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EVIDENCE

Larry W. Jones

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INTRODUCTION

The scope of the following survey is the Montana Supreme Court's interpretation of the Montana Rules of Evidence in decisions issued from January 1, 1981, to December 31, 1981. The author has selected those cases that indicate new trends, major developments or that otherwise are of practical importance to Montana attorneys.

I. COMPLETENESS DOCTRINE: RULE 106

The Montana Supreme Court in *Spraggins v. Elvidge*¹ held Rule 106² did not modify Montana parol evidence law.³ The court also affirmed its earlier interpretation, made prior to the adoption of the Rules of Evidence, of the completeness doctrine.⁴ The doctrine allows an adverse party, after his opponent has introduced

1. ___ Mont. ___, 625 P.2d 1151 (1981).

2. MONT. R. EVID. 106 provides:

Remainder of or related acts, writings, or statements.

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require him at that time to introduce any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of his case matters covered by this rule.

3. MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 28-2-904, 72-11-304 (1981); *Leigland v. McGaffick*, 135 Mont. 188, 338 P.2d 1037 (1959).

4. *State Highway Comm'n v. Churchwell*, 146 Mont. 52, 403 P.2d 751 (1965), *construing*, REVISED CODES OF MONTANA 1947 [hereinafter cited as R.C.M. 1947] § 93-401-11 (fore-runner to Rule 106).

into evidence a part of a writing, act, declaration or conversation, to introduce into evidence any part of these items necessary to make them understood in their proper context.⁵

The district court in *Spraggins* allowed the respondent and his wife to testify in a contract dispute about an oral agreement that allegedly preceded their written contract.⁶ Relying on Rule 106 and the testimony of the respondent and his wife, the court found that the written contract not only covered the sale of the real property described in the contract, but that it also settled a previous business transaction between the appellant and respondent that was not mentioned in the written contract.⁷

In reversing this finding, the Montana Supreme Court stated that neither party had pleaded that the written contract was imperfect or claimed that it was invalid. Absent one of these claims, parol evidence, according to the court, is inadmissible to vary or alter the terms of a written contract.⁸ The court characterized Rule 106 as a "procedural rule" that was never intended to allow a court to admit parol evidence to modify a written contract.⁹ Because the respondent had offered all of the writings constituting the contract, Rule 106 was not applicable. *Spraggins* makes clear that, even when Rule 106 is applicable to admit into evidence portions of a written contract omitted by a party opponent, it does not independently sanction the admission of parol or extrinsic evidence that varies or alters the terms of the written contract.

II. RELEVANCE: RULE 402

A. Blood Alcohol Tests

In *McAlpine v. Midland Electric Co.*,¹⁰ the Montana Supreme Court held that laboratory blood analysis reports were admissible into evidence because they were not required or supplemental accident reports, which are inadmissible under Montana Code Annotated [hereinafter cited as MCA] § 61-7-114 (1981). The court had previously held that this statute made all required accident reports and supplemental reports inadmissible in a civil or criminal trial.¹¹

5. MONT. R. EVID. 106 states the completeness doctrine.

6. *Spraggins*, ___ Mont. ___, 625 P.2d at 1152.

7. *Id.* at ___, 625 P.2d at 1153.

8. *Id.* at ___, 625 P.2d at 1153-54.

9. *Id.* at ___, 625 P.2d at 1155.

10. ___ Mont. ___, 634 P.2d 1166, 1169 (1981), (Daly, J., dissenting without opinion) (reversed because of improper jury instruction).

11. *Morrison v. City of Butte*, 150 Mont. 106, 112-13, 413 P.2d 79, 82-83 (1967) (construing R.C.M. 1947 § 32-1213 (Supp. 1977), current version at MCA § 61-7-114 (1981)).

McAlpine involved a wrongful death action in which the widow of the passenger killed in an automobile accident brought suit against both the owner of a truck and trailer involved in the accident and the State of Montana. The district court admitted into evidence, over appellant's objection, the laboratory blood alcohol analysis reports of appellant's decedent and the driver of the automobile in which he was a passenger.¹² Although the appellant did not base her objection on MCA § 61-7-114 (1981), the court nevertheless considered, on appellant's appeal from a judgment for defendants, whether the laboratory reports were required or supplemental accident reports.

The laboratory reports are not required accident reports, the court concluded, because the laboratory test form stated that giving a blood sample is voluntary.¹³ They are not supplemental, the court reasoned, because the Division of Motor Vehicles may not require a driver to file a completed laboratory test form to supplement a prior insufficient accident report.¹⁴ Additionally, the court noted that the form did not indicate it was part of an accident report, and when filled in, it did not suggest that it was part of an accident report.¹⁵

The court discussed why information given or discovered in completing an accident report required by the Uniform Accident Reporting Act¹⁶ is admissible, even though the contents of a required report¹⁷ are inadmissible under MCA § 61-7-114 (1981).¹⁸ Before the court were two opposing lines of authority. In a Florida case cited by appellant, *Cooper v. State*,¹⁹ the court construed a Florida statute,²⁰ almost identical to Montana's statute, mandating the confidentiality of required accident reports. There the court

12. *McAlpine*, ___ Mont. ___, 634 P.2d at 1168-69. The case report does not indicate on what basis appellant objected.

