UTAH EVIDENCE CASES
September 2016 to September 2017

Hon. Derek P. Pullan
Fourth District Court
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1. ARTICLE 1. GENERAL PROVISIONS

a. Rule 103. Rulings on evidence

i. *State v. Cruz*, 2016 UT App 234. (Eighth Dist., J. McClellan). Defendant was convicted on two counts of sodomy on a child. At trial, Defendant told the court he did not object to the reliability of the CJC interview under Rule 15.5 and did not object to the video being admitted into evidence. Trial court sent the CJC video back to the jury room during deliberations. HELD: Affirmed. Trial court erred by allowing "testimonial" exhibits to be taken into the jury room. Defendant invited any error in admitting the CJC video.

1. "A party who withdraws an objection in the face of the court's insistence that the objection lacks merit and thereafter agrees with the court's conclusion, does not invite any resulting error."
2. BUT: "A party who, without having objected to a proposed course of action, affirmatively represents that [he] has no objection to it, invites any resulting error."

ii. *State v. Courtney*, 2017 UT App 172 (Second Dist, J. DiReda). Defendant convicted of possession with intent to distribute. Trial court admitted a prior conviction for drug distribution and certain prior bad acts related to drug use with his girlfriend. Before trial, Defendant attempted to influence the girlfriend's testimony. At trial, Defendant made damaging admissions on the witness stand. HELD: Sustained. Even if admission of the evidence was erroneous, there was no reasonable likelihood that the error affected the outcome of the proceedings.

b. Rule 106. Remainder of related writings or recorded statements

i. *State v. Johnson*, 2016 UT App 223. (Third Dist., J. Bernards-Goodman). Defendant broke into victim's home in a drunken rage. Threatened her and took her cellphone. At trial, the court admitted victim's written statement to police over Defendant's hearsay objection, but then reversed

itself after the statement was published to the jury. Defense counsel examined victim about various aspects of the statement. Court received the rest of the statement under Rule 106. HELD: Affirmed.

2. ARTICLE 2. JUDICIAL NOTICE

3. ARTICLE 3. PRESUMPTIONS

4. ARTICLE 4. RELEVANCE AND ITS LIMITS

a. Rules 401-402. Test for Relevant Evidence

i. *State v. Fairbourn,* 2017 UT App 158 (3rd Dist., J. Trease). Fairbourn was shot three times after he produced a knife and lunged at a police officer. At trial, the prosecutor elicited testimony about (1) what was going through the officer's mind during the encounter with Defendant; and (2) the "21-foot rule" used by officer to determine when they are at most risk. Defendant objected to the officer's state of mind as improperly appealing to the sympathies of the jury (officer testified that he had a family who relied on him and he wanted to go home to). He objected to the 21-foot rule as irrelevant. On cross examination of the Defendant, the prosecutor asked the Defendant about testimony of state witnesses that conflicted with Defendant's testimony. On appeal, Defendant claims that the prosecutor improperly asked him to comment on the veracity of other witnesses. HELD: Affirmed.

1. Whether the officer had a family appealed to sympathies and inadmissible under Rule 403—but harmless.
2. "Evidence that has even the slightest probative value is relevant under the rules of evidence." The 21-foot rule was relevant because it lent *credibility* to the officer's version of events, explaining why he acted in the way he did.

ii. *State v. Thompson,* 2017 UT App 183 (Third Dist., J. Hogan). Defendant was convicted of murder, two counts of aggravated assault, and driving under the influence. Defendant drove his pickup truck into an intersection killing one driver and impacting seven cars. At trial, the State introduced evidence of text messages between Defendant and a woman (not his wife). The text messages were sexual in nature and sent hours before the crash. Defendant's wife confronted him with the text messages and this argument was one of the reasons Defendant drove away from the home. On appeal,

Defendant argues that the text messages were not relevant and were more prejudicial than probative. HELD: *Affirmed.* Text messages were relevant to Defendant's ability to act knowingly and whether he suffered from extreme emotional distress or anxiety.

b. Rule 403. Excluding Relevant Evidence

i. *State v. Johnson,* 2016 UT App 223. (Third Dist., J. Bernards-Goodman). Defendant broke into victim's home in a drunken rage. Threatened her and took her cellphone. At trial, State offered recording of Defendant made a week after the incident in which he uses coarse language and says "arrest me for breaking and entering." He was convicted of burglary. Affirmed: Recording was relevant, probative and not unfairly prejudicial. Core concern is not the language of the recording but what it may reveal about Defendant's character.

