

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The Indiana General Assembly, and to a far greater extent the Indiana's appellate courts, confronted many issues of Indiana criminal law and procedure during the survey period October 1, 2014 to September 30, 2015. A year after the General Assembly's overhaul of the criminal code regarding sentencing, legislation was limited primarily to minor tinkering. But the appellate courts addressed a variety of issues that arise in all stages from the beginning of criminal cases to their end.

I. LEGISLATIVE DEVELOPMENTS

As summarized in past two surveys, a major criminal code overhaul passed in 2013 became effective with some minor changes in the 2014 session on July 1, 2014.¹ That sweeping legislation, and Title 35 in general, remained largely intact after the 2015 session included only modest changes. As described below, however, a few penalties were enhanced or decreased, and significant changes were made to the statute of limitations for rape and the ability to seek a modification of sentence.

A. Enhanced Penalties

For decades, a significant limitation on a trial court's ability to impose consecutive sentences for counts within the same case existed for crimes within an "episode of criminal conduct," which was defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance."² Exempted from that limitation—and thus without limit for the imposition of consecutive terms—were several statutory "crime[s] of violence."³ In 2015, the General Assembly added a seventeenth crime to that list: unlawful possession of a firearm by a serious violent felon.⁴

More significantly, though, the General Assembly increased the maximum term for those who do not commit crimes of violence.⁵ Previously, a defendant

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1. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 48 IND. L. REV. 1241, 1241-45 (2015) (citing House Bill 1006, as passed in 2013, which is available at <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2013&session=1&request=getBill&docno=1006> [perma.cc/GDB8-7TZ2]). The 2014 changes are available at <https://iga.in.gov/legislative/2014/bills/house/1006/> [perma.cc/PFQ6-HDWB].).

2. IND. CODE § 35-50-1-2(b) (2015).

3. *Id.* § 35-50-1-2(a).

4. *Id.*

5. *Id.*

committed multiple felony offenses⁶ as part of an episode of criminal conduct could face no more than “the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.”⁷ Thus, a defendant who committed multiple offenses, the most serious of which was a Level 4 felony, could face no more than nine years, the advisory term for a Level 3 felony.⁸ Under the revised statute, trial courts may now impose sentences longer than those advisory sentences.⁹ Specifically, the maximum sentence for episodes of criminal conduct are now:

- Level 1 offense: 42 years
- Level 2 offense: 32 years
- Level 3 offense: 20 years
- Level 4 offense: 15 years
- Level 5 offense: 7 years
- Level 6 offense: 4 years.¹⁰

Few other enhancements to penalties were enacted in 2015. One notable exception is the penalty for child molesting, which can range from a Level 1 to Level 4 offense depending on the severity of the conduct and age of the victim,¹¹ added a new section under which defendants may be charged as Level 1 felons if their crime “results in the transmission of a dangerous sexually transmitted disease and the person knew that the person was infected with the disease.”¹²

B. New Death Penalty Aggravators

Although death penalty requests are rarely filed, prosecutors who wish to pursue a capital charge against a defendant have a few new options. The General Assembly added the following aggravating circumstances to the death penalty/life without parole statute in 2015:

- (11) The defendant . . .
 - (B) decapitated or attempted to decapitate the victim; while the victim was alive . . .
- (17) The defendant knowingly or intentionally:
 - (A) committed the murder:
 - (I) in a building primarily used for an educational purpose;
 - (ii) on school property; and
 - (iii) when students are present; or

6. The sentencing restriction applies only to multiple felony offenses. IND. CODE § 35-50-1-2(c) (2014). Thus, when a defendant is convicted of one felony and one misdemeanor (or multiple misdemeanors), the statute does not apply. *Lewis v. State*, 31 N.E.3d 539, 541 (Ind. Ct. App. 2015).

7. IND. CODE § 35-50-1-2(c)(2).

8. *Id.*; see also IND. CODE § 35-50-2-3 to -6.

9. IND. CODE § 35-50-1-2.

10. *Id.* § 35-50-1-2(d).

11. *Id.* § 35-42-4-3(a), (b).

12. *Id.* § 35-42-4-3(a)(5).

- (B) committed the murder:
 - (I) in a building or other structure owned or rented by a state educational institution or any other public or private postsecondary educational institution and primarily used for an educational purpose; and
 - (ii) at a time when classes are in session.
- (18) The murder is committed:
 - (A) in a building that is primarily used for religious worship; and
 - (B) at a time when persons are present for religious worship or education.¹³

C. Paraphernalia Narrowed, Penalties Lightened

The offense of possession of paraphernalia was amended to state expressly that the “section does not apply to a rolling paper.”¹⁴ The penalties were also lightened. The first time offense is now a Class C misdemeanor—instead of a Class A misdemeanor.¹⁵ A subsequent offense is a Class A misdemeanor instead of a Level 6 felony.¹⁶

D. Statute of Limitations for Rape

The general statute of limitations of five years for most felony offenses¹⁷ was extended for rape as a Level 3 felony. The State may now file charges within five years of

the earlier of the date on which:

- (1) the state first discovers evidence sufficient to charge the offender with the offense through DNA (deoxyribonucleic acid) analysis;
- (2) the state first becomes aware of the existence of a recording (as defined in IC 35-31.5-2-273) that provides evidence sufficient to charge the offender with the offense; or
- (3) a person confesses to the offense.¹⁸

The bill was called “Jenny’s Law” after a woman who was raped as a college student and lobbied for the change.¹⁹ The man who raped her confessed nine

13. *Id.* § 35-50-2-9.

14. *Id.* § 35-48-4-8.3(a).

15. *Id.* § 35-48-4-8.3(b).

16. *Id.*

17. *Id.* § 35-41-4-2(a)(1).

18. *Id.* § 35-41-4-2(n).

19. *Our Opinion: Law a Testament to Perseverance*, S. BEND TRIB., May 5, 2015, at A5, available at http://www.southbendtribune.com/news/opinion/our_opinion/our-opinion-law-a-

years after the rape and could not be prosecuted under the existing five-year statute of limitations.²⁰

E. Sentence Modifications

The sweeping changes to the modification statute described in last year's survey—removing the restriction on prosecutorial consent when seeking a modification more than a year after sentence was imposed²¹—were modified again in 2015. The amendment made clear that (most of) those who committed their offenses or were sentenced before July 1, 2014, could seek a modification as under the 2014 legislation—no more than one time each year and two times total.²²

But the legislation excluded “violent criminals” who committed at least one of fourteen listed offenses, including homicide, robbery as a Level 2-3 offense, and burglary as a Level 1-4 offense.²³ The “violent criminals” may file one modification request within 365 days without the request of the prosecutor but must obtain consent of the prosecutor for any request filed more than 365 days after sentencing.²⁴ The narrowing for “violent criminals” was softened, however, for those who committed offenses “after June 30, 2014, and before May 15, 2015, [who] may file one (1) petition for sentence modification without the consent of the prosecuting attorney, even if the person has previously filed a petition for sentence modification.”²⁵

II. DECISIONAL LAW DEVELOPMENTS

As summarized below, the Indiana Supreme Court and Indiana Court of Appeals addressed cases involving several stages and aspects of criminal cases from bail, discovery, guilty plea or trial, to sentencing and post-conviction matters.²⁶ The focus in this section is Indiana Supreme Court opinions, although several significant Indiana Court of Appeals' opinions are also discussed.

A. Self-Defense and Setting Bail for Murder

Two years ago, in *Fry v. State*,²⁷ the supreme court reversed 150 years of

testament-to-perseverance/article_d9d47e85-c0cb-5da9-8802-f9e4487a47d6.html [perma.cc/44JJ-8MH4].

20. *Id.*

21. Schumm, *supra* note 1, at 1245.

22. Compare IND. CODE § 35-38-1-17(j), with *id.* § 35-38-1-17(h).

23. *Id.* § 35-38-1-17(d), (j).

24. *Id.* § 35-38-1-17(k).

25. *Id.* § 35-38-1-17(m).

26. For other developments important to criminal law practitioners, the appellate, evidence, and Indiana constitutional law articles included in this issue of the *Indiana Law Review* are also recommended.

27. 990 N.E.2d 429 (Ind. 2013).

precedent in requiring in murder cases that “the burden lies with the State to show that ‘proof is evident, or the presumption strong,’ if it seeks to deny bail to that defendant.”²⁸

In *Satterfield v. State*,²⁹ the defendant admitted that he shot the victim but asserted self-defense because the decedent had “forcefully attempted to enter [his] car while holding a shiny object.”³⁰ In denying his request for bail, the trial court refused to consider any facts related to self-defense.³¹ The court of appeals reversed and remanded for a new bail hearing, emphasizing “a defendant’s right to present exculpatory evidence as to his or her culpability during a bail proceeding and the trial court’s duty to take this evidence into account when considering a request for bail.”³²

B. Tolling Statute of Limitations for Concealment

Class B felony charges must be filed within five years, but the statute exempts any time from criminal statutes of limitation during which an accused “conceals evidence of the offense, and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence.”³³

In *Study v. State*,³⁴ the trial court denied a motion to dismiss a robbery charge filed more than five years after the crime. The State’s amended charging information alleged the defendant had concealed evidence of

- 1) his identity by wearing a mask during the offense; 2) the vehicle that he used to drive away after the robbery; 3) the trash can used during the robbery that he took from the bank; 4) clothing he wore during the robbery; 5) personal property taken from a victim; 6) the weapon used during the commission of the offense; and 7) evidence relating to other robberies which displayed a common modus operandi³⁵

After reviewing several Indiana cases, the supreme court explained that cases “applying the concealment-tolling provision to only positive acts that conceal that an offense has been committed are correct.”³⁶ Emphasizing that courts have given a narrow construction to provisions that toll the statute of limitations, the court concluded that none of the defendant’s actions prevented “law enforcement from discovering that a bank had been robbed. The State’s ability to investigate

28. *Id.* at 443-44.