13. *Id.* at ___, 634 P.2d at 1169.

14. *Id.* (quoting MCA § 61-7-109(2) (1981)). The investigating officer did not use the exact blood alcohol figures on the laboratory report to complete his report. *Id.* at ___, 634 P.2d at 1170.

15. *Id.* at ___, 634 P.2d at 1169.

16. MCA §§ 61-7-101 through -117 (1981).

17. MCA § 61-7-109 (1981) requires the operators of motor vehicles involved in accidents and investigating officers to complete and submit accident reports to the Division of Motor Vehicles.

18. Although an accident report would generally be relevant in an action based on a reported accident, MONT. R. EVID. 402 makes otherwise relevant evidence inadmissible if its admission is excluded by statute. *Cf.* MONT. R. EVID. 803(8) (investigative reports by police are not within public records exception to hearsay rule).

19. 183 So.2d 269 (Fla. Dist. Ct. App. 1966).

20. FLA. STAT. § 317.171 (current version at FLA. STAT. ANN. § 316.066 (West 1975 & Supp. 1982)).

held that information obtained to make a required accident report "speak the facts" was inadmissible regardless of the source of that information.²¹ The Montana Supreme Court rejected this holding as an improper interpretation of Montana's statute, stating that the logic of the *Cooper* court would "require the exclusion of any information, regardless of its source, which contributed to the completion of a required report."²² Instead, the court adopted the reasoning in a California case, *Stroud v. Hansen*,²³ in which a California court construed a California statute,²⁴ almost identical to Montana's statute, mandating the confidentiality of required accident reports. The *Stroud* court held that "[n]o evidence of the facts that occurred at the time of a vehicular accident is privileged. Only those reports are confidential which are so made by [the Code]."²⁵

McAlpine promotes two policies. Keeping required accident reports confidential encourages drivers to comply with Montana law.²⁶ Secondly, it does not deny the trier of fact information necessary for an adjudication on the merits, simply because the information found its way into a required report.

Additionally, *McAlpine*, by implication, authorizes an investigating officer to testify on the basis of his personal knowledge even if the information that he discloses is also contained in a required or supplemental report.²⁷ What *McAlpine* leaves unanswered is whether a required or supplemental accident report may be used to refresh the memory of a witness or may be used as a recorded recollection.²⁸

21. *Cooper*, 183 So.2d at 272, quoted in *McAlpine*, ___ Mont. ___, 634 P.2d at 1169.

22. *McAlpine*, ___ Mont. ___, 634 P.2d at 1169.

23. 48 Cal. App. 2d 556, 120 P.2d 102 (Cal. Dist. Ct. App. 1941).

24. 1935 Cal. Stats. ch. 27 § 488 (current version at CAL. VEH. CODE §§ 20012, 20013 (West 1971 & Supp. 1981)).

25. *Stroud*, 48 Cal. App. 2d at 560, 120 P.2d at 104, quoted in *McAlpine*, ___ Mont. ___, 634 P.2d at 1170.

26. The court recognized this policy in *Morrison*, 150 Mont. at 113, 431 P.2d at 83.

27. See *Stroud*, 48 Cal. App. 2d at 560, 120 P.2d at 104 (testimony by investigating officer as to statements of driver involved in accident not part of required report and, therefore, admissible).

28. Given the prohibition in MCA § 61-7-114(3) (1981) and the requirements of MONT. R. EVID. 612, arguably a trial court could deny a witness an opportunity to use a required accident report to refresh his memory or the court could strike the testimony of a witness who had used a required accident report to refresh his memory. The California Supreme Court has held that an investigating officer may use a required accident report to refresh his memory. *Robinson v. Cable*, 55 Cal. 2d 425, 359 P.2d 929, 11 Cal. Rptr. 377 (1961).

Additionally, given the prohibition in MCA § 61-7-114(3) (1981) and the language in MONT. R. EVID. 803(5), one may reasonably argue that a court should not allow a party to use a required accident report as a recorded recollection or allow an adverse party to offer it as an exhibit.