ii. *State v. Martin,* 2017 UT 63 (Fourth Dist., J. Howard). Defendant was convicted of sexually abusing his sisters-in-law, AL and NL. The defense strategy was to undermine credibility of AL and NL by identifying inconsistencies and by developing evidence that the children had been coached by their adoptive mother, Stephanie. To rebut evidence of inconsistencies, the State called a forensic interviewer from the CJC who testified about (1) why child sex abuse victims make incomplete initial disclosures and disclose details over time; and (2) regarding common behaviors of children who have been abused. As to Stephanie, the defense sought to put on evidence that (1) she had a reputation for untruthfulness; (2) she had induced some of her other children to make false accusations of sexual abuse; and (3) she herself had falsely accused other family members of sexual misconduct. Trial court admitted (1) and (2) but excluded (3). HELD: Affirmed.

1. DPP NOTE: Supreme Court's affirmance on Rule 403 grounds—avoiding the risk of a trial within a trial—is unfounded. This evidence if offered under Rule 608(b)—to challenge the veracity of Stephanie as a testifying witness—does not create this risk because the examiner must live with the answer. No extrinsic evidence is admissible. But if offered under Rule 404(b) under doctrine of chances theory, then extrinsic evidence about whether these events did or did not occur may be admissible.

c. Rule 404. Character Evidence; Crimes or Other Acts

i. *State v. Thornton,* 2017 UT 9. Defendant was convicted of multiple counts of rape, sodomy, and sexual abuse of 12 year old child. He rented a room from the child's mother. Defendant provided mother cocaine for free, and then later encouraged her to engage in prostitution to pay for the drugs. Mother engaged in acts of prostitution in the home and this was known to the child. Child believed she was pregnant with Defendant's child and at last reported to Mother. Child was engaging in sexual activity with a 14 year old friend at the same time. At trial she testified about the sensations of pain associated with intercourse. District court (1) overruled 404(a) objection to Defendant's prior bad acts (drug distribution and encouraging prostitution); and (2) excluded evidence of child's other sexual behavior under Rule 412 finding no exception applied. Court of appeals reversed on the first issue because district court did not engage in separate "scrupulous examination" of the bad acts, and sustained on the 412 question. HELD: Reversed.

1. Utah Supreme Court abandons "scrupulous examination" requirement. Rules determine what evidence comes in and stays out. They do not impose certain procedural methods analysis.
2. Rule 412(b)(1)—exception applies only to forensic physical evidence, not to the child's belief about pregnancy.
3. Rule 412(b)(3)—Sixth Amendment protects the right of Defendant to present evidence "essential to the defense." Rules that interfere with this right are unconstitutional only when they (1) "infringe on a weighty interest of the accused; (2) are arbitrary; or (3) disproportionate to the purposes they are designed to serve.

ii. *State v. MacDonald,* 2017 UT App 124. Defendant is charged with child abuse homicide. Alleged victim is his girlfriend's son. The couple lived together over 6 week period. The State moved to admit evidence of prior bad acts including: (1) Defendant yelled at the child and the other children; (2) Defendant called the child a "whiner"; (3) Defendant was jealous of the child; (4) Defendant flipped off the child; (5) Defendant threw the child onto a chair and squeezed the cheeks of the child. Trial court: (1) excluded yelling on the ground that it was inadmissible character evidence offered to prove Defendant was an inpatient father; (2) excluded "whiner" because probative value was substantially outweighed by inadmissible character inference; (3) excluded jealously because a "feeling" is not a prior bad act, but rather unhelpful lay opinion—did not

manifest deep-seeded envy that motivated intent to kill; (4) excluded the "the bird" improper character evidence; and (5) excluded the prior acts committed against the child as irrelevant because they were not of the same character as the mechanism of injury. Held: Reversed on the last one remanded for Rule 403 analysis.

iii. *State v. Oostendorp,* 2017 UT App 85 (First District, Cannell, J.). Defendant was convicted of forcible sodomy. Defendant met victim online and a shockingly violent relationship—both physically and sexually—ensued. The trial turned on consent. The state portrayed the victim as a helpless and demoralized target of abuse. Defendant claimed a consensual submissive/dominant sexual relationship and at worst mistake as to consent. The prosecutor introduced (1) text messages including Defendant "name-calling" victim; (2) evidence Defendant viewed the victim as a sex object; (3) evidence Defendant used a weapon to intimidate victim and associated death threats; and (4) a threat to stab the victim the day after the charged events. This is really two categories of evidence—demeaning treatment and threats of violence. On appeal, Defendant claimed error under Rule 404(b). HELD. Sustained. Evidence was admissible for non-character purpose of proving nature of the party's relationship and disproving Defendant's claim of consent. NOTE: Voros, J., concurring—"the time has come to make reference to the Shickles factors reversible error."