29. 30 N.E.3d 1271, 1279 (Ind. Ct. App. 2015).

30. *Id.*

31. *Id.*

32. *Id.*

33. IND. CODE § 35-41-4-2(h)(2) (2015).

34. 24 N.E.3d 947 (Ind. 2015).

35. *Id.* at 951.

36. *Id.* at 953.

the crime and develop a case was not thwarted.”³⁷ Rather, authorities “discovered the robbery and were able to begin investigating immediately.”³⁸

C. Discovery in Criminal Cases

Both the Indiana Supreme Court and Indiana Court of Appeals issued opinions allowing access to important evidence as part of discovery in criminal cases.

1. *Deposition Question*.—In *Hall v. State*,³⁹ the Indiana Supreme Court found that the trial court erred in denying the defendant’s motion to compel the child’s mother to answer a deposition question.⁴⁰ The question was about an alleged prior false accusation involving another child in Kentucky, which “*could have* revealed potentially relevant information under Indiana Trial Rule 26(B)(1) that *could have* provided Hall with knowledge of what he classifies as [the child’s] alleged prior false accusation of sexual misconduct.”⁴¹ Nevertheless, the court found the error harmless by a 3-2 vote and affirmed the conviction.⁴²

2. *INSPECT Records*.—Having a valid prescription is a defense to the felony offense of possession of a controlled substance.⁴³ But when a defendant subpoenaed the Indiana Board of Pharmacy for a copy of her INSPECT (“Indiana scheduled prescription electronic collection and tracking program”) report, the Board filed a motion to quash, which the trial court granted because the defendant had failed to show “she could not get her prescription records elsewhere.”⁴⁴

The court of appeals applied Indiana’s three-part test for discoverability of records in *Lundy v. State* and reversed.⁴⁵ The Board did not dispute that the records were material to Lundy’s defense.⁴⁶ Moreover, the court held that a defendant knowing where she could “possibly” obtain her records did not make those records “readily available” to her, which is part of the particularity

37. *Id.* at 954.

38. *Id.*

39. 36 N.E.3d 459 (Ind. 2015), *reh’g denied*, (Sept. 23, 2015).

40. *Id.* at 467.

41. *Id.* at 466-67 (emphasis in original).

42. *Id.* at 468. The majority found:

[G]iven the extensive evidence of Hall’s guilt presented by the State, the likely minimal impact of the information he wanted before the jury, and the cross-examination of witnesses Hall was otherwise able to conduct, the jury’s verdict would not have been any different had the jury heard and considered Hall and [the mother’s] conversation and the Kentucky incident.

Id. at 474.

43. *Lundy v. State*, 26 N.E.3d 656, 657 (Ind. Ct. App. 2015).

44. *Id.* at 657 & n.2, 659.

45. *Id.* at 660.

46. *Id.* at 661.

requirement intended to maximize discovery.⁴⁷

D. Severance Law Continues to Divide the Court

In *Pierce v. State*,⁴⁸ a three-justice majority upheld several convictions for child molesting over a defendant's claim that they should have been severed. The supreme court held separate trials are not required when a defendant "commit[s] the same crime, in substantially the same way, against similar victims."⁴⁹ Specifically, the defendant had "exploited his position of a trusted grandfather or great uncle by molesting young female family members in his care" and employed a similar method of inviting each victim to spend the night when no other children were present.⁵⁰

Justice Rucker, joined by Justice Dickson, dissented, noting that a divided court of appeals' panel applying the "traditional approach" had found the trial court erred in denying severance and a majority of the Indiana Supreme Court had reached the opposite conclusion.⁵¹ Instead of continuing "down this path of inconsistency," the dissent urged providing "greater clarity to an area of law that remains in a state of confusion."⁵²

E. Plea Agreements

Although most of the decisional law discussed in this survey is an outgrowth of relatively few jury and bench trials, far more criminal cases in Indiana are resolved by a plea agreement. By pleading guilty, defendants give up most rights to appeal and face relatively long odds in any later post-conviction challenge to a crime they admitted as part of a plea agreement. Three cases decided during the survey period highlight important aspects of plea agreements and the contours of later challenges to them.

In *Russell v. State*,⁵³ a defendant "pleaded guilty to five counts of class C felony neglect of a dependent and two counts of class C felony criminal confinement." The plea agreement "capped Russell's sentence at ten years 'pursuant to Indiana Code 35-50-1-2(c).'"⁵⁴ Because the offenses were not part of a single criminal episode, however, the limitation did not apply and the defendant should have faced the possibility of consecutive terms totaling more

47. *Id.* at 662.

48. 29 N.E.3d 1258 (Ind. 2015).

49. *Id.* at 1267.

50. *Id.* at 1266-67.

51. *Id.* at 1272 (Rucker, J., dissenting).

52. *Id.*; see also *Wells v. State*, 983 N.E.2d 132, 137 (Ind. 2013) (Rucker, J., dissenting) (explaining "our traditional approach in resolving claims of severance fails to provide meaningful guidance to either the bench or the bar, and thus lends itself to inconsistent results, even where the facts are very similar").

53. 34 N.E.3d 1223, 1224 (Ind. 2015).

54. *Id.* at 1224 (citation omitted).

than fifty years.⁵⁵ The defendant challenged this lenient sentence on appeal.⁵⁶ The court of appeals *sua sponte* found the plea agreement void as a matter of law and remanded the case to the trial court to provide “Russell the opportunity to ratify the plea agreement without the erroneous sentencing limitation,” thus allowing the trial court complete discretion in sentencing, or to vacate the plea agreement.⁵⁷

The defendant petitioned for transfer and the State agreed that supreme court precedent mandated upholding the plea agreement.⁵⁸ Indeed, a decade earlier the justices held in *Lee v. State*,⁵⁹ “where a defendant enters a plea of guilty knowingly, intelligently, and voluntarily, there is no compelling reason to set aside the conviction on grounds that the sentence is later determined to be invalid.”⁶⁰ Applying that precedent in *Russell*, the majority upheld the plea agreement, reasoning “[b]ecause *Lee* requires us to uphold a sentencing provision that misstates the law, provided the defendant pleaded guilty knowingly, intelligently, and voluntarily—as Russell indisputably did, and provided that the defendant benefit from the bargain when the State errs—as Russell unequivocally does.”⁶¹ Justice Massa dissented, emphasizing that plea agreements “should be the product of an informed and honest bargaining process, and not a mistake of law,” before concluding “the outcome here was dependent upon such a mistaken understanding, apparently shared by all in the room.”⁶²

Two opinions from the court of appeals reached opposite conclusions about the authority of a trial court to allow acceptance of a plea agreement. In *Stone v. State*,⁶³ the defendant failed to attend the scheduled presentence investigation between his guilty plea and sentencing hearing.⁶⁴ The court of appeals reiterated that court-accepted plea agreements are binding except in narrow circumstances including an assertion of innocence at sentencing or the violation of the express terms of the agreement, such as failing to testify at the trial of a co-defendant.⁶⁵ Because the exceptions did not apply, the trial court abused its discretion in withdrawing acceptance of the plea agreement.⁶⁶

In *Campbell v. State*⁶⁷ the plea agreement unequivocally required the defendant to “voluntarily and completely testify at any proceeding” concerning

55. *Id.*

56. *Id.*

57. *Id.* at 1226.

58. *Id.*

59. 816 N.E.2d 35, 39 (Ind. 2004).

60. *Russell*, 34 N.E.3d at 1228.

61. *Id.*

62. *Id.* at 1232 (Massa, J., dissenting).

63. 27 N.E.3d 341 (Ind. Ct. App. 2015).

64. *Id.* at 343.

65. *Id.*

66. *Id.* at 344.

67. 17 N.E.3d 1021 (Ind. Ct. App. 2014).

the robbery and murder of a specific victim.⁶⁸ The defendant refused to testify when called at his co-defendant's trial.⁶⁹ However, the plea agreement did not include a specific remedy for such a refusal, instead providing for repudiation and reinstatement of the charges if Campbell appealed either his conviction or sentence.⁷⁰ In affirming the trial court's decision to permit the State to withdraw from the plea agreement, the court of appeals concluded "the provision obligating Campbell to testify in his co-defendants' trials would be rendered meaningless if Campbell could unilaterally break the Plea Agreement after acceptance by the trial court and still receive the same benefits as if he had fully performed."⁷¹

F. Jury Issues

Although there are relatively few jury trials in Indiana each year,⁷² each presents numerous opportunities for reversible error, from selecting the jury, to a variety of rulings or counsel's remarks during the trial, to jury instructions and conduct of the deliberating jurors. The opinions below address challenges to jurors during voir dire and claims of juror misconduct; Part II.G. addresses jury instructional claims.