In holding that the blood alcohol test results were admissible, the court also clarified the foundation necessary for their admission in a civil trial.²⁹ The appellant in *McAlpine* argued that the test results lacked a proper foundation because the respondents had not shown that the sampling and testing were done in accordance with the procedures established in the Administrative Rules of Montana.³⁰ The court held that adherence to these safeguards is not a precondition to the admissibility of blood alcohol test results in a civil case:

Under section 61-8-401, MCA, a presumption of being under the influence of alcohol may arise if a defendant's blood alcohol reaches a certain level. This presumption may be used in an effort to convict a person of the charge of driving while intoxicated. A criminal defendant is entitled to the procedural safeguards provided by the ARM before such a presumption is applied. It does not follow that the same safeguards must be employed when blood test results are used in a civil case.³¹

A party seeking to introduce into evidence blood alcohol test results must at a minimum demonstrate that the person who took the blood sample "followed good practice in the field."³² From *McAlpine* one may reasonably infer that good field practice involves drawing a sample in a way which prevents contamination and dilution and which otherwise ensures a representative sample and a reliable result.³³

B. *Psychologist-Client Privilege*

In a case that may prompt further litigation, the Montana Su-

See generally Title, *Police Accident Reports: A Collision Between the California Vehicle and Evidence Codes*, 43 J. ST. B. CAL. 711 (1968).

29. Under MONT. R. EVID. 901(a) a proper foundation (i.e., authentication) is a condition precedent to the admission of evidence and a party proffering evidence satisfies the condition by showing that a proffered item is what he claims it to be.

30. *McAlpine*, ___ Mont. ___, 634 P.2d at 1170. The procedures referred to are currently codified at ADMINISTRATIVE RULES OF MONTANA § 23.3.931. The procedures are aimed at preventing contamination, dilution or spoilage of the sample, and at ensuring the sample is properly identified.

31. *Id.* at ___, 634 P.2d at 1171.

32. *Id.*

33. *Id.* at ___, 634 P.2d at 1170-71. *Cf.* *Benner v. B.F. Goodrich Co.*, 150 Mont. 97, 104, 430 P.2d 648, 651-52 (1967). The *Benner* court held the trial court improperly admitted into evidence blood alcohol test results because the tube in which the samples were taken had held, prior to a wash with clear water and soap, formalin and formaldehyde. According to an expert witness, the modified Nicloux test used was a volatility test, which would show a higher alcohol content than actually existed if the formalin or formaldehyde were still present. The gas chromatography test used in *McAlpine* apparently eliminates this problem. *McAlpine*, ___ Mont. ___, 634 P.2d at 1171.

preme Court, in *Matter of A.J.S.*,³⁴ adopted a test for determining the existence of a psychologist-client relationship that will reveal the existence of a statutory psychologist-client privilege.³⁵ The court effectively abolished the privilege for court-ordered psychological evaluations in abuse, neglect and dependency proceedings.³⁶

In *Matter of A.J.S.*, the appellant argued that her motion in limine to exclude the testimony of the psychologist who examined her should have been granted, because her communications with the psychologist were privileged. A psychologist examined her by order of the trial court in an abuse and neglect proceeding. The supreme court held there was no privilege because there was no psychologist-client relationship. The court rejected the appellant's two-part test for the existence of a psychologist-client relationship: trust in the psychologist coupled with an expectation of confidentiality.³⁷ The relationship exists, according to the court, only if a person seeks out a psychologist for professional help, and if his communications are aimed at securing professional help. The psychologist-client privilege did not exist because the appellant saw the psychologist by order of the court, and because the communications were directed at evaluating the appellant as part of the abuse and neglect proceeding.³⁸

Noting that the appellant and the psychologist had previously communicated in an unrelated matter, the court, in dicta, discussed the psychologist-client privilege as it relates generally to abuse and neglect proceedings.³⁹ Because the rights of a mother are not absolute and because the best interests and welfare of a child are paramount, a district court, in this type of proceeding, must balance⁴⁰ the rights of each. In the instant case, "even assuming *arguendo*, that the previous contacts did establish a psychologist-client relationship, it was yet within the discretion of the dis-

34. — Mont. —, 630 P.2d 217 (1981).

35. MCA § 26-1-807 (1981) provides:

The confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client. Nothing in any act of the legislature shall be construed to require such privileged communications to be disclosed.

36. An abuse and neglect proceeding is a civil action (MCA § 41-3-401(3) (1981)), the purpose of which is to implement the declared policy of the State of Montana "to provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection." MCA § 41-3-101(2) (1981).

37. *Matter of A.J.S.*, — Mont. —, 630 P.2d at 221.

38. *Id.* (citing *Bernardi v. Community Hospital Assoc.*, 166 Colo. 280, 295-96, 443 P.2d 708, 715-16 (1968)).

39. *Id.*

40. *Id.*

strict court to consider the testimony" of the psychologist.⁴¹ This discretionary power, according to the court, arises from a "court's inherent power to do what is best to protect the welfare of the infant."⁴² From the supreme court's discussion of the psychologist-client privilege in an abuse and neglect proceeding, it appears that the legislature is powerless⁴³ to keep court-ordered, psychologist-client communications confidential, when those communications are relevant to this type of proceeding.⁴⁴

The court refused to decide on appeal the question of whether the admission into evidence of the psychologist's testimony violated the appellant's constitutional right of privacy,⁴⁵ because the appellant failed to raise the issue in district court.⁴⁶ Only further litigation can reveal whether some form of psychologist-client privilege, albeit under the guise of a constitutional right of privacy, exists in abuse and neglect proceedings. Only the constitutional claim remains as a possible means by which a person may successfully exclude the testimony of his psychologist, regarding the results of a court-ordered evaluation in an abuse and neglect proceeding.