iv. *State v. Montoya,* 2017 UT App 110 (3rd Dist., J. Himonas). Defendant convicted of murder for shooting his ex's boyfriend. Boyfriend had gang ties and a long history of violence. Trial court excluded evidence of an incident that occurred six months before the shooting. Boyfriend had threatened Montoya's cousin at her apartment with a gun over an issue related to the ex. On appeal, court of appeals assumed it was error to exclude the evidence. HELD: Affirmed. No prejudice.
    1. DPP NOTE: The apartment incident (if known to the Defendant) would be admissible under Rule 404(b) to show the Defendant's intent (self-defense).
    2. DPP NOTE: URE 103 incorporates the "prejudice standard." You cannot claim error unless exclusion of evidence affected a substantial right.

v. *State v. Trujillo,* 2017 UT App 116 (Third Dist., J. Trease). Defendant was arrested for aggravated assault. After police told him not to contact

the neighbor (victims), Defendant said: "If I'm being charged with aggravated assault, then my boys will be paying [the neighbors] a visit and its [the officer's] fault." He also said, "Do you expect me to go to jail and nothing happen?" Trial court admitted gang expert testimony about prison gangs, gang culture, and Defendant's role as a gang leader. On appeal, Defendant argues the gang evidence was inadmissible character evidence under Rule 404(b). HELD: Affirmed.

1. Gang evidence was admissible to show Defendant made a threat. "My boys" does not refer to boy scouts.
2. Probative value was not substantially outweighed by danger of unfair prejudice. Good summary of gang evidence cases. Note: Limiting instruction given.

vi. *State v. Ringstad*, 2017 UT App 128 (First Dist, J. Wilmore). Defendant charged with rape of a child. He had married into the family and was preparing to go to the temple. At trial, the parties stipulated to the introduction of testimony from the child's sister that Defendant had violently raped her over a two year period. Defendant challenged admission of this testimony on appeal claiming ineffective assistance of counsel and plain error. Held: Sustained. Legitimate trial strategy to admit outlandish 404(b) acts to undermine credibility of the State's case. If this was error, defendant invited it.

vii. *State v. Martin*, 2017 UT 63 (Fourth Dist., J. Howard). Defendant was convicted of sexually abusing his sisters-in-law, AL and NL. The defense strategy was to undermine credibility of AL and NL by identifying inconsistencies and by developing evidence that the children had been coached by their adoptive mother, Stephanie. To rebut evidence of inconsistencies, the State called a forensic interviewer from the CJC who testified about (1) why child sex abuse victims make incomplete initial disclosures and disclose details over time; and (2) regarding common behaviors of children who have been abused. As to Stephanie, the defense put sought to put on evidence that (1) she had a reputation for untruthfulness; (2) she had induced some of her other children to make false accusations of sexual abuse; and (3) she herself had falsely accused other family members of sexual misconduct. Trial court admitted (1) and (2) but excluded (3). HELD: Affirmed.

1. Supreme Court states that defendant's theory to admit the prior false accusations is an invocation of the doctrine of chances—"as

the number of accusations of sexual misconduct increases, the probability of coincidence decreases, and the likelihood that the witness has levied a false accusation increases."

viii. *State v. Vu*, 2017 UT App 179 (Third Dist., J. Hogan). Defendant was convicted of possession with intent to distribute. He was arrested "high" with 31 grams of meth next to his bed. Before the arrest, police had supervised five controlled buys from Defendant using a confidential informant. Informant testified at trial regarding these buys. On appeal, Defendant challenged the admission of the prior buys under Rule 404. HELD: Affirmed. Prior buys were admissible for the non-character purpose of proving intent. DPP NOTE: Isn't this character evidence disguised in "non-character purpose" clothing? Because Defendant intended to distribute drugs on five other occasions, he is more likely to have possessed the 31 grams of meth with the intent to distribute. Beware of propensity reasoning!