1. *"Exhaustion Rule" for Peremptory Challenges.*—Litigants may seek appellate review of for-cause challenges to prospective jurors only after they have exhausted their allocated peremptory challenges under Indiana's "exhaustion rule."⁷³ As a matter of first impression in *Oswalt*, the Indiana Supreme Court held that "parties satisfy the exhaustion rule the moment they use their final peremptory challenge—regardless of whom they strike."⁷⁴ Thus, "if parties fully comply with the exhaustion rule and demonstrate they were unable to remove any prospective juror for lack of peremptories, appellate courts may review denial of any motion to strike for cause, regardless of whether a challenged juror actually served on the jury."⁷⁵

Because the trial court was within its discretion to deny all three of the defendant's preserved for-cause challenges, the court affirmed *Oswalt's* conviction.⁷⁶

68. *Id.* at 1024.

69. *Id.*

70. *Id.*

71. *Id.*

72. Schumm, *supra* note 1, at 1249; *see, e.g.*, Joel Schumm, *The Disappearing Jury Trial in Indiana: Some Thoughts (and Stats) on the Past Five Years*, IND. L. BLOG (Dec. 18, 2012, 9:17 AM), http://indianalawblog.com/archives/2012/12/ind_courts_the_36.html [perma.cc/V85H-7WX7].

73. *Oswalt v. State*, 19 N.E.3d 241, 244 (Ind. 2014).

74. *Id.*

75. *Id.*

76. *Id.* at 251. Applying *Oswalt*, the supreme court quickly dispensed with a similar claim in a death penalty case decided months later, finding a defendant's "conclusory assertion that he was forced to accept biased jurors is not nearly enough for us to find reversible error." *Weisheit v.*

2. *Unauthorized Communication*.—Last survey period, the Indiana Supreme Court clarified the standards for addressing claims of unauthorized contacts and communication with jurors in *Ramirez v. State*.⁷⁷ The court explained:

Defendants seeking a mistrial for suspected jury taint are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence: (1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and (2) the contact or communications pertained to the matter before the jury. The burden then shifts to the State to rebut this presumption of prejudice by showing that any contact or communications were harmless. If the State does not rebut the presumption, the trial court must grant a new trial. On the other hand, if a defendant fails to make the initial two-part showing, the presumption does not apply. Instead, the trial court must apply the probable harm standard for juror misconduct, granting a new trial only if the misconduct is “gross and probably harmed” the defendant. But in egregious cases where juror conduct fundamentally compromises the appearance of juror neutrality, trial courts should skip *Currin*’s two-part inquiry, find irrebuttable prejudice, and immediately declare a mistrial. At all times, trial courts have discretion to decide whether a defendant has satisfied the initial two-part showing necessary to obtain the presumption of prejudice or a finding of irrebuttable prejudice.⁷⁸

a. *Note and cookies*.—*Ramirez* was applied this survey period in *Weisheit v. State*.⁷⁹ There, Juror Number 10 brought cookies baked by his wife to the jury room.⁸⁰ An accompanying note read, “Thank you for your service for the family of Alyssa [and] Caleb Lynch. I will pray for you all to have strength and wisdom to deal with the days ahead. God bless!”⁸¹ Alyssa and Caleb were the children the defendant was charged with killing.⁸²

The trial court questioned the fifteen jurors and alternates individually, of which “four were unaware of the note, five were aware of the note but had not read it, and the remaining six recalled that the note thanked them for their jury service.”⁸³ Each stated that the note had no effect on them.⁸⁴ The trial court individually questioned the jurors, issued an admonishment, and dismissed Juror Number 10.⁸⁵ The supreme court affirmed the convictions, agreeing with the trial

State, 26 N.E.3d 3, 13 (Ind. 2015), *cert. denied*, 136 S. Ct. 901 (2016).

77. 7 N.E.3d 933 (Ind. 2014).

78. *Id.* at 939 (citations omitted).

79. 26 N.E.3d 3 (Ind. 2015).

80. *Id.* at 13.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 16. The court further found the defendant was not entitled to a mistrial based on

court that the State successfully rebutted the presumption of prejudice from the note “by showing that its contents were harmless and that the note had no influence on the jury.”⁸⁶

b. Fear for juror safety.—In *Beasley v. State*,⁸⁷ one juror “told the other jurors that she recognized a person in the gallery and was concerned for her safety and well-being.”⁸⁸ Applying the *Ramirez* framework, the court of appeals easily rejected the claim of juror misconduct.⁸⁹ First, the defendant was not entitled to a presumption of prejudice because “he failed to show that extra-judicial contact or communications between jurors and unauthorized persons occurred”—or for that matter that “any extra-judicial contact or communications occurred at all.”⁹⁰ Second, applying the probable harm standard, which permits granting a new trial only if the misconduct is “gross and probably harmed” the defendant, the court observed that the juror “did not lie or otherwise make misrepresentations.”⁹¹ Moreover, when the court learned of the juror’s concerns, it ceased deliberations and individually interviewed each juror, eventually removing the juror, replacing her with an alternate, and admonishing the jury not to discuss the reasons for the juror’s dismissal.⁹²

c. Internet search.—But in *Bisard v. State*,⁹³ the defendant and State agreed that a juror committed misconduct “by performing an internet search on the reliability of blood tests,” which was shared with some of the other jurors.⁹⁴ Therefore, under *Ramirez*, prejudice was presumed and “the burden shifted to the State to rebut this presumption of prejudice by showing that any contact or communications were harmless.”⁹⁵ Nevertheless, the court of appeals refused to order a new trial because (1) the offending juror was “immediately relieved of his jury duties and escorted from the building,” and (2) jurors who were aware of the Internet search “clearly indicated that they could set aside what they heard from [the juror] in arriving at their verdicts,” which “removed any taint.”⁹⁶

d. Failure to disclose Facebook “friend.”—In *Slaybaugh v. State*,⁹⁷ the court

“cumulative juror impropriety” because he failed to establish that an actual juror was biased. *Id.* The trial court had found Juror Number 2 untruthful and removed him from the jury. *Id.* at 15. Juror Number 66 was not selected. *Id.*

86. *Id.* at 16.

87. 30 N.E.3d 56 (Ind. Ct. App. 2015), *vacated in part on other grounds by*, 46 N.E.3d 1232 (Ind. 2016).

88. *Id.* at 72.

89. *Id.* at 72-74.

90. *Id.* at 73.

91. *Id.* at 74.

92. *Id.*

93. 26 N.E.3d 1060 (Ind. Ct. App.), *trans. denied*, 32 N.E.3d 238 (Ind. 2015).

94. *Id.* at 1069.

95. *Id.*

96. *Id.* at 1070.

97. 44 N.E.3d 111 (Ind. Ct. App. 2015), *adopted and incorporated by reference in* 47 N.E.3d 607 (Ind. 2016).

of appeals considered whether juror misconduct occurred when a juror in a rape trial failed to disclose that he was a Facebook friend of the victim's step-sibling.⁹⁸ The trial court scheduled a hearing and ordered the parties to depose the juror.⁹⁹ The trial court reviewed all supporting documents attached to defense motion and the State's response and reasoned the juror "truthfully stated that she had no knowledge of the defendant, the victim or the family of either."¹⁰⁰

The court of appeals quoted at length from a Kentucky Supreme Court case that aptly explained:

But "friendships" on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire. The degree of relationship between Facebook "friends" varies greatly, from passing acquaintanceships and distant relatives to close friends and family. The mere status of being a "friend" on Facebook does not reflect this nuance and fails to reveal where in the spectrum of acquaintanceship the relationship actually falls. Facebook allows only one binary choice between two individuals where they either are "friends" or are not "friends," with no status in between.¹⁰¹

Observing that the defendant's challenge to the trial court's assessment that the juror "was truthful during voir dire is nothing more than an invitation to reweigh the evidence and the court's credibility determination," the court concluded that the defendant failed to show that there was misconduct, let alone gross misconduct to warrant a new trial.¹⁰²

G. Jury Instructions

The Indiana Supreme Court decided three jury instruction cases involving issues of accomplice liability in attempted murder trial, the presumption of innocence, and the definition of intentionally.

1. *Accomplice Liability and Attempted Murder.—Rosales v. State*¹⁰³ considered the interplay of accomplice liability and attempted murder. The supreme court held the specific intent to kill instruction is required even in cases where it is unknown if the defendant was convicted of attempted murder on the basis of accomplice liability or direct liability.¹⁰⁴ Because defense counsel had not objected to the erroneous instruction, the justices had to consider "whether the error was prejudicial enough under the circumstances of this case to make a

98. *Id.* at 111-112.

99. *Id.* at 112.