41. *Id.* It is unclear whether a court could consider the testimony of a psychologist who had a psychologist-client relationship with a party *and* who had not also examined the party at court order. But the language in *Matter of A.J.S.* arguably permits this.

42. *Id.* (quoting *People v. Fitzgerald*, 40 Misc. 2d 966, 224 N.Y.S. 2d 441, 442 (N.Y. Sup. Ct. 1968)). In invoking the inherent power of a court to protect the welfare of a youth, the *Fitzgerald* court relied on *People ex rel. Fields v. Kaufmann*, 9 A.D. 2d 375, 193 N.Y.S. 2d 789 (N.Y. App. Div. 1959).

43. Not only is the legislature powerless, it is apparently also unwilling to keep psychologist-client communications confidential when the client is a child in an abuse, neglect or dependency proceeding. MCA § 41-3-404(3) (1981); *see generally* MCA §§ 42-3-204(1), 50-16-314 (1), (2)(c), (d) (1981).

44. MCA § 41-3-403(1)(a), (2)(b) (1981) authorizes a court, once a county attorney files a petition for protective services and temporary investigative authority (MCA § 41-3-402 (1981)), to order a parent to submit to a psychological evaluation.

Additionally, because the Rules of Civil Procedure, except where modified by statute, apply in an abuse and neglect proceeding (MCA § 41-3-401(3) (1981)), and because a parent is a party in this type of proceeding (MCA § 41-3-401(4), (5) (1981)), the party filing the petition alleging abuse and neglect arguably could frame the petition in a way that places the mental condition of the parent in controversy and then move the court under MONT. R. Civ. P. 35 for a mental examination of the parent.

Using either or both of these tactics, a moving party could try to force a parent to undergo a psychological evaluation and then have the psychologist testify against the parent.

45. MONT. CONST. art. II, § 10 provides: "Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

46. *Matter of A.J.S.*, — Mont. —, 630 P.2d at 221-22.

C. Medical Malpractice Panel

The Montana Supreme Court struck down a statutory exception to the admission of relevant evidence in a decision which upheld the constitutionality of the Montana Medical Malpractice Panel Act.⁴⁷ In *Linder v. Smith*,⁴⁸ the plaintiff, in an original proceeding before the court, sought a declaratory judgment regarding the constitutionality of the Act.⁴⁹ The panel created by the Act screens claims of medical malpractice and makes a preliminary evaluation of the merits of a claim; it then tries to encourage the parties to reach a settlement.⁵⁰ To accomplish this two-fold purpose, the panel is authorized to conduct hearings.⁵¹ Prior to *Linder*, under MCA § 27-6-704(2) (1981), the statement of any person made during a hearing could not later be used for impeachment.⁵² To uphold the constitutionality of the Act, the court had to sever this statutory exception to the admissibility of otherwise relevant evidence.⁵³ The court held "[i]t is fundamental to our adversarial system that litigants retain the right to impeach the sworn testimony of a witness testifying against them."⁵⁴ Without this right, it is unlikely, the court reasoned, that a litigant can get a full and fair hearing in court.

III. OTHER CRIMES: RULE 404(b)

The Montana Supreme Court continued to follow the substantive limitations and procedural requirements it imposed in *State v. Just*⁵⁵ on the admissibility, in a criminal proceeding, of evidence of other crimes.⁵⁶ The *Just* limitations permit the admission of evidence of another crime only if it: (1) is similar to the crime

47. MCA §§ 27-6-101 through -704 (1981).

48. — Mont. —, 629 P.2d 1187 (1981).

49. *Id.* at —, 629 P.2d at 1188-89. The plaintiff alleged nine constitutional violations.

50. MCA § 27-6-102 (1981).

51. MCA §§ 27-6-501 through -503 (1981).

52. MCA § 27-6-704(2) (1981) provides:

No statement made by any person during a hearing before the panel may be used as impeaching evidence in court. The decision of the medical review panel is not admissible as evidence in any action subsequently brought in any court of law.

See MONT. R. EVID. 801(d)(1).

53. *Linder*, — Mont. —, 629 P.2d at 1192.

54. *Id.*

55. — Mont. —, 602 P.2d 957, 961-64 (1979).