d. Rule 412

5. ARTICLE 5. PRIVILEGES

6. ARTICLE 6. WITNESSES

a. Rule 602. Need for Personal Knowledge

i. *State v. Christensen*, 2016 UT App 225. Defendant convicted of object rape for having sex with victim who had taken Ambien to hallucinate. While on Ambien before the rape, she hallucinated non-existent people entering the room. She woke from unconsciousness with pain in her rectum. At trial, State offered expert testimony that victim exhibited symptoms consistent with PTSD, a condition caused by serious trauma. Defendant offered own rebuttal expert. On appeal, Defendant alleged plain error and ineffective assistance. Affirmed. HELD: Competency is a "low bar" requiring personal knowledge—"opportunity" and "capacity to perceive events in question. Memory that is less than complete does not make a person incompetent.

ii. *State v. Oostendorp*, 2017 UT App 85. Defendant convicted of forcible sodomy. Defendant moved to exclude victim's testimony on the ground that she was not competent. He pointed to psychological report

demonstrating that victim had gaps in her memory related to the charged events. Trial court admitted the testimony. Defendant appealed. HELD: Affirmed.

1. Rule 602 requires personal knowledge, which means "the opportunity and the capacity to perceive the events in question."
2. Competency requires "the ability to recall events."
3. Minor gaps in memory go to credibility not competency.

iii. *State v. Cruz,* 2016 UT App 234. CJC Interviews are "testimony" and should not have been taken into the jury room as exhibits. Same is true for transcripts of testimony. Creates unfair emphasis.

iv. *Mowers v. Simpson,* 2017 UT App 23. Trial court excluded Mower's affidavit filed in opposition to Defendants' motion for summary judgment because (1) the affidavit contradicted Mower's deposition testimony; and (2) the affidavit contained conclusory and speculative statements. Mower had given deposition testimony that a person had a power of attorney before Mower went to prison in California. Her affidavit contradicted this. The affidavit denied facts or stated they "had not been proved to her satisfaction." HELD: Affirmed.

1. "As a matter of general evidence law, a deposition is generally a more reliable means of ascertaining the truth than an affidavit, since a deponent is subject to cross-examination and an affiant is not."
2. Statements of "belief" or denial lack foundation and do not create material issues of fact.

b. Rule 608. A Witness's Character for Truthfulness or Untruthfulness

i. *State v. Isaacson,* 2017 UT App. 1. Defendant convicted of possessing a concealed gun without a permit. He attempted to call character witnesses to testify about his own truthfulness and about his feelings and propensities related to the concealed weapons law. Defendant testified that he had to economize to buy his gun and to take the classes and could not afford the fee for the permit. On cross, the prosecutor tested these claims of poverty ("You go to Jazz games. Do you buy food there."). Trial court excluded the character witnesses. HELD: Evidence of character for truthfulness is admissible only after the Defendant's character for truthfulness is attacked. Never happened here. (Difference:

"You are a liar" vs. "You are lying right now."). Note: Concurrence. It's all irrelevant anyway.

ii. *State v. Yawlowski,* 2017 UT App 177 (Third Dist., J. Reese). Defendant convicted of burglary and lewdness for breaking into ex-girlfriend's house, threatening her, and urinating on the walls. At trial, the Court allowed defense counsel to cross examine the girlfriend about using someone else's identification to visit Defendant in jail, but excluded evidence of a plea in abeyance for theft by deception, and an arrest for theft by deception. HELD: Affirmed.
    1. Rule 608(b) allows cross-examination about specific instances of conduct probative of character for truthfulness.
    2. Cross examination is not unrestrained—no party is entitled to inquire into these acts. Trial court has broad discretion.

7. ARTICLE 7. EXPERT TESTIMONY

a. Rule 701. Opinion Testimony by Lay Witnesses

i. *State v. Yawlowski,* 2017 UT App 177 (Third Dist., J. Reese). Defendant convicted of burglary and lewdness for breaking into ex-girlfriend's house, threatening her, and urinating on the walls. At trial, State called a forensic technician responsible for collecting the evidence. He testified that he compared the footprints in the snow near the home with the tread of Defendant's shoe and found them to be similar and "identical." On appeal, Defendant argued that the expert testimony was inadmissible under Rule 702. HELD: Affirmed. The testimony was lay opinion testimony under Rule 701. It was rationally based on the witness's perception, helpful to a clear understanding of his testimony, and not based on scientific, technical or other specialized knowledge.