100. *Id.* at 119 (citation omitted).

101. *Id.* at 117 (quoting *Sluss v. Commonwealth*, 381 S.W.3d 215, 221-23 (Ky. 2012)).

102. *Id.* at 119.

103. 23 N.E.3d 8 (Ind. 2015).

104. *Id.* at 9.

fair trial impossible”—or fundamental error.¹⁰⁵ That lofty standard was met “because the State’s closing arguments repeatedly told the jury that specific intent to kill was *not* required for accomplice liability.”¹⁰⁶

2. *Presumption of Innocence.*—*McCowan v. State*¹⁰⁷ offered an opportunity to revisit *Robey v. State*,¹⁰⁸ which had reaffirmed earlier precedent that “[a]n instruction . . . which advises the jury that the presumption of innocence prevails until the close of the trial, and that it is the duty of the jury to reconcile the evidence upon the theory of the defendant’s innocence if they could do so, must be given if requested.”¹⁰⁹ In *McCowan*, the justices concluded,

unequivocally and prospectively that it is the absolute right of every criminal defendant to receive the following jury instruction upon request: “The presumption of innocence continues in favor of the defendant throughout the trial. You should fit the evidence to the presumption that the defendant is innocent if you can reasonably do so.”¹¹⁰

Nevertheless, because the jury instructions in *McCowan* adequately encompassed these principles, which was the minimum required by prior precedent, the court held the trial court’s failure to use this precise language was not error.¹¹¹

3. *Definition of “Intentionally.”*—Indiana Criminal Pattern Jury Instruction 9.05 defines intentionally by first citing the applicable statute and then continues:

A person engages in conduct “intentionally” if, when he engages in the conduct, it is his conscious objective to do so. [If a person is charged with intentionally causing a result by his conduct, it must have been his conscious objective not only to engage in the conduct but also to cause the result.]¹¹²

In *Campbell v. State*,¹¹³ the Indiana Supreme Court noted that the first sentence tracks the verbatim language of Indiana Code section 35-41-2-2(a) and thus is “presumptively correct.” But two court of appeals’ opinions had suggested disagreement about whether the second sentence is a correct statement of law.¹¹⁴

Resolving that conflict in *Campbell*, the supreme court concluded the pattern instruction was a correct a statement of law, but suggested the language might be

105. *Id.* at 15.

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

107. 27 N.E.3d 760 (Ind. 2015).

108. 454 N.E.2d 1221 (Ind. 1983).

109. *Id.* at 1222.

110. *McCowan*, 27 N.E.3d at 762.

111. *Id.* at 767-68.

112. IND. CRIMINAL PATTERN JURY INSTRUCTION 9.05.

113. 19 N.E.3d 271, 277 (Ind. 2014).

114. *Id.* at 276-77 (citing *Corley v. State*, 663 N.E.2d 175 (Ind. Ct. App. 1996); *Johnson v. State*, 605 N.E.2d 762 (Ind. Ct. App. 1992)).

improved:

Here, the second sentence of the contested instruction serves to emphasize the heavy burden placed on the State to prove that a defendant acted intentionally. And this is so because not only must the State prove that an accused had the “conscious objective” to engage in the prohibited conduct but also that he intended to “cause the result” of his conduct. For clarity the sentence might be amended to read “If a person is charged with intentionally causing a result by his conduct, *the State is required to prove* it must have been his conscious objective not only to engage in the conduct but also cause the result.”¹¹⁵

H. Prosecutorial Misconduct

As summarized in last year’s survey, the Indiana Supreme Court reiterated in *Ryan v. State*,¹¹⁶ defendants are “‘highly unlikely’ to prevail on a claim of fundamental error relating to prosecutorial misconduct.”¹¹⁷ The fundamental error doctrine requires “*an undeniable and substantial effect on the jury’s decision* [such] that a fair trial was impossible.”¹¹⁸

The Indiana Supreme Court issued opinions in four cases involving prosecutorial misconduct, and the court of appeals reversed in a fifth.

1. Misconduct During Closing Argument.—First, the justices summarily affirmed a court of appeals opinion that had reversed a conviction based on prosecutorial misconduct in *Brummett v. State*.¹¹⁹

The misconduct was also not objected to but even more egregious in *Brummett*,¹²⁰ decided by the court of appeals one day before *Ryan*. During the jury trial for child molesting and sexual misconduct with a minor, the deputy prosecutor made comments implying defense counsel’s arguments helped “guilty men go free.”¹²¹ She stated defense counsel employed “tricks” while questioning

115. *Id.* at 277-78 (emphasis in original).

116. 9 N.E.3d 663 (Ind. 2014).

117. *Id.* at 667 (citing *Baer v. State*, 942 N.E.2d 80, 99 (Ind. 2011)).

118. *Id.* at 668 (emphasis in original).

119. 24 N.E.3d 965 (Ind. 2015). Transfer was granted because the Indiana Supreme Court took issue with the court of appeals’ statement that “‘the prosecutor’s misconduct did amount to fundamental error under *the standard now to be used*,” thereby implying that *Ryan* may have created a new fundamental error standard.” *Id.* at 966. It explained that “*Ryan* did not alter the doctrine of fundamental error. It simply restated and applied the longstanding standard. Except for the rehearing opinion’s implication to the contrary, *Brummett* likewise applied the existing doctrine of fundamental error.” *Id.*

120. 10 N.E.3d 78 (Ind. Ct. App. 2014), *aff’d*, 24 N.E.3d 965 (Ind. 2015). A short opinion reaffirming the original decision was issued, initially as an unpublished opinion on August 20, 2014, but later ordered published in December 2015. *Brummett*, 21 N.E.3d 840 (Ind. 2015).

121. *Brummett*, 10 N.E.3d at 85.

the child victims by sitting at counsel table.¹²²

The prosecutor stated, “I trust that if it was a child that any of you loved having to come into this courtroom you would appreciate um, that same conviction or anger, call it whatever you want, coming out of the State if it was your kid coming on the stand,” asking them to focus on irrelevant and improper considerations.¹²³ The prosecutor also accused defense counsel of collaborating with the defendant to falsify information: “And in those months he couldn’t come up with anything. But once he hired an attorney and they were able to kind of talk things through all of a sudden it’s this money issue.”¹²⁴

The court of appeals explained that the prosecutor’s statement that “‘these kids do not . . . they do not lie about the Defendant,’ was not based on any evidence outside of the girls’ testimony” and concluded that “the statement constituted improper vouching.”¹²⁵ Moreover, although the prosecutor’s comment that a witness, “had nothing to gain,” was permissible, the prosecutor went too far when she stated that the witness, “just had to do the right thing,” as it suggested that the prosecutor knew the witness was telling the truth.¹²⁶

In short, it concluded the prosecutor’s comments impugned the integrity of defense counsel and demeaned the role of defense counsel; personally vouched for the State’s witnesses; and asked questions that were argumentative and inflammatory.¹²⁷

2. *A Rare Dissent from Denial of Transfer.*—Just days before the Indiana Supreme Court summarily affirmed the *Brummett* opinion, Justice David, joined by Justice Rucker, issued an opinion dissenting from the denial of transfer in a case involving prosecutorial misconduct.¹²⁸ He emphasized the duty of prosecutors to ensure “criminal defendant’s rights are upheld by exercising only the soundest judgment and caution.”¹²⁹ “Whether improper prosecutorial statements are due to carelessness or a conscious effort to test the line of what constitutes misconduct, the potential for a cumulative prejudicial impact on a defendant cannot be ignored.”¹³⁰

“Walking the line of permissible and impermissible conduct creates distrust in our legal system, undermines the rights we have sworn to protect, and discourages collegiality. The profession deserves thoughtful adherence to ethical, professional, and prosecutorial standards.”¹³¹ Concerned that the court was “passing up an opportunity to resolve what seems to me to be a disturbing trend,”

122. *Id.*

123. *Id.* (citation omitted).

124. *Id.* (citation omitted).

125. *Id.* at 87 (citation omitted).

126. *Id.*

127. *Id.*

128. *Shell v. State*, 26 N.E.3d 1 (Ind.) (David, J., dissenting.), *cert. denied*, 136 S. Ct. 238 (2015).

129. *Id.* at 2.