56. MONT. R. EVID. 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

charged, (2) is near in time to the crime charged, (3) tends to establish a common scheme, plan or system, and (4) does not create a prejudicial effect which outweighs its probative value.⁵⁷ The *Just* court's procedural requirements mandate notice to a defendant that evidence of another crime will be introduced and an explanation to a jury of the limited purpose of the evidence.⁵⁸

In *State v. Wurtz*⁵⁹ the appellant was charged with intimidation.⁶⁰ During his trial the district court admitted into evidence the testimony of a woman who had been the victim of a prior and unrelated sexual assault by the appellant.⁶¹ The intimidation victim testified that the appellant made obscene and intimidating comments as he pursued her in his car. The assault victim testified that, prior to the assault, the appellant had made obscene comments and a suggestive gesture while pursuing her in his car.

The court, applying the *Just* limitations, held the testimony of the assault victim was admissible to prove motive, intent and a common scheme.⁶² Noting that the incidents were similar and not commonplace,⁶³ the court stated that the nine months between incidents did not make the assault too remote in time, and that the prejudicial effect of the testimony was sufficiently reduced by the district court's compliance with the *Just* procedural requirements.⁶⁴

Because the other crime testimony admitted in *Wurtz* dealt with sexual assault, a crime different in kind from the crime with which the appellant was charged (intimidation), *Wurtz* may signal the court's willingness to apply the *Just* limitations more liberally in favor of allowing the admission of evidence of other crimes.⁶⁵ At the same time, *Wurtz* continues the court's practice of applying the *Just* similarity limitation on the basis of the particular facts of each case.⁶⁶

57. *Just*, ___ Mont. ___, 602 P.2d at 961.

58. *Id.* at ___, 602 P.2d at 962-64.

59. ___ Mont. ___, 636 P.2d 246 (1981) (Morrison, Shea, J.J., dissenting).

60. *Id.* at ___, 636 P.2d at 248. The *Wurtz* court upheld the constitutionality of MCA § 45-5-203(1)(c) (1981).

61. *Id.* In an unrelated and prior case the appellant pleaded guilty to sexual assault.

62. *Id.* at ___, 636 P.2d at 251.

63. *Id.* Cf. *State v. Hansen*, ___ Mont. ___, 608 P.2d 1083, 1085-86 (1980) (alleged twisting of rape victim's thumb against her wrist to force intercourse not distinctive enough to remove it from events common to rape).

64. *Id.*

65. See generally Survey, *Montana Supreme Court Survey of 1981 Civil Procedure and Evidence*, 42 MONT. L. REV. 343, 356-58 (1981) [hereinafter cited as Survey].

66. One may reasonably anticipate that, as the court continues to construe Rule 404(b), it will develop a catalogue of features common to the commission of certain crimes as well as a rogues gallery of offenders whose flair for the distinctive places them within the

The *Wurtz* court also approved a slight departure from a procedural requirement it had mandated in *Just*.⁶⁷ The prosecution in *Wurtz* notified the appellant, before trial, that it would introduce evidence of another crime to prove motive, intent of common scheme or plan,⁶⁸ but the court instructed the jury that it could consider this evidence as proof of identity, motive or intent. The purpose behind the notice requirement is to prevent surprise; the court held that the appellant was neither surprised nor prejudiced, because having raised the defense of alibi he had put the identity of the perpetrator at issue.⁶⁹

*State v. Casagrande*⁷⁰ contains another example of evidence of "other wrongs" under Rule 404(b)⁷¹ and illustrates a situation in which a defense counsel does not waive his right to object to the admission of evidence of other wrongs, even though it was the defense counsel's questioning of a prosecution witness that elicited the evidence of other wrongs.

During the appellant's trial for aggravated burglary, the appellant's counsel on cross-examination asked the investigating officer if he found anything in his search of the appellant's apartment that connected him to the burglary (*i.e.*, "fruits of the crime").⁷² The officer testified that he found a pharmaceutical bottle similar to the ones used at the burglarized pharmacy.⁷³ Additional questioning of the officer and the pharmacy owner revealed that the bottle could not be directly connected with the burglarized pharmacy.⁷⁴ On redirect examination, the pharmacy owner testified that the type of bottle in question was only used to store narcotic substances and was not the type in which prescriptions were dispensed.⁷⁵ Over the objection of the appellant, the district court admitted into evidence the pharmaceutical bottle found in the appellant's apartment and, for demonstrative purposes, another

reach of Rule 404(b).

67. The *Just* court, ___ Mont. ___, 602 P.2d at 963-64, stated:

Evidence of other crimes may not be received unless there has been notice to the defendant that such evidence is to be introduced Additionally, the notice to the defendant shall include a statement as to the purposes for which such evidence is to be admitted.

68. *Wurtz*, ___ Mont. ___, 636 P.2d at 252.

69. *Id.*

70. ___ Mont. ___, 637 P.2d 826 (1981).

71. *See supra* note 56.

72. *Casagrande*, ___ Mont. ___, 637 P.2d at 827.

73. *Id.*

74. *Id.* at ___, 637 P.2d at 827-28.

