mtDNA hair evidence. Trial court used notes of deceased detective to authenticate the nuclear DNA blood evidence. Defendant challenged expert testimony about statistical significance of the mtDNA evidence. HELD: Chain of custody challenge fails. Evidence of the statistical frequency of the Defendant's mtDNA was admissible under Rules 702 and 403.

    - Standard of Review: Legal question underlying admissibility of evidence = correctness. Decision admit or exclude, foundation, expert testimony = abuse of discretion.

- Chain of Custody—Authentication (Rule 901(a)):
  - Only actual tampering or bad faith will overcome a presumption that evidence is handled with regularity. Chain of custody goes usually to weight, not to admissibility. Parties need not eliminate "every conceivable possibility that the evidence may have been altered." (P26).
  - There must be a reasonable probability that the proffered evidence has not been changed in any important respect." Trial court must be convinced that the exhibit is "in substantially the same condition when introduced into evidence as it was when the crime was committed." (P26).
  - Authentication is a 104(a) determination—not bound by rules of evidence.
  - Notes of detective were "non-testimonial hearsay"—notes reflecting performance of ministerial duties.
- Expert Testimony (Rules 702-703).
  - Comparing mtDNA results to FBI database and concluding that 99.94% of people could be excluded, but not defendant met threshold requirements under Rule 702.
  - Did not violate Rule 403. Probative value is not substantially outweighed by the danger of unfair prejudice when "its limitations are fully disclosed." (NOTE: There are rational limits to this idea).