130. *Id.*

131. *Id.*

the two justices would have granted transfer.¹³²

3. *Prosecutor Misconduct in Death Penalty Case.*—The Indiana Supreme Court has long held that the imposition of the death sentence must be based on those aggravating circumstances listed in the statute, and a prosecutor commits misconduct by requesting “a jury to return a death penalty for anything other than that the mitigating factors are outweighed by the aggravating factor or factors.”¹³³ Thus, a prosecutor “stepped over the line” in *Isom v. State* when arguing the following during the rebuttal phase of closing arguments: “Kevin Isom failed Cassandra as a wife [sic] and as a life partner. He failed the children as a father. He failed himself as a man. He failed his mother as a son. And he failed the community as a productive and constructive member of that community.”¹³⁴ Because the defendant did not object, reversal would only be warranted if the remarks were so prejudicial as to make a fair trial impossible.¹³⁵ Finding that any harm from the remark as part of several weeks of testimony and two days of mitigation testimony was “*de minimis* and not substantial,” the justices affirmed.¹³⁶

4. *State’s Use of Inconsistent or Perjured Testimony.*—In *Smith v. State*,¹³⁷ the State called a witness at a jury trial for burglary who offered a very different version of events than during her earlier guilty plea to the same crime. Although the defendant secured a reversal in the court of appeals based on a finding that the witness had offered perjured testimony,¹³⁸ the supreme court framed the “the proper question” as follows: “did the State impermissibly use false testimony to obtain a conviction in violation of a defendant’s due process rights?”¹³⁹ Precedent had focused on “whether the jury’s ability to assess all of the facts and the credibility of the witnesses supplying those facts has been impeded to the unfair disadvantage of the defendant.”¹⁴⁰

In rejecting the claim of prosecutorial misconduct and affirming the conviction, the supreme court noted that the State had notified opposing counsel and the trial court of the witness’s conflicting testimony and “proactively drew attention to the discrepancies” in her testimony “multiple times throughout the trial, thus permitting the jury to fully function as an informed fact finder” and allow the defense to “actively emphasize such inconsistencies to the defendant’s advantage.”¹⁴¹

5. *A Reversal in the Court of Appeals.*—As in *Brummett*, the alleged

132. *Id.*

133. *Isom v. State*, 31 N.E.3d 469, 493 (Ind. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

134. *Id.* at 492-93 (citation omitted).

135. *Id.* at 493.

136. *Id.*

137. 34 N.E.3d 1211 (Ind. 2015).

138. *Id.* at 1213.

139. *Id.* at 1220.

140. *Id.*

141. *Id.* at 1220-21.

misconduct in a case involving sex crimes in *Thornton v. State*¹⁴² occurred during closing argument and defense counsel failed to object.¹⁴³

First, in response to defense counsel's argument that samples from the crime scene were "inconclusive" for a match of the victim's blood, the prosecutor argued the police "had a minimal amount of time because of the speedy trial request in which to get all this testing done."¹⁴⁴ Because defendants have a constitutional right to a speedy trial, blaming a "shortcoming in the State's evidence on a defendant's invocation of a fundamental constitutional right surely constitutes prosecutorial misconduct, and likely also constitutes fundamental error."¹⁴⁵

Second, the prosecutor emphasized that women are "made to feel like they're on trial" or "criminals" and that "we re-victimize these people who come forward with rape."¹⁴⁶ The court of appeals found the comments fell within three prohibited categories of argument: (1) convicting a defendant for reasons other than guilt, (2) invoking sympathy for a victim, and (3) urging a conviction to "encourage other victims to come forward."¹⁴⁷ The court of appeals admonished the prosecutor from making similar comments at a retrial.¹⁴⁸

I. Crime or Not a Crime?

As has become a tradition in the survey article, this section again surveys cases in which the appellate courts addressed whether convictions for a variety of offenses were supported by sufficient evidence.¹⁴⁹

1. How Much Evidence Is Required? Did the Supreme Court Lower the

142. 25 N.E.3d 800 (Ind. Ct. App. 2015).

143. The court reversed a criminal confinement conviction based on a violation of the Confrontation Clause but proceeded to address claims of prosecutorial misconduct that could arise if the State chose to retry the defendant, who had also been charged with other offenses on which the jury did not reach a verdict. *Id.* at 805.

144. *Id.* at 806 (emphasis removed).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. The cases discussed in this section are challenges to the sufficiency of the evidence after trial. Other cases in prior years, however, have found their way to the appellate courts through pretrial motions to dismiss—some ending successfully. *See, e.g.,* *Smith v. State*, 867 N.E.2d 1268 (Ind. 2007) (reversing denial of motion to dismiss child seduction charges). The continued viability of pre-trial dismissals, however, may be somewhat in question after *Corbin v. State*, 17 N.E.3d 270 (Ind. 2014). There, a teacher and coach who had communicated with a sixteen-year-old student on Facebook was charged with attempted child solicitation. *Id.* at 271. In upholding the denial of the motion to dismiss, the supreme court reasoned that the charging information mostly tracked the language of the seduction statute and the case was "in the charging stage, when other evidence, if there is any, is not yet known." *Id.* at 272. Because "there are enough unanswered questions," the court held the charges were "sufficient to survive a motion to dismiss at this time." *Id.*

Bar?—As discussed in last year’s survey, just months after the supreme court’s opinion in *Meehan v. State*,¹⁵⁰ Judge Crone opined in another sufficiency case that the supreme court had fundamentally changed the sufficiency equation.¹⁵¹ Reflecting on *Meehan*, Judge Crone wrote in a 2-1 opinion in *Willis v. State* that “under *Meehan*, the quantum of circumstantial evidence needed to affirm a criminal conviction in Indiana is extremely small indeed.”¹⁵² The 2-1 opinion in *Willis* upheld a conviction for criminal trespass.¹⁵³

The supreme court disagreed and reversed the conviction in an opinion that made no reference to the court of appeals’ suggestion that *Meehan* had fundamentally lowered the quantum of proof for a conviction.¹⁵⁴ Indeed, the opinion includes just one general citation to *Meehan*.¹⁵⁵ The justices focused instead on the facts of the case and a failure of proof under the principle that “[a] reasonable inference of guilt must be more than a mere suspicion, conjecture, conclusion, guess, opportunity, or scintilla.”¹⁵⁶ Specifically, the supreme court noted that the defendant,

was running in a field near a recreation center sometime after the burglar alarm was activated. To be sure this conduct may have been considered suspicious, and perhaps [he] may even have had the opportunity to interfere with the possession and use of the recreation center without the owner's consent.¹⁵⁷

In uncharacteristically less-than-emphatic language, the court concluded, “It appears to us that the evidence in this case is insufficient.”¹⁵⁸

2. *No Reversal on Insanity Grounds Despite Unanimous Expert Testimony.*— In *Galloway v. State*,¹⁵⁹ a 3-2 majority of the Indiana Supreme Court held:

Where there is no conflict among the expert opinions that the defendant was insane at the time of the offense, there must be other evidence of probative value from which a conflicting inference of sanity can be drawn. Such probative evidence is usually in the form of lay opinion testimony that conflicts with the experts or demeanor evidence that, when considered in light of the other evidence, permits a reasonable inference of sanity to be drawn.¹⁶⁰

150. 7 N.E.3d 255 (Ind. 2014).

151. *Willis v. State*, 13 N.E.3d 460 (Ind. Ct. App. 2014), *rev'd*, 27 N.E.2d 1065 (Ind. 2015).

152. *Id.* at 462.

153. *Id.*

154. *Willis v. State*, 27 N.E.3d 1065, 1068 (Ind. 2015).

155. *Id.* at 1067.

156. *Id.* at 1068 (quoting *Mediate v. State*, 498 N.E.2d 391, 393 (Ind. 1986)).

157. *Id.*

158. *Id.*

159. 938 N.E.2d 699 (Ind. 2010).

160. *Id.* at 712 (internal citation omitted).

Applying that precedent but distinguishing the facts in *Myers v. State*,¹⁶¹ the four-justice majority affirmed a jury's verdict of guilty but mentally ill to four counts of attempted murder, rejecting the defendant's claim that he was insane at the time of the offense.¹⁶² Although the experts who testified at trial unanimously agreed that the defendant was "incapable of understanding the wrongfulness of his conduct at the time of the offense," the court reiterated that "testimony regarding behavior before, during, and after a crime may be more indicative of actual mental health at [the] time of the crime."¹⁶³

Justice Rucker, a member of the *Galloway* majority, dissented.¹⁶⁴ He acknowledged that the defendant "had seemingly been coping better with his mental illness over the past several years"; "had never met the individuals he shot at, and nothing in the record indicates that he had ever attacked any other individuals due to delusions regarding his believed involvement in the military or CIA"; and "did nothing during the incident itself that explicitly demonstrated he was suffering from a delusion at that time, while the defendant in *Galloway* shouted out that he believed his grandmother was the devil."¹⁶⁵

But Justice Rucker opined these were "distinctions without a difference," and *Galloway* had held "where there is no conflict among the expert opinions as to the defendant's insanity then there must be other evidence either from 'lay opinion testimony that conflicts with the experts or demeanor evidence.'"¹⁶⁶

3. *Felony Murder When Co-Perpetrator Is Not the Shooter*.—More than fifteen years ago in *Palmer v. State*,¹⁶⁷ the Indiana Supreme Court held in a 3-2 opinion that the statutory language "kills another human being" while committing a delineated felony does not restrict the felony murder statute solely to instances in which the felon is the killer.¹⁶⁸ The justices were asked to reconsider that precedent in a high profile case decided during the survey period.

In *Layman v. State*,¹⁶⁹ four young men in Elkhart planned to burglarize a house they believed was unoccupied but were surprised to find the homeowner inside; he shot and killed one of them.¹⁷⁰ They were charged and convicted of felony murder.¹⁷¹ The justices declined to overrule *Palmer* and its progeny, reasoning "both the doctrines of *stare decisis* as well as legislative acquiescence counsel against overruling our existing precedent in this area of the law."¹⁷²

161. 27 N.E.3d 1069 (Ind. 2015).