b. Rule 702. Testimony by Experts

i. *State v. Christensen,* 2016 UT App 225. Defendant convicted of object rape for having sex with victim who had taken Ambien to hallucinate. While on Ambien before the rape, she hallucinated non-existent people entering the room. She woke from unconsciousness with pain in her rectum. At trial, State called a clinical psychologist who testified about the symptoms of PTSD and that victim exhibited some behaviors

consistent with those symptoms. The psychologist did not testify that victim suffered from PTSD or that she had been sexually assaulted. HELD: Affirmed. "Manifestation of certain behavioral symptoms and expert testimony that such symptoms are consistent with sexual abuse" was admissible under Rule 702 and had probative value as circumstantial evidence. Note: Expert did not speculate that victim had been raped or sexually abused.

ii. *Conoco-Phillips v. UDOT*, 2017 UT App 68. Conoco-Phillips sued UDOT because UDOT's contractor shot wick drains into the road, compromising the protective coating on Conoco's pipeline buried 28 feet underground. Conoco moved to exclude parts of the testimony of UDOT's expert witness. That witness had used DCVG testing to detect "holidays" or voids in the pipeline protective coating and found none. He further testified that (1) that a wick drain would damage the pipeline itself if contact was made; and (2) the protective coating could not withstand a strike from a wick drain. Conoco objected to these two opinions. HELD: The work experience of the expert did not lay foundation for his opinions. He knew nothing about wick drain installation or the effect of wick drains striking pipelines. (NOTE: A lay witness gave an unsolicited expert opinion that DCVG was fine at 3-4 feet but a crap shoot at 30 feet. Conoco objected, but ultimately agreed to no curative instruction if UDOT did not use the evidence in closing. Waiver: Invited Error).

iii. *State v. Martin*, 2017 UT 63 (Fourth Dist., J. Howard). Defendant was convicted of sexually abusing his sisters-in-law, AL and NL. The defense strategy was to undermine credibility of AL and NL by identifying inconsistencies and by developing evidence that the children had been coached by their adoptive mother, Stephanie. To rebut evidence of inconsistencies, the State called a forensic interviewer from the CJC who testified about (1) why child sex abuse victims make incomplete initial disclosures and disclose details over time; and (2) regarding common behaviors of children who have been abused. As to Stephanie, the defense put sought to put on evidence that (1) she had a reputation for untruthfulness; (2) she had induced some of her other children to make false accusations of sexual abuse; and (3) she herself had falsely accused other family members of sexual misconduct. Trial court admitted (1) and (2) but excluded (3). HELD: Affirmed.

1. Court notes powerful arguments that evidence about typical behaviors of sexual abuse victims and the manner in which they make disclosures should be excluded.
2. Some courts categorically exclude this evidence as unreliable, outside the scope of any credible scientific or therapeutic method, and an improperly influencing the jury's assessment of credibility.
3. District courts encouraged to "continue to carefully assess all scientific and technical evidence and argument put forth in deciding whether to admit this kind of evidence."

c. Rule 703. Bases of an Expert's Opinion Testimony

d. Rule 704. Opinion on Ultimate Issue

i. *State v. Rust*, 2017 UT App 176 (Third Dist., J. Parker). Defendant was convicted of money laundering, conspiracy to distribute drugs, and two counts of filing a false tax return. At trial, the girlfriend of one of Defendant's associates testified that she and her boyfriend purchased drugs from Defendant for resale. At trial, the State called an expert witness who testified that using drug proceeds to fund a casino gambling account, to buy a car, to fund a wire transfer, to get a prepaid debit care, or open a credit union account all constituted "money laundering." On appeal, Rust challenges the expert's legal conclusion about what constitutes money laundering. HELD: Affirmed. Court assumes without deciding that admission of the expert testimony was error. Defendant cannot show that the alleged error was prejudicial.
    1. Rule 704 does not ban expert testimony that embraces an ultimate issue, but "opinions that tell the jury what result to reach or give legal conclusions" are "impermissible."
    2. Expert testimony that hypothetical facts matching conduct of which Defendant is accused meet the requirements of a criminal statute is not admissible under Rule 704.

e. Rule 705. Disclosing the Facts or Data Underlying Expert Opinion

8. ARTICLE 8. HEARSAY

a. Rule 801. Definitions; Exclusions from Hearsay

i. *State v. Scott*, 2017 UT App 74. Defendant was convicted of murder. Trial court excluded evidence that the victim had threatened him prior to his shooting her, and that he believed the threat was serious when he saw her gun missing from safe. Trial court excluded evidence of the threat as hearsay. HELD: Reversed. The threat is not hearsay. They do not make assertions capable of being proved true or false—they are a kind of verbal act. The threat was offered not for the truth of the matter asserted but for the effect on the hearer.