75. *Id.* at ___, 637 P.2d at 828.

identical to it.⁷⁶

The court reasoned that the bottle from the appellant's apartment and the testimony concerning it were evidence of other wrongs or acts, because the jury could infer from this evidence that the bottle was used for narcotics and that the appellant had illegally obtained it.⁷⁷ For this reason, admission of the bottles was "severely prejudicial." The court never explicitly held that the bottles and testimony concerning them were inadmissible. Because the court also found that the testimony of the appellant's alleged accomplice was insufficiently corroborated by other evidence, it is unclear if the court reversed and dismissed the charges because of the improperly admitted evidence, the lack of corroboration, or both.

Although it was appellant's cross-examination that first broached the issue of the pharmaceutical bottle, the appellant was not estopped from alleging, as error, the admission of the bottles for two reasons: (1) the investigating officer's response was "unsolicited" and (2) appellant's subsequent questioning of the officer and the pharmacist was directed at explaining the matter raised in the unsolicited answer.⁷⁸

IV. WITHDRAWN PLEA OF GUILTY: RULE 410

Construing for the first time Rule 410,⁷⁹ which governs the admissibility of a withdrawn plea of guilty, the Montana Supreme Court followed both the express language of the rule and the Commission Comment explaining it. The appellant in *State v. Hansen*⁸⁰ had entered a guilty plea to a charge of sexual intercourse

76. *Id.* at ___, 637 P.2d at 828-29.

77. *Id.* The court treated the evidence as character evidence, although it did not expressly characterize the evidence in this way.

78. *Id.* (citing *State v. Tiedemann*, 139 Mont. 237, 243, 245, 362 P.2d 529, 532-33 (1961); *State v. Rivers*, 133 Mont. 129, 135, 320 P.2d 1004, 1007 (1958)).

79. MONT. R. EVID. 410 provides:

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

The Montana rule differs from the federal rule in that it does not expressly require as a precondition to admissibility that a plea of guilty have been made under oath and in the presence of counsel. MONT. R. EVID. 410, Commission Comment.

80. ___ Mont. ___, 633 P.2d 1202 (1981).

without consent, which the district court later withdrew after the appellant, according to the presentence investigation report, denied having sexual intercourse with the complaining witness.⁸¹ At the subsequent trial, the appellant testified he did not, without consent, have sexual intercourse with the complaining witness; the prosecution then introduced into evidence statements made by the appellant at the prior proceeding.⁸²

Noting that these statements were introduced for impeachment purposes, the court then adopted standards for determining whether, under Rule 410, the appellant's prior statements were "voluntary and reliable."⁸³ Statements made in connection with a prior plea of guilty are "voluntary and reliable" and therefore admissible only if they are not compelled by threats, violence, direct or indirect promises or improper influence.⁸⁴ As evidence that these standards were not violated, the court cited the trial judge's explanation⁸⁵ to the appellant of his right to a trial, of the charge against him,⁸⁶ including lesser included offenses,⁸⁷ and of the maximum possible sentence he could receive. In holding the appellant's prior statements admissible,⁸⁸ the court in effect adopted a "totality of the circumstances" test to determine voluntariness and

81. *Id.* at ___, 633 P.2d at 1204.

82. *Id.*

83. MONT. R. EVID. 410.

84. Hansen, ___ Mont. ___, 633 P.2d at 1205 (quoting *Hutto v. Ross*, 429 U.S. 28 (1976)). *Ross* involved statements made by a defendant confessing to the crime charged after he and the prosecution reached a plea bargaining agreement. The defendant later withdrew from the agreement and the prosecution introduced these statements into evidence at the subsequent trial. The Court held that a plea bargain does not per se make a subsequent confession involuntary and therefore inadmissible.

85. *Id.* at ___, 633 P.2d at 1205-06.

86. MCA § 46-12-204(2) (1981) provides: "The court may refuse to accept a plea of guilty and shall not accept the plea of guilty without first determining that the plea is voluntary with an understanding of the charge."

The court's discussion of this statutory requirement in *Hansen*, ___ Mont. ___, 633 P.2d at 1205, suggests that unless a defendant understands the charge against him, his plea of guilty cannot be voluntary. Stated differently, a defendant's guilty plea that was not compelled by threats, violence, direct or indirect promises or improper influence might nevertheless be involuntary if he entered the plea not understanding the charge against him. If this interpretation of *Hansen* is correct, then a defendant's understanding of the charge against him is a standard that must be added to the others, and a failure to demonstrate compliance with this standard would, presumably, bar the use for impeachment purposes of statements made by a defendant in a prior proceeding in which he had entered a plea of guilty.

For an example of successful compliance with MCA § 46-12-204(2) (1981), see *State v. White*, ___ Mont. ___, 632 P.2d 1118, 1120-21 (1981).

87. Unless an explanation of lesser included offenses is given to a defendant, he cannot, as a matter of law, understand the charge against him. *State v. Azure*, 175 Mont. 189, 194-96, 573 P.2d 179, 182-83 (1977).

88. Hansen, ___ Mont. ___, 633 P.2d at 1208.

reliability.