162. *Id.* at 1078.

163. *Id.* at 1075-76 (quoting *Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004)).

164. *Id.* at 1082-84 (Rucker, J., dissenting).

165. *Id.* at 1082-83.

166. *Id.* at 1083 (quoting *Galloway v. State*, 938 N.E.2d 699, 712 (Ind. 2010)).

167. 704 N.E.2d 124 (Ind. 1999).

168. *Id.* at 126.

169. 42 N.E.3d 972 (Ind. 2015).

170. *Id.* at 974.

171. *Id.* at 974-75.

172. *Id.* at 978.

Nevertheless, the court found insufficient evidence to support the felony murder convictions based on the facts of the particular cases.¹⁷³ It noted that in earlier cases, “an armed defendant engaged in violent and threatening conduct, either as a principle [sic] or an accessory, that resulted in the ‘mediate or immediate cause’ of a co-perpetrator's death.”¹⁷⁴ In contrast, when young men in Elkhart “broke and entered the residence of the homeowner intending to commit a theft—a burglary—not only were they unarmed, but also neither the Appellants nor their cohorts engaged in any ‘dangerously violent and threatening conduct.’”¹⁷⁵

The case was remanded with instructions to enter verdicts of guilty to burglary as a Class B felony and re-sentence the defendants for that offense.¹⁷⁶

4. *Public Intoxication.*—As discussed in last year's survey,¹⁷⁷ in response to the supreme court's 2011 opinion in *Moore v. State*¹⁷⁸ the public intoxication statute was amended in 2012 to require beyond intoxication in a public place that the defendant: (1) endangers the person's life; (2) endangers the life of another person; (3) breaches the peace or is in imminent danger of breaching the peace; or (4) harasses, annoys, or alarms another person.¹⁷⁹ The new statutory language has been addressed in many cases, often resulting in reversals for insufficient evidence.¹⁸⁰

In *Morgan v. State*,¹⁸¹ the Indiana Supreme Court initially addressed a vagueness challenge to the term “annoys” in the statute. The court acknowledged that a subjective application of the term “would lead to absurd results and exceedingly broad discretion in enforcement.”¹⁸² Therefore, based on the long-standing purpose of the statute and precedent, the justices concluded “that the application of a reasonableness standard to the term ‘annoys’ satisfies constitutional requirements.”¹⁸³ Thus, a conviction can only be sustained if the

173. *Id.* at 980.

174. *Id.* at 979.

175. *Id.* (quoting *Jenkins v. State*, 726 N.E.2d 268, 271 (Ind. 2000)).

176. *Id.* at 981.

177. Schumm, *supra* note 1, at 1261.

178. 949 N.E.2d 343 (Ind. 2011).

179. IND. CODE § 7.1-5-1-3(a) (2015).

180. See Schumm, *supra* note 1, at 1261-62. Many convictions have been affirmed, though, including *Labarr v. State*, decided during the survey period. 36 N.E.3d 501, 503 (Ind. Ct. App. 2015). There, a police officer found the defendant unconscious on the floor of a minivan. *Id.* at 502. Throughout nearly the entire encounter, the defendant was nonresponsive and unable to stand or walk; he “eventually passed out onto his brother and vomited into the street.” *Id.* In finding sufficient evidence of endangerment, the court of appeals concluded, because he would have been “left on a public street near a busy bar in the middle of the night” without the officer's assistance, the defendant's “state of intoxication left him vulnerable to injuries resulting from traffic accidents, falling down, and being victimized by passersby.” *Id.*

181. 22 N.E.3d 570 (Ind. 2014).

182. *Id.* at 576.

183. *Id.* at 577.

defendant's conduct would annoy a reasonable person.¹⁸⁴

Turning to the sufficiency of the evidence, the supreme court recounted that a police officer observed the defendant sleeping at a bus shelter and the defendant initially refused to leave, became agitated, and swayed when he stood up to exit.¹⁸⁵ Noting that the defendant did not yell or make unreasonable noise—and that his agitation upon being awakened would not be viewed as annoying by a reasonable person—the court found insufficient evidence to support the conviction.¹⁸⁶

5. *A Very Brief Opinion.*—A mere 334 words, *Gibson v. State*,¹⁸⁷ is perhaps the most surprising opinion during the survey period—not because of what it says but because of what it doesn't say. The Indiana Supreme Court granted transfer from a memorandum decision of the court of appeals to vacate a Class D felony criminal confinement conviction for which the sentence was ordered to be served concurrently to a sixteen-year term for another offense.¹⁸⁸ The supreme court's per curiam opinion does not cite authority or provide analysis, but simply concluded:

Gibson was charged with and convicted of confinement by removal under Indiana Code section 35-42-3-3(a)(2). Gibson's charging information provided that he “did knowingly remove [the victim] by force or threat of force by pulling [the victim] to the ground and battering him.” (Appellant's App. at 83.) The jury instruction for this count mirrored the language of section 3(a)(2) of the statute. (Appellant's App. at 173.)

We agree with Gibson that there was insufficient evidence to support his conviction for criminal confinement under section 3(a)(2).¹⁸⁹

The opinion suggests the supreme court is willing to grant transfer to correct an error, even in a memorandum decision and with seemingly no practical consequence to the defendant. Defendants with more at stake may take solace.

6. *Court of Appeals Cases.*—

a. *Insufficient evidence of neglect.*—*Taylor v. State*¹⁹⁰ involved a working mother who left her son with her boyfriend, who beat him and fractured his skull.¹⁹¹ In reversing the conviction, the court of appeals found “the jury simply was not provided evidence that Taylor inflicted an injury, was present when injury was inflicted, heard the infliction of injury, or saw manifestations of an

184. *Id.* at 578.

185. *Id.* at 577-78.

186. *Id.* at 578-79.

187. 42 N.E.3d 81 (Ind. 2015).

188. *Id.*

189. *Id.* at 82 (footnote omitted).

190. 28 N.E.3d 304 (Ind. Ct. App.), *trans. denied*, 32 N.E.3d 239 (Ind. 2015).

191. *Id.* at 305.

injury necessitating medical care.”¹⁹² Even if she “conceivably or hypothetically could have seen an injury of such severity that immediate medical care would be warranted, there is no evidence that she did so.”¹⁹³

However, the jury could reasonably infer that Taylor knowingly deprived J.N. of medical care after her return home only *if* she saw and assessed injuries warranting medical attention, which could be true *if* injuries of such severity were visible to her, which could be true *if* conditions were visually suitable, that is, *if* J.N.’s body was exposed to the eye under adequate lighting conditions.¹⁹⁴

b. Battery conviction affirmed despite mother’s use of corporal punishment.—As discussed in previous survey articles,¹⁹⁵ beginning with *Willis v. State*,¹⁹⁶ Indiana appellate courts have addressed several claims of reasonable parental discipline. Those claims requires the State to prove either “(1) the force the parent used was unreasonable or (2) the parent’s belief that such force was necessary to control her child and prevent misconduct was unreasonable.”¹⁹⁷ The supreme court adopted a non-exhaustive list of six factors from the Restatement (Second) of Torts that should be weighed.¹⁹⁸ In *Willis*, the court concluded five to seven swats on the buttocks, arm, and thigh with a belt or extension cord was not unreasonable when it left only temporary bruising and did not require medical attention.¹⁹⁹

This year, however, the court of appeals affirmed a conviction, finding the State’s evidence sufficient to refute the claim of parental privilege. Specifically, in *Smith v. State*,²⁰⁰ the court distinguished *Willis*, where the parent inflicted “only five to seven swats which we find were more controlled than those displayed here.”²⁰¹ Moreover, Smith pushed her daughter “several times to advance her beating”; when the daughter tried to fight off the beating, Smith fought back.²⁰² Thus, as the trial court found, “what might have begun as reasonable chastisement, escalated to a fight between a mother and her thirteen-year-old daughter,” during which the daughter “sustained numerous bruises on various parts of her body, including her face, shoulder, arms, and legs.”²⁰³

192. *Id.* at 309.

193. *Id.*

194. *Id.* (internal citation and footnotes omitted).

195. *See, e.g.*, Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067, 1083 (2012).

196. 888 N.E.2d 177 (Ind. 2008).

197. *Id.* at 182.

198. *Id.*

199. *Id.* at 183-84.

200. 34 N.E.3d 252, 257 (Ind. Ct. App. 2015).