ii. *State v. Nay*, 2017 UT App 3. Hanson and Nay were convicted at a joint trial for producing marijuana in their home. Nay challenged joinder on appeal. At trial, Hanson testified that she could not remember her confession to police—which implicated Nay, herself, and her brother. Prosecutor's confronted Hanson with her prior inconsistent confession. Nay challenged joinder on appeal. He argued that in a separate trial, Hanson would not have been available for cross due to her lack of memory. HELD: Affirmed. Lack of memory would not have made Hanson unavailable. Her prior inconsistent statement was not hearsay under Rule 801(d)(1)(A). *Bruton* is not a problem because Hanson testified and was available for cross.

iii. *State v. Reyos*, 2017 UT App 132 (3rd District, Reese, J.). Defendant convicted of aggravated murder. He executed a friend who abandoned him in a gang fight—and had "set him up." John (an acquaintance of Defendant) gave a written and recorded statement to the police stating that Defendant had admitted killing the victim. At trial, John claimed he had no memory of the statement—even after listening to it. He agreed that it sounded like his voice and that the signature affirming the truth of the statement looked like his. State then introduced the recorded statement to the jury as a non-hearsay prior statement under Rule 801(d)(1)(A). On appeal, Defendant claimed that admission of the statement violated his confrontation rights under the Sixth Amendment. Held: Sustained.

1. Confrontation Clause:
    a. Testimonial Statements (unavailability and a prior opportunity to cross).
    b. Unavailable = Not there to testify.

c. Requires opportunity for effective cross examine, not cross examination that is effective in every way I want.

2. Unavailability under Rule 804 = Broader concept.
    a. I can appear and testify . . . but have no memory.

b. Rule 802. The Rule Against Hearsay

c. Rule 803. Exceptions (Available Witness)

i. 803(2). Excited Utterance.

1. *State v. Fahina*, 2007 UT App 111. Defendant was charged with sexual assault, aggravated kidnapping, forcible sodomy and aggravated assault. Defendant lived with victim in an extended stay motel. She claimed that Defendant forced her to perform oral sex at knife point, prevented her leaving the room, and threw her to the ground. Defendant claimed that he had rebuffed her profession of love and victim fabricated the whole story—including her "stress of excitement" that the officer observed. Officer testified that victim was crying and distraught when he arrived. Officer then rehearsed victim's brief narrative about what had happened. HELD: Affirmed.
    a. Court of appeals assumed error in admitting the excited utterance because it was cumulative of victim's trial testimony.
    b. No prejudice—because it was cumulative of victim's trial testimony. It did not "expand the narrative" of victim.

d. Rule 804. Exceptions (Unavailable Witness)

i. Rule 804(b)(1). Former Testimony.

1. *State v. Mackin*, 2016 UT 47. Defendant and ex-girlfriend fought in car. Defendant had taken the girlfriend's purse in the belief that it contained evidence she was going to steal a motor home. Trial court admitted preliminary hearing testimony of girlfriend at trial. Process server had undertaken reasonable efforts to find girlfriend without success. HELD: Sustained. Girlfriend was unavailable and Defendant had a prior opportunity to cross-examine her.

2. *State v. Goins*, 2017 UT 61. (Third Dist., J. Boyden). Defendant was convicted of aggravated assault and threatening with a weapon in a fight or quarrel. Defendant believed Estrada had stolen his cell phone and decided to shake down Omar to find out where Estrada had gone (ultimately biting of Omar's ear lobe in the process). At trial, court admitted the preliminary hearing testimony of Estrada who was nowhere to be found. Court of appeals affirmed. HELD: Reversed. Counsel's motivation to develop testimony at preliminary hearing is not always the same as at trial. Trial judge must examine the preliminary hearing transcript to determine if counsel had a similar motive.

e. Rule 805. Hearsay Within Hearsay

f. Rule 806. Attacking and Supporting Declarant's Credibility

g. Rule 807. Residual Exception

9. <u>ARTICLE 9. AUTHENTICATION AND IDENTIFICATION</u>

10. <u>ARTICLE 10. CONTENT OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS</u>

11. <u>ARTICLE 11. MISCELLANEOUS RULES</u>

a. Rule 1101. Applicability of Rules

b. Rule 1102. Reliable Hearsay in Preliminary Examinations.