Additionally, *Hansen* expressly endorses the policy, stated in the Commission Comment to Rule 410, of penalizing a defendant who would abuse the plea bargain process by contradicting at trial earlier statements made by him in connection with a plea of guilty that he later withdraws.⁸⁹

V. EXPERT TESTIMONY: RULES 701-705

Relying on a test announced in a case pre-dating the adoption of the Rules of Evidence, the Montana Supreme Court in *State v. Howard*⁹⁰ imposed a new limitation on the subject matter about which an expert may testify.⁹¹

The appellant in *Howard* was convicted of aggravated assault and kidnapping after having been charged with attempted homicide, aggravated kidnapping and sexual intercourse without consent.⁹² The physician who examined the victim testified regarding the nature and extent of the victim's injuries. The physician also stated, over appellant's objection, his opinion of what the victim's assailant intended to do. He testified "that somebody tried to murder her."⁹³

Noting that Rule 704⁹⁴ makes "otherwise admissible" expert testimony unobjectionable, even though it may address a question to be decided by a jury, the court nevertheless found that the district court erred in admitting the physician's opinion.⁹⁵ Quoting *State v. Campbell*,⁹⁶ the court reasoned⁹⁷ that the jury was as ca-

89. *Id.* at ___, 633 P.2d at 1204, 1207. The court quoted extensively from MONT. R. EVID. 410, Commission Comment, and relied almost exclusively on it in holding the defendant's earlier statements admissible.

90. ___ Mont. ___, 637 P.2d 15 (1981).

91. MONT. R. EVID. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

92. *Howard*, ___ Mont. ___, 637 P.2d at 16.

93. *Id.* at ___, 637 P.2d at 17.

94. MONT. R. EVID. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

95. *Howard*, ___ Mont. ___, 637 P.2d at 17-18. The error was harmless because in convicting the defendant of lesser included offenses the jury did not rely on the physician's testimony regarding intent.

96. 146 Mont. 251, 258, 405 P.2d 978, 983 (1965). The *Campbell* court stated:

The basic rule on the admissibility of expert opinion is whether the subject is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness, or whether the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

pable as the witness to infer the intent of the victim's assailant from the nature and extent of her injuries.⁹⁸ While the rule followed in *Howard* is consistent with prior Montana case law, the court limited the subject matter of a physician's opinion. An opinion of an assailant's intent based on an examination of the injuries sustained by his victim is not a proper subject for expert testimony.

The court, apparently for the first time since the adoption of the Rules of Evidence, also indicated the bases on which an expert may give opinion testimony.⁹⁹ In *State v. Close*,¹⁰⁰ the appellant argued that the district court should have sustained his objection to allowing a pathologist to state his opinion on how the blows that killed the victim were administered. The pathologist based his opinion on photographs which were taken out of his presence.¹⁰¹ Reasoning that the pathologist was an expert, the court held that he could base his opinion regarding the fatal blows on "actual observations, photographs and other tests."¹⁰²

VI. PRIOR INCONSISTENT STATEMENT: RULE 801

Although *State v. Fitzpatrick*¹⁰³ appeared to settle the meaning and application of Rule 801(d)(1)(A),¹⁰⁴ the Montana Supreme Court in *State v. White Water*¹⁰⁵ clarified the broad language in its

(citations omitted).

97. *Howard*, ___ Mont. ___, 637 P.2d at 17.

98. Compare *Leybold v. Foxx Butte Theater Corp.*, 103 Mont. 232, 62 P.2d 223 (1936) (safety of swinging doors not a matter for expert testimony) and *Ployhar v. Board of Trustees of Missoula*, ___ Mont. ___, 609 P.2d 1226 (1980) (only if cause of accident is complex or beyond common experience may witness give opinion testimony).

99. MONT. R. EVID. 703 provides:

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Although the appellant challenged the basis of the pathologist's opinion, the court neither relied on nor cited MONT. R. EVID. 703.

100. ___ Mont. ___, 623 P.2d 940 (1981).

101. *Id.* at ___, 623 P.2d at 946.

102. *Id.* Given the appellant's argument and the court's ruling, *Close* is authority for the meaning of MONT. R. EVID. 703 and is consistent with prior Montana law. MONT. R. EVID. 703, Commission Comment.

103. ___ Mont. ___, 606 P.2d 1343 (1980).