201. *Id.*

202. *Id.*

203. *Id.* at 257.

c. Insufficient evidence of conspiracy.—In *Kemper v. State*,²⁰⁴ the defendant and another man arrived at a gas station in the same vehicle, exchanged text messages throughout the evening, and the man drove the defendant away from the scene when the defendant provided instructions on how to evade capture.²⁰⁵ A conspiracy requires evidence of an agreement, which the court found lacking because the text messages “indicate nothing more than that the two planned to meet,” and the defendant telling the other man to “get out of the vehicle after the two had crashed into the woods” showed “a lack of planning and, therefore, a lack of agreement.”²⁰⁶ Finally, although the other man had pleaded guilty but did not testify about the existence of an agreement, the court reiterated that a “coconspirator's plea of guilty is not admissible as substantive evidence of the defendant's guilt.”²⁰⁷

d. Perjury conviction reversed for immateriality.—Among many issues raised by former Secretary of State Charles White, the court of appeals considered whether providing his incorrect address on a marriage license application supported a conviction for perjury.²⁰⁸ Reiterating long-standing precedent that a conviction cannot be supported if the false information is “of no importance of immaterial,” the court reversed the perjury conviction because the only material residence information was the county—not the street address—and White included his correct county of residence.²⁰⁹ Others may not fare so well in the future. A separate statute criminalizes furnishing false information on a marriage license,²¹⁰ although prosecutors did not pursue that charge against White.

e. Sitting in the driver's seat of a parked car is “operating.”—In 2013, the General Assembly added the following definition for “operate” to Title 9, which includes driving offenses like operating a vehicle while intoxicated: “to navigate or otherwise be in actual physical control of a vehicle.”²¹¹ In *West v. State*,²¹² the appellate court was asked to apply the new definition for the first time. Because the defendant was found sitting in the driver's seat with the engine running, the court found sufficient evidence that she was in “actual physical control” as required by the statute.²¹³

f. Supplying a fictitious name is not identity deception.—After being stopped by police, Christopher Duncan identified himself as George Walker and later supplied the same name and a date of birth of April 6, 1967 when he was booked

204. 35 N.E.3d 306, 311 (Ind. Ct. App.), *trans. denied*, 37 N.E.3d 960 (Ind. 2015).

205. *Id.* at 310.

206. *Id.*

207. *Id.* at 311.

208. *White v. State*, 25 N.E.3d 107 (Ind. Ct. App. 2014), *trans. denied*, 34 N.E.3d 685 (Ind. 2015), *cert. denied*, 136 S. Ct. 595 (2015).

209. *Id.* at 123.

210. *Id.* (citing IND. CODE § 31-11-11-1 (2013)).

211. IND. CODE § 9-13-2-117.5 (2015).

212. 22 N.E.3d 872 (Ind. Ct. App. 2014), *trans. denied*, 26 N.E.3d 612 (Ind. 2015).

213. *Id.* at 876.

in the local jail.²¹⁴ The State offered no evidence at trial that the name and date of birth belonged to a real person.²¹⁵ Relying heavily on the supreme court's opinion in *Brown v. State*,²¹⁶ which had reversed convictions for identity deception against a man who pretended to work for a radio station and used a fake name, the court of appeals reversed Duncan's conviction because "the identity deception statute does not criminalize the use of a fictitious name."²¹⁷

g. No felony enhancement for officer's scraped knuckle.—The base resisting law enforcement offense is a Class A misdemeanor when a person "knowingly or intentionally: (1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties."²¹⁸ The offense is enhanced to a felony if the person "inflicts bodily injury on or otherwise causes bodily injury to another person."²¹⁹

In *Smith v. State*,²²⁰ an officer was injured when he fell to the ground while forcing the defendant to the ground.²²¹ In vacating the felony enhancement, the court of appeals reasoned that the defendant "did not 'inflict' an injury on the officer or 'cause' the officer's injury."²²² Rather, the defendant was "a passive part of the encounter" and "took no actions toward" the officer who scraped his knuckle and fingertip while taking the defendant to the ground.²²³

J. Sentencing Issues Under Appellate Rule 7(B)

For many years, substantive appellate sentence review under Appellate Rule 7(B) was a one-way street, with the supreme court reducing a few sentences on transfer each year.²²⁴ That rule, which implements the Indiana Constitution's power to review and revise sentences, allows appellate courts to revise a statutorily authorized sentence "if, after due consideration of the trial court's decision, the Court find that the sentence is inappropriate in light of the nature

214. *Duncan v. State*, 23 N.E.3d 805, 808 (Ind. Ct. App. 2014), *trans. denied*, 26 N.E.3d 982 (Ind. 2015).

215. *Id.* at 813.

216. 868 N.E.2d 464 (Ind. 2007).

217. *Duncan*, 23 N.E.3d at 813. Although not charged in the case or discussed in the opinion, a person who knowingly or intentionally refuses to provide his or her name, address, and date of birth, or his or her driver's license if it was in his or her possession, to a law enforcement officer who stops him or her for an infraction or ordinance violation commits a Class C misdemeanor. IND. CODE § 34-28-5-3.5 (2015).

218. IND. CODE § 35-44.1-3-1.

219. *Id.*

220. 21 N.E.3d 121 (Ind. Ct. App. 2014).

221. *Id.* at 123-24.

222. *Id.* at 125.

223. *Id.*

224. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 46 IND. L. REV. 1033, 1057 (2013); Schumm, *supra* note 195, at 1093.

of the offense and the character of the offender.”²²⁵ As summarized in recent surveys, the Indiana Supreme Court took a different course in 2012 in issuing opinions reinstating the trial court’s sentence after vacating the court of appeals-ordered reductions; the court also became considerably less likely to grant transfer in any cases for purposes of reducing a sentence.²²⁶

As summarized in last year’s survey, the justices granted relief to two juvenile co-defendants who were convicted and sentenced as adults for two counts of murder and one count of robbery.²²⁷ The supreme court did not grant transfer to vacate any reduced sentences, which is not surprising when the court of appeals has recently been reducing only one or two sentences each year and generally under circumstances under which even the Indiana Attorney General would not seek transfer. For example, as summarized in last year’s survey, in March of 2014, the court of appeals reduced a sentence of 270 years for multiple sex crimes to 165 years—still surely a life sentence—after including several pages of thoughtful analysis and precedent in *Corbally v. State*.²²⁸ Transfer was not sought in the case, which easily satisfied the State’s expectation of a “compelling analysis” mentioned during an Indiana Supreme Court oral argument discussed in the 2013 survey.²²⁹

Although reductions remain rare—and still considerably less common than a few years ago—criminal defendants seeking a reduction of their sentence were greeted with more success this year than in the past two, including one win in the supreme court and several at the court of appeals.

1. *Indiana Supreme Court*.—In *Park v. State*,²³⁰ the supreme court reviewed a forty-year sentence (twenty-six years in the Department of Correction, four years in Tippecanoe Community Corrections, and ten years suspended to probation) imposed upon a defendant convicted of dealing methamphetamine, a Class A felony, who had a criminal history and history of substance abuse.²³¹ The three-justice majority concluded in its “collective judgment” that the sentence was excessive and remanded the case to the trial court for a “more appropriate sentence given the nature of the offense and character of the defendant”: thirty years (twenty in the Department of Correction, two on Community Corrections,

225. IND. R. APP. P. 7(B). In *Marcus v. State*, the court of appeals struck a brief and remanded for appointment of “competent counsel,” because “[a]pparently oblivious to the direction of this Court and a decade of legal progression, Counsel yet again advocates for a review of his client’s sentence under the manifestly unreasonable standard. He wholly fails to present a cogent argument with citation to relevant authority.” 27 N.E.3d 1134 (Ind. Ct. App.), *trans. denied*, 42 N.E.3d 520 (Ind. 2015).

226. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 47 IND. L. REV. 1043, 1055-57 (2014).

227. Schumm, *supra* note 1, at 1265.

228. 5 N.E.3d 463 (Ind. Ct. App. 2014).

229. Schumm, *supra* note 224, at 1056.

230. 22 N.E.3d 552 (Ind. 2014).

231. *Id.* at 554-55.

and eight suspended to probation).²³²

Justice Dickson, joined by Justice Massa, dissented, concluding the case was not “sufficiently rare or exceptional to warrant appellate intrusion into the trial court’s sentencing decision.”²³³ The dissent emphasized the “serious nature of the offense”—manufacturing meth “in a residential area where families with several young children lived”—and the poor character of the defendant, who committed the offense while on probation and whose criminal history was “riddled with such probation violations and revocations.”²³⁴ Finally, noting the “relatively little modification” of executed time from thirty to twenty-two years, Justice Dickson observed that Indiana’s appellate “sentencing review and revision capacity and authority does not warrant such minor adjustments.”²³⁵

2. *Court of Appeals.*—As explained in recent survey articles, the Indiana Supreme Court’s decreased receptiveness to reducing sentences has been greeted by a similar trend in the Court of Appeals. Instead of reducing several sentences each year (twenty-six in one survey period, sixteen in another) at the beginning of this decade, one or two reductions were more common in recent years. This survey period, nine sentences were reduced, which was just over 3% of the 260 requests from criminal defendants. The reductions were more common after a trial (6/128) than after a guilty plea (3/131).²³⁶

a. *Published opinions.*—The reduction in *Norris v. State*²³⁷ was primarily the result of the nature of his offense. As to the character of the offender, the defendant’s criminal history included “four convictions for possession of marijuana and [he] was on probation for two of those convictions when he committed this offense,” but he had “not spent a lot of time in the DOC. Many of his previous sentences were suspended to probation. He has successfully completed probation in some cases but not others.”²³⁸

But more remarkable was “the relatively innocuous nature of this offense.”²³⁹ Specifically, “Norris sold ten hydrocodone tablets for \$60 to a confidential informant during a controlled buy that was closely monitored by the police.”²⁴⁰ In light of the small amount of drugs, the court reduced his maximum twenty-year executed sentence to twelve years, “with eight years executed in the DOC

232. *Id.* at 555-56.