104. MONT. R. EVID. 801 provides in part: A statement is not hearsay if: (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony"

105. ___ Mont. ___, 634 P.2d 636 (1981).

holding in *Fitzpatrick*,¹⁰⁶ regarding the admissibility of a prior inconsistent statement as substantive evidence. Additionally, the court stated, in dictum, that Rule 801(d)(1)(A) imposes a "sufficiency limitation" that precludes a criminal conviction, if the only evidence supporting the conviction is a prior inconsistent statement.¹⁰⁷

The respondent in *White Water* was charged with sexual intercourse without consent.¹⁰⁸ The only evidence in support of one element of the offense¹⁰⁹ was an unsworn statement taken by the sheriff in the presence of a state-employed social worker during an interview with the alleged victim.¹¹⁰ In her testimony at the jury trial, the alleged victim repudiated the assertions she allegedly made in the statement.¹¹¹ Both the sheriff and the social worker testified that the alleged victim made the assertions recorded in the statement.¹¹² At the close of the State's case, the trial judge dismissed the charge, reasoning that because the alleged victim had repudiated the assertions contained in the statement there was no evidence to prove one of the elements of the offense.¹¹³

The Montana Supreme Court affirmed the dismissal holding that "[a]n unreliable prior inconsistent statement should not be the sole, substantive evidence upon which a jury should be allowed to base guilt."¹¹⁴ The alleged victim in *White Water* has a "learning disability" and was "somewhat susceptible to agree with suggestions made to her when she cannot clearly verbalize her thoughts."¹¹⁵

The court in *Fitzpatrick* held that a prior inconsistent statement is admissible as substantive evidence, if the declarant is subject to cross-examination while testifying at a trial.¹¹⁶ The court's holding in *White Water* appears to make reliability,¹¹⁷ at least in a

106. See generally Survey, *supra* note 65, at 364-65.

107. *White Water*, ___ Mont. ___, 634 P.2d at 639.

108. *Id.* at ___, 634 P.2d at 637. See MCA §§ 45-2-101(61), 45-5-503 (1981).

109. The element was penetration and the alleged victim allegedly stated during the interview that the respondent penetrated her vagina with his finger. *Id.* at ___, 634 P.2d at 637-38.

110. *Id.*

111. *Id.* at ___, 634 P.2d at 637.

112. *Id.* at ___, 634 P.2d at 638.

113. *Id.* at ___, 634 P.2d at 637; see MCA § 46-16-403 (1981) (motion to dismiss).

114. *Id.* at ___, 634 P.2d at 638.

115. *Id.*

116. *Fitzpatrick*, ___ Mont. ___, 606 P.2d at 1349.

117. The court's analysis of Rule 801(d)(1)(A) suggests that reliability has always been a precondition to the admissibility of a prior inconsistent statement. "In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at trial because it was made nearer in time to the matter to which it relates and is less likely to be

criminal case,¹¹⁸ an additional precondition to the admissibility of a prior inconsistent statement and to a jury's consideration of the statement as substantive evidence.

In imposing this reliability requirement,¹¹⁹ the court attempted to make clear that it was not suggesting that a prior inconsistent statement is per se unreliable:

The question is not whether one sort of statement carries a greater indicia of reliability than another, but rather, whether the circumstances pursuant to which the prior statement was given, coupled with the present availability of the witness for observation and cross-examination under oath, provide sufficient reliability for admitting that statement as substantive evidence.¹²⁰

Although *White Water* involved only the admissibility, as substantive evidence, of an unreliable prior inconsistent statement, the court expressed itself regarding the situation where a reliable prior inconsistent statement is the only evidence supporting a criminal conviction.¹²¹ By way of anticipation, the court stated, "[w]e believe, furthermore, that a conviction supported only by a prior inconsistent statement should not be allowed to stand."¹²² Rule 801(d)(1)(A), according to the court, imposes a "sufficiency limitation" that prevents the state from obtaining a criminal conviction solely on the basis of an otherwise admissible prior inconsistent statement.¹²³

influenced by the controversy that gave rise to the litigation.'" *White Water*, ___ Mont. ___, 634 P.2d at 638 (quoting Advisory Committee's Note, 56 F.R.D. 183, 296 (1972)).

118. Because *White Water* was a criminal case and because the court limited its discussion to criminal cases, only further litigation will reveal whether a party in a civil case may object to the use of a prior inconsistent statement on the ground that it is unreliable.

119. *White Water*, ___ Mont. ___, 634 P.2d at 639 (citing *California v. Green*, 399 U.S. 149, 163-64 n.15 (1970); *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945)). In imposing this reliability requirement the court relied on what it termed "due process considerations." *Id.*

120. *Id.* Presumably further litigation will indicate what other circumstances are indicative of unreliability. The court twice indicated that the prior statement was unsworn. *Id.* at ___, 634 P.2d at 638. Rule 801(d)(1)(A) does not require as a condition of admissibility that a prior inconsistent statement must have been made under oath. MONT. R. EVID. 801(d)(1)(A), Commission Comment. Even if the prior statement in *White Water* had been made under oath, its reliability would not have increased because the unreliability was caused by a mental disability.

121. *Id.*

122. *Id.* (citing S. REP. NO. 1277, 93rd Cong., 2d Sess. 16 n.21 (1974)) reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7062 and 4 WEINSTEIN'S EVIDENCE, 801-73 n.53 (1975) (1981 pagination 801-86 n.15); Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3, 21 (1975).

123. *Id.*