233. *Id.* at 556.

234. *Id.* at 557-58.

235. *Id.* at 557.

236. The most recent year’s data came from a Westlaw search of Indiana Court of Appeals’ cases and is on file with the author. The author thanks Josh Woodward, IU-McKinney Class of 2017, for his invaluable research assistance. The supreme court upheld the enforceability of plea provisions that waive a right to challenge a sentence on appeal in *Creech v. State*, 887 N.E.2d 73 (Ind. 2008). Although those provisions are now standard in many counties, they appear to be never or rarely used in other counties or before certain judges.

237. 27 N.E.3d 333 (Ind. Ct. App. 2015).

238. *Id.* at 336.

239. *Id.*

240. *Id.*

and four years suspended to supervised probation.”²⁴¹

Hunt v. State,²⁴² involved an egregious non-homicide crime committed by a defendant with a lengthy criminal history. The defendant broke into the residence of an elderly couple, knowing they were at home at the time, striking the man on the head, mouth, and arm with a tire iron and confined them both in their living room.²⁴³ “He had previously been convicted of burglary, residential burglary, and battery”; “failed to appear for his criminal proceedings eight different times”; and “continued to blame his father for involving him in the crimes.”²⁴⁴ Nevertheless, after reviewing sentences cases with similar facts and convictions, the court found the 120-year sentence an “outlier” in need of revision.²⁴⁵ Reiterating that appellate courts “need not ensure that all sentences for similar acts and defendants are precisely the same,” it reduced the sentence to 100 years.²⁴⁶

In *Carter v. State*,²⁴⁷ a defendant who was in his early twenties at the time of the offenses, had maintained steady employment, and had no criminal history sought a reduction of his ninety-eight-year sentence for multiple child molesting offenses against the same victim.²⁴⁸ Although the defendant held a position of trust as the victim’s stepfather and the offenses were “undeniably serious,” the court of appeals concluded that the ninety-eight-year sentence was “out of the range of appropriate results,” reducing it to sixty-eight years.²⁴⁹

b. Unpublished opinions.—Although a reduction of a sentence is a relatively rare event, six of the opinions reducing sentences were memorandum or unpublished opinions. Although these cannot be cited to Indiana courts as precedent, their reasoning provides useful insight for practitioners and trial judges into circumstances under which a sentence might be found inappropriate. They are briefly summarized below.

In *Carter v. State*,²⁵⁰ the court reduced a ninety-five-year maximum sentence to sixty-five years, observing that the defendant’s “prior convictions consisted almost exclusively of Class C and Class D felonies” and that his aggregate sentence included “the imposition of a thirty-year habitual offender enhancement.”²⁵¹

The twenty-two-year-old defendant with no criminal history in *Reyes-Valdes*

241. *Id.*

242. 43 N.E.3d 588 (Ind. Ct. App.), *trans. denied*, 43 N.E.3d 244 (Ind. 2015).

243. *Id.* at 589.

244. *Id.* at 591.

245. *Id.* at 591-92.

246. *Id.* at 592.

247. 31 N.E.3d 17 (Ind. Ct. App. 2015), *reh’g denied*, (June 10, 2015), *trans. denied*, 37 N.E.3d 493 (Ind. 2015).

248. *Id.* at 32-33.

249. *Id.* at 33.

250. No. 02A03-1403-CR-108, 2015 WL 1432979 (Ind. Ct. App. Mar. 30, 2015), *trans. denied*, 34 N.E.3d 684 (Ind. 2015).

251. *Id.* at *11.

*v. State*²⁵² was found not to be beyond rehabilitation. Despite “the extraordinarily large amount of cocaine involved,” which suggested the crime “was not an ordinary drug transaction,” the maximum sentence of fifty years for dealing cocaine was reduced to forty.²⁵³

Reducing a sentence for child molesting to the minimum twenty years for a Class A felony in *Singleton v. State*,²⁵⁴ the court of appeals remarked that the trial court’s thirty-eight year sentence was “excess of that sought by the State and that recommended by the probation department.”²⁵⁵ The court was also concerned that the defendant “may have been penalized for exercising his Constitutional right to a trial by jury” because the victim’s stepfather “was permitted to testify at some length that his family had suffered because Singleton had withdrawn from a plea bargain.”²⁵⁶

In reducing another sentence for child molesting, the court of appeals in *Lacroix v. State*²⁵⁷ acknowledged the defendant’s “position of trust was sufficiently aggravating to justify an enhanced sentence,” but that his “lack of significant criminal history and his steady employment together with the fact that these acts were all identical and committed against one victim” warranted a concurrent—instead of a consecutive terms, of forty-year terms with five of those years suspended to probation.²⁵⁸

In reducing a sentence a man’s habitual-enhanced sentenced for dissemination of matter harmful to minors (for watching pornography on a computer in front of young children) by a year and a half, the two-judge majority in *Grubb v. State*²⁵⁹ reiterated our supreme court’s observation that “placing an instance of sexual misconduct along a spectrum of heinous to horrific in no way diminishes the seriousness of any particular offense or the suffering of any particular victim,” but instead “is a necessary part of maintaining the proportionality between sentences and offenses, and of treating like cases alike.”²⁶⁰

In ordering concurrent terms for Class A felony child molesting in *Nicol v. State*,²⁶¹ the court noted that the defendant was in his early fifties at the time of the offenses, “had been steadily and gainfully employed for the fifteen years

252. No. 15A01-1406-CR-237, 2015 WL 4205240 (Ind. Ct. App. July 13, 2015), *trans. denied*, 40 N.E.3d 856 (Ind. 2015).

253. *Id.* at *7.

254. No. 32A01-1407-CR-323, 2015 WL 873250 (Ind. Ct. App. Feb. 27, 2015), *trans. denied*, 37 N.E.3d 960 (Ind. 2015).

255. *Id.* at *3.

256. *Id.*

257. No. 35A05-1404-CR-196, 2014 WL 6882287 (Ind. Ct. App. Dec. 8, 2014), *trans. denied*, 26 N.E.3d 614 (Ind. 2015).

258. *Id.* at *5.

259. No. 53A01-1404-CR-184, 2014 WL 6751245 (Ind. Ct. App. Dec. 1, 2014).

260. *Id.* (quoting *Hamilton v. State*, 955 N.E.2d 723, 728 (Ind. 2011)).

261. No. 64A03-1311-CR-472, 2014 WL 6601979 (Ind. Ct. App. Nov. 20, 2014).

prior to his arrest,” and had no prior criminal history.²⁶² Considering the reduced life expectancy of most prisoners, the forty-four year sentence (reduced from eighty-four years) may well be a life sentence.²⁶³

In short, last year’s survey noted “a trend quite different from the first ten or twelve years of this century,” namely that, with one exception, each case involved juvenile or young defendants.²⁶⁴ The reductions this year involved a wider variety of circumstances related both to the nature of the offense and character of the offender.

K. Restitution

As in earlier years, defendants continued to succeed in challenging restitution awards on a variety of grounds, two of which are discussed below.

First, in *Hill v. State*,²⁶⁵ a department store employee was convicted of two counts of theft and ordered to pay more than \$2500 in restitution.²⁶⁶ The court of appeals vacated the restitution order because the trial court had included losses from theft allegations unrelated to the convictions in its restitution award.²⁶⁷ Restitution must be based on the actual loss to the store, but the employee was detained by loss prevention officers and the items were confiscated from her at that time.²⁶⁸

Second, in *Akins v. State*,²⁶⁹ the defendant pleaded guilty to two offenses involving different police officers: a Class D felony battery offense (resulting in injury) to Officer Watson and a misdemeanor (no injury) resisting offense involving Officer Keyes.²⁷⁰ The trial court ordered the Defendant to pay nearly \$28,000 in restitution after the State submitted “medical records and bills for Officer Antwon Keyes, which indicated that he had experienced a leg injury on December 15, 2013, while struggling with an unidentified ‘suspect’ or ‘person.’”²⁷¹ In reversing the award and remanding for a hearing at which the defendant would be “given an opportunity to test the State’s evidence and submit his own,” the court of appeals reasoned there was no evidence the defendant caused Officer Keyes’ injury when the defendant merely pleaded guilty to the misdemeanor offense involving Officer Keyes and the medical records did not identify the “person” or “suspect” who caused Officer Keyes’ injuries.²⁷²

262. *Id.* at *8.

263. *Id.*

264. Schumm, *supra* note 1, at 1266.

265. 25 N.E.3d 1280 (Ind. Ct. App. 2015).

266. *Id.* at 1281.

267. *Id.* at 1283.

268. *Id.*

269. 39 N.E.3d 410 (Ind. Ct. App. 2015).

270. *Id.* at 411.

271. *Id.* at 412.

272. *Id.* at